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Samuel C. Shenk - - - Deputy Clerk - - - San Francisco
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[1] Died Nov. 11, 1941.

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CALIFORNIA REPORTER

IN VOLUME

121 PACIFIC REPORTER

SECOND SERIES

19 Cal.2d 314

PEOPLE v. CRIMM.

Cr. 4365.

Supreme Court of California.

Jan. 28, 1942.

Rehearing Denied Feb. 26, 1942.

1. Homicide ⇐250

In prosecution of inmate of prison for the murder of another inmate, evidence *held* sufficient to sustain conviction.

2. Stipulations ⇐14(11)

In murder prosecution wherein defendant's counsel and district attorney stipulated at beginning of trial that female members of panel should be excused and defendant also stated in response to question that it was satisfactory to be tried before jury on which there would be no women, defendant could not, after conviction, challenge the jury on ground that there were no women on jury.

3. Criminal law ⇐1086(10)

Where several defendants were tried together for murder, and there were numerous recesses, and when court would reconvene judge would inquire if it was stipulated that jurors were all present and two or more of counsel so stipulated on each occasion, appellant was not entitled to reversal of conviction on ground that because his counsel made audible stipulation on only three occasions, record was silent on whether jury ever did return after any particular recess, where entire jury was present at all stages and nowhere was it charged that jury was absent when its presence was required.

4. Criminal law ⇐720(9)

In murder prosecution, prosecuting officer was free to discuss conflict in two stories related by defendant, one implicating three others and himself and the other implicating only himself, and to advance any reasonable motive therefor.

5. Criminal law ⇐1166½(1)

Where defendant in murder prosecution at first related story implicating himself and three others, fact that during recess defendant first related to defense counsel other than his own the story that he alone had perpetrated the homicide did not require reversal, where, before reconvening of court, defendant's own counsel was likewise so advised, and court upon being informed of defendant's change of testimony took every precaution to protect him from pursuing an ill-advised course.

6. Constitutional law ⇐268

Where defendant in murder prosecution at first related story implicating himself and three others but later declared that he alone murdered deceased, and at all times defendant had advice and assistance of counsel and court admonished defendant, the circumstances surrounding revised story, which he first related to defense counsel other than his own during a recess, did not suggest a denial of "due process of law."

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

In Bank.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Steve Crimm was convicted for murder, and he appeals.

Affirmed.

Rehearing denied; HOUSER, J., not participating.

George W. Artz, Jr., and Benjamin D. Frantz, both of Sacramento, and Roy Daily, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

The appellant Crimm and three other inmates of Folsom Prison were jointly charged with the murder of one Fred E. Smith, also an inmate, in an information filed by the district attorney of Sacramento County. Each defendant entered a plea of not guilty. Early in the trial Crimm's motion to change his plea to one of guilty to a

charge of manslaughter was denied. At the conclusion of a protracted trial the jury returned separate verdicts finding Crimm guilty of murder of the first degree, without recommendation, and finding each of the three codefendants not guilty. Crimm prosecutes this appeal from the judgment imposing the death penalty and from the order denying a new trial.

[1] The deceased, an elderly inmate, was found dead on December 28, 1940, in his cabin on "flower garden hill," a portion of the prison premises where he was engaged in gardening. His head and body had many lacerations and knife wounds, which the prison doctor testified had caused death. Early in the trial Crimm took the stand as a prosecution witness and related a story that implicated him and the codefendant Ferrow as "look-outs" and codefendants Freeman and Walker as the actual perpetrators of the homicide. He declared that the four of them met pursuant to previous agreement and proceeded toward the deceased's cabin for the purpose of permitting two of the group to settle certain grievances with deceased. Crimm and Ferrow assertedly remained near the cabin while the other two approached and entered the cabin. Crimm testified that he heard scuffling in the cabin. He approached the cabin, peered into it, and saw the deceased on the floor covered with blood. His assailants stood near him and a "bloody axe" lay on the floor. The four left the scene, and Crimm testified, they exchanged trousers shortly thereafter to facilitate the disposition of those that were blood-spattered. In narrating this version of the homicide, Crimm admitted that he had engaged in an earlier conversation with Ferrow as to how deceased could be "gotten rid of" and that he had "an idea" why they went to the deceased's cabin on the day of the homicide. Each of the three codefendants took the witness stand in his own defense and denied participating in the murder. In addition, defendant Walker repudiated an earlier confession to the warden on the ground that it was made solely to ascertain the effect of Crimm's story to the warden implicating the four defendants.

It would serve no useful purpose to narrate a number of circumstances tending to support the appellant's first version of the homicide. The jury by its several verdicts convicting the appellant alone and acquitting the codefendants apparently rejected that version and accepted as true appellant's second version, given at a later point in the trial, wherein he declared that he alone, unassisted by others, had murdered the deceased. On the last day of the trial, Crimm recalled as a witness for the defendant Freeman, took the stand and freely admitted that he alone had perpetrated the murder as the result of a dispute with the deceased over a narcotic deal. He repudiated his first version of the homicide and exonerated his three codefendants of any knowledge of or participation in the killing.

After deliberating more than five hours the jury returned verdicts finding Crimm guilty as charged and exonerating the several codefendants. There is no merit in the contention that the evidence is insufficient to support Crimm's conviction. Aside from the innocence or guilt of the others, either of Crimm's versions of the homicide points to his guilt as a principal in the death of the deceased. Whatever confusion arises from his conflicting stories does not serve to establish his innocence.

[2] Likewise without merit is the contention that "the jury was not a lawful jury" because made up of men alone. In so contending, appellant concedes that "all of the reported decisions seem diametrically opposed to the theory" advanced by him. Examination of the record discloses that at the beginning of the trial it was stipulated between the several counsel representing the defendants and the district attorney that all female members of the panel should be excused and that the jury should be made up of male members only because of the probable nature of the testimony. In addition to the stipulation of counsel, each defendant personally consented to be tried by a jury without women. In response to a question of the trial court whether it is "satisfactory to you and do you desire to be tried before a jury upon which there will be no women," the appellant Crimm responded, "It is." Under the circumstances, appellant may not now successfully challenge the jury.

[3] It is next contended that the record fails to disclose that the jury was present at all stages of the trial. There were numerous recesses during the trial. When the court would reconvene the trial judge would inquire if it was stipulated that the jurors were all present and in their places. Two or more counsel so stipulated on each occasion. Because appellant's counsel made an audible stipulation on only three occa-

sions, it is argued that "the record is entirely silent upon the matter of whether or not the jury ever did return after any particular recess." Two or more counsel, however, did stipulate to the presence of the entire jury, and the entire jury was present at all stages of the proceedings. Nowhere is it charged that the jury or any part thereof was absent at any time when its presence was required.

[4] There is neither error nor prejudice in that part of the district attorney's closing argument challenged by the appellant. The prosecuting officer was free to discuss the conflict in the two stories related by appellant and to advance any reasonable motive therefor.

[5, 6] The fact that during a recess of court appellant first related to defense counsel other than his own the story that he alone had perpetrated the homicide does not require a reversal. Before the reconvening of the court his own counsel was likewise so advised. The court upon being informed of appellant's change of testimony took every precaution to protect him from pursuing an ill-advised course. The court admonished the appellant in the following manner: "Now, you understand, Mr. Crimm, that you are now testifying in the case where you are accused of the crime of murder, and if you make any statements, they must be freely and voluntarily; if you give any testimony here, it must be freely and voluntarily, with the understanding that you are now on trial for the murder of the deceased in this case. And anything that you say, of course, would be considered by this Jury in the matter of determining your innocence, as well as by the Jury in the event that they find that you are guilty of the crime of murder in the first degree; it would also be considered by the jury in determining the amount of punishment that you would receive. Now you have your counsel, Mr. Artz, who has been appointed by this Court, and you have been accorded all of the rights that the law provides for a man charged with crime. I would suggest that you be very careful, that you tell the truth, that you be not guided by anything except the absolute truth, and aside from that, you are not required to testify against yourself unless you so desire."

In the face of this advice by the court the appellant proceeded to relate the story that implicated him as the sole perpetrator of the murder. He testified further that he had no desire to see innocent persons suffer and that his change of story was entirely voluntary and not the result of fear or duress. Appellant's counsel cross-examined him with respect to the new story and at no time requested a continuance to permit further consultation between client and counsel. At all times appellant had the advice and assistance of counsel and the circumstances surrounding the revised story in no way suggests, as contended, "a denial of due process of law."

An examination of the entire record reveals nothing in the rulings on the evidence or in the giving or refusing of instructions that requires a reversal.

The judgment and order are affirmed.



BEKINS VAN LINES, Inc., v. JOHNSON, State Treasurer.

Sac. 5508.

Supreme Court of California.

Jan. 16, 1942.

Rehearing Granted Feb. 13, 1942.

1. Automobiles ⇐98

The phrase "gross receipts from operation of motor vehicles" as used in statute imposing a license fee for transportation of property on state highway, based on a percentage of the gross receipts from the operation of motor vehicles, is plain, needs no interpretation and is intended to be limited to the transportation activities of a company which might be engaged in warehousing, selling, or other business not strictly related to transporting goods or persons. St. 1933, pp. 928, 930–933, 936, §§ 1(a, d), 4–6, 9, 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Gross Receipts from Operation of Motor Vehicles".

2. Automobiles ⇐98

The statute imposing license fee for transportation of property by motor vehicle on state highways, based on a percentage

of the "gross receipts from the operation of motor vehicles", is not limited in its application to that proportion of the gross receipts from operation of motor vehicles which is derived from the actual use of the motor vehicles on public streets and highways, but included activities preparatory to loading and unloading of vehicles, and from which it was claimed that at least 50% of gross proceeds from the operation of vehicles was derived. St.1933, pp. 928, 930–933, 936, §§ 1(a, d), 4–6, 9, 14.

3. Constitutional law ⇐70(1)

In construing a statute, court may not supply any language which the legislature must be deemed to have omitted intentionally.

4. Automobiles ⇐73

The Motor Vehicle Transportation License Tax Act imposing license fee for transportation of property by motor vehicle on state highways, based on a percentage of the gross receipts from the operation of motor vehicles, is not unconstitutional as "discriminatory" as applied to a van company which derived at least 50% of the proceeds of transportation from services preparatory to loading and unloading the vehicles. St. 1933, pp. 928, 930–933, 936, §§ 1(a, d), 4–6, 9, 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Discriminatory".

5. Automobiles ⇐98

The fact that in determining the fixed rate to be charged for transportation operations or services, the Railroad Commission computed that 40 per cent. of transportation operations was attributable to accessorial services, was not a factor bearing on the legislative intent in adopting definition of the phrase "gross receipts from operation" as used in the statute imposing a license tax for the transportation of property by motor vehicle on the state highways, based on a percentage of the gross receipts from the operation of the motor vehicles. St.1933, pp. 928, 930–933, 936, §§ 1(a, d), 4–6, 9, 14; St. 1935, p. 878, § 10.

6. Automobiles ⇐65

Though the license tax imposed by the Motor Vehicle Transportation License Tax Act is not, strictly speaking, a so-called "in lieu tax", it may be considered in the nature of an in lieu tax, in view of the statutory provisions limiting the total taxes payable on property usable in the business of transportation, including license taxes, to five per cent. of gross receipts from operation as defined by the act. St.1933, pp. 928, 930–933, 936, §§ 1(a, d), 4–6, 9, 14.

See Words and Phrases, Permanent Edition, for all other definitions of "In Lieu Tax".

7. Automobiles ⇐98

A van company was properly taxed under the Motor Vehicle Transportation License Tax Act on its intracity pickup and delivery service in connection with its intercity hauls as distinguished from its strictly intracity business, notwithstanding that the act provides that it does not apply to motor vehicles operating exclusively within incorporated cities or towns. St.1933, pp. 928, 930–933, 936, §§ 1(a, d), 4–6, 9, 14.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Suit by the Bekins Van Lines, Inc., against Charles G. Johnson, as State Treasurer, to recover additional taxes assessed under the Motor Vehicle Transportation License Tax Act, and paid under protest. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment affirmed.

For prior opinion, see 114 P.2d 684.

Harry A. Encell, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and R. L. Chamberlain and Adrian A. Kragen, Deputy Attys. Gen., for respondent.

PER CURIAM.

The plaintiff sued to recover additional taxes assessed for the years 1935 and 1936 under the provisions of the California Motor Vehicle Transportation License Tax Act (Stats. 1933, p. 928, as amended Stats. 1935, p. 2176; Deering's Gen. Laws, 1937, Act 5130d), and paid under protest. The court rendered judgment for the defendant and the plaintiff appealed.

The plaintiff was and is engaged in the business of transporting property for hire over the public highways of the state by motor vehicle and was therefore taxable for the years involved pursuant to the provisions of said act. The act is entitled,

"An act imposing a license fee or tax for the transportation of persons or property for hire or compensation upon the public streets, roads and highways in the State of California by motor vehicle." It requires operators of motor vehicles within the state engaging in the business of transporting persons or property over any public highways within the state for compensation or hire to obtain a license. The operator is required by section 4 to make a monthly report "showing the gross receipts from operation of said operator for the preceding calendar month." The section also provides that a "license tax equal to three per cent of gross receipts from operation" shall be assessed, payable monthly, § 5. Section 6 provides that every operator must keep an accurate record of all gross receipts from operation. Section 9 provides that if the total taxes paid by any operator, including license and all other taxes on property used exclusively in the business of transporting persons or property for hire over the public highways of the state exceed five per cent of the gross receipts from operation of such operator in this state, the difference between the amount paid and five per cent is credited on license taxes thereafter accruing and the balance refunded. Section 14 provides that the act does not apply to motor vehicles operating exclusively within incorporated cities or towns or operating between incorporated cities or towns where no portion of the public highway outside of the corporate limits of the cities or towns is traversed.

Section 1(a) provides that the word "operator" shall include all persons or corporations who operate motor vehicles upon any public highway in this state and thereby engage in the transportation of persons or property for hire or compensation either directly or indirectly.

Section 1(d) reads: "The term 'gross receipts from operation' shall include all receipts from the operation of such motor vehicle or motor vehicles beginning and ending entirely within this State and a proportion based upon the proportion of the mileage within this State to the entire mileage over which such business is done of gross receipts of such operator on all business passing through, into or out of this State, or partly within and partly without this state."

In its return for the years 1935 and 1936 to the Board of Equalization the plaintiff reported its gross receipts from all transportation business in the state exclusive of hauls excepted by section 14 of the act. In said returns, however, the plaintiff claimed as deductions forty per cent of the gross receipts which it computed was derived from loading and unloading operations, also additional sums derived from pick-up and delivery service within municipalities. The Board of Equalization disallowed deductions of $25,533.32 for loading and unloading operations and $1,010.68 for pick-up and delivery service on the 1935 returns; and $25,570.28 loading and unloading operations, and $1,400 pick-up and delivery service on the 1936 returns. It assessed an additional tax of $2,016.63 for those years, which the plaintiff paid under protest.

It is the plaintiff's contention that inasmuch as the Motor Vehicle Transportation License Tax Act was formulated and enacted for the purpose of raising revenue for construction of public highways (In re Bush, 6 Cal.2d 43, 56 P.2d 511; Bacon Service Corporation v. Huss, 199 Cal. 21, 29, 248 P. 235; Valley Motor Lines, Inc., v. Riley, 23 Cal.App.2d 208, 73 P.2d 288), only that portion of the gross receipts which is derived from actual transportation activities over the highways is subject to the tax of three per cent on "gross receipts from operation." No deduction was claimed by the plaintiff for the loading and unloading time consumed between the truck and the sidewalk. The plaintiff argues that the definition contained in section 1(d) confines the word "operation" to the actual transporting of the goods over the public highways, including sidewalk loading and unloading, as distinguished from the loading and unloading of such goods between the sidewalk and the house. The record shows that whenever packing and crating labor was required as distinct from dismantling and moving furniture and goods between the house and the sidewalk preparatory to loading and unloading, a separate charge was made and the paid charges for such labor were not included by the Board of Equalization in the gross receipts subject to the tax. But the plaintiff claims that it should be allowed a deduction for a proper proportion of the gross receipts which represents the revenue from operations between the sidewalk and the house estimated by it at about 56 per cent; also that it should be permitted deductions for the amounts separately indicated on its way bills received from

pick-up and delivery service within municipalities. In intercity hauls of small consignments the plaintiff found it more convenient to pick up and deliver with the use of smaller trucks between the point of pick-up and delivery and the larger truck or van which was to transport or which had transported the goods over the public highways. In other intercity hauls the van or truck received and discharged the load directly at the door. The plaintiff contends that receipts from such separate pick-up and delivery service within municipalities in connection with intercity hauls should be excepted from assessment under the act because that service is conducted entirely within municipalities and does not employ any part of the public highways.

[1-3] Both sides concede that there is no decided case which directly involves the point considered under the first claimed deduction. However, we are of the opinion that the plain language of the act determines the issue. This court has heretofore held that "gross receipts from operation" is plain language which requires no interpretation. Pacific Gas & Electric Co. v. Roberts, 176 Cal. 183, 167 P. 845. See, also, McHenry v. Alford, 168 U.S. 651, 666, 18 S.Ct. 242, 42 L.Ed. 614; State v. United Electric Light & Water Co., 90 Conn. 452, 97 A. 857. In the case of Pacific Gas & Electric Co. v. Roberts, supra [176 Cal. 183, 167 P. 847], somewhat similar provisions adopted in section 14 of article XIII, applying to public service corporations, were denominated "perfectly plain, unequivocal language," and the contention that "gross receipts" meant "gross earnings" was rejected. It was held that the language did not contemplate any deduction from the "gross receipts from operation." In the case of McHenry v. Alford, supra [168 U.S. 651, 18 S.Ct. 248, 42 L.Ed. 614], a similar phrase was said to mean "earnings [receipts] which arise because of its operation," without any undesignated exceptions. Likewise in the present case "gross receipts from operation" must be taken in its plain sense without limitation or deduction save as expressly modified by the Legislature. The only modification pertinent in this case is that contained in the definition of "gross receipts from operation," which adds to the foregoing quoted phrase the words "of such motor vehicle or motor vehicles beginning and ending entirely within this State * * *," etc. The plaintiff seeks to have this Court interpret the legislative language as applying only to that proportion of the gross receipts from its operation of motor vehicles which is derived from the actual use of the truck on the public streets and highways. "Gross receipts from operation of motor vehicles" is language sufficiently plain. It was undoubtedly intended to be limited to the transportation activities of a company which might also be engaged in warehousing, selling, or other business not strictly related to transportation of goods or persons. The plaintiff concedes that the words "operation of motor vehicles" as used in the definition include loading and unloading activities at the sidewalk. However, the goods must be taken to and from the sidewalk as an inseparable preparatory activity connected with the loading and unloading operations. We therefore fail to see how the plaintiff can be excused from the payment of a proportion of the license tax based on its claim that more than fifty per cent of gross receipts from operation of motor vehicles was derived from time devoted to such preparatory activities. The preparatory activities sought to be excepted are just as much a part of and essential to transportation, and therefore to operation of motor vehicles, as are actual loading and unloading operations which are also preparatory to the actual rolling of the vehicle along the highways. To adopt the plaintiff's suggestion would be to add to the language of the definition a limitation which the Legislature did not express and which it must be deemed it did not intend. If the Legislature intended to exclude from "operation" as defined every incidental service and activity customary and essential in the matter of transporting goods for compensation and hire, it could easily have said so. By failure to use any such limiting words the Legislature indicated its intention of not so limiting or circumscribing the meaning or scope of the act. In re Bush, supra. Under the applicable rules of construction this court may not supply any language which the Legislature must be deemed to have omitted intentionally.

[4, 5] There is no constitutional objection urged or which could be urged to the application of the plain language of the act. All of the required safeguards have been afforded by the Legislature in the exercise of the

taxing power. No unreasonable discriminations are involved and in the absence of any such unlawful classification the act is constitutional. Bacon Service Corporation v. Huss, supra. It is not urged that imposition of a tax equal to a percentage of gross receipts from operation of the business of transportation including all of its connected incidental operations and so-called "accessorial" services or operations for the purposes stated in the act is not a proper exercise of the taxing power. The fact that in determining the fixed rate to be charged for transportation operations or services the Railroad Commission of the state computed that 40 per cent of transportation operations was attributable to accessorial services (see § 10, Highway Carriers Act, Stats.1935, p. 878; Deering's Gen.Laws.1937, Act 5129a) is not a factor bearing upon the legislative intent in adopting the definition here under consideration. The fact that the Legislature in the present act did not distinguish between actual rolling on the public highways and any accessorial services is an argument that it intended no such distinction.

[6] No special significance may be given the fact that the license tax under the present act is not, strictly speaking, a so-called "in lieu" tax, in so far as any applicability of the case of Pacific Gas & Electric Co. v. Roberts, supra, is concerned. It is true the license tax here involved is not an all purpose tax and that ad valorem taxes are assessable; but it may be considered in the nature of an "in lieu" tax because of the provisions of section 9 of the act which limit the total taxes payable on property usable in the business of transportation, including license taxes, to five per cent of gross receipts from operation as defined by the act.

[7] Nor may any distinction be made by the plaintiff on its returns between intercity hauls which require for convenience an intracity pick-up and delivery service, and those which do not require such service in the convenient method of initiating or terminating such intercity transportation. The plaintiff in this connection relies on Pioneer Express Co. v. Riley, 208 Cal. 677, 284 P. 663. In that case the plaintiff's activities were confined exclusively to intercity hauls. Another company, formerly a competitor of the plaintiff, abandoned all intercity activities and confined itself to intracity business exclusively, including the pick-up and delivery service required by the plaintiff. It appeared that the plaintiff in that case in good faith did not engage in intracity pick-up and delivery service as part of its intercity hauls. It was held that it had paid its tax in full, based on the report of intercity operations as conducted by it. No invalidity may be said to attach by reason of the fact that the plaintiff here is taxed on its intracity pick-up and delivery service in connection with its intercity hauls as distinguished from its strictly intracity business. In re Bush, supra. The trial court in the present case properly concluded that receipts from all hauls which originated in one city for transportation over the public highways or which terminated in a city after such transportation should be treated without distinction as taxable gross receipts from operation.

It is shown that receipts from intracity business as excepted from the act were not included in the computation of gross receipts from operation as defined by the act. Nor were charges for labor furnished for the purpose of packing and crating goods, or warehousing, included in the gross receipts subject to taxation. All exceptions and limitations provided by the act were contemplated in the additional assessment paid under protest by the plaintiff. The trial court correctly concluded that the assessment of the additional tax was in accordance with the statute.

The judgment is affirmed.

TRAYNOR, J., did not participate herein.



19 Cal.2d 304

DISTRICT BOND CO. v. POLLACK et al. (ZASLAW et al., Interveners).

L. A. 17217.

Supreme Court of California.

Jan. 26, 1942.

1. Municipal corporations ⇐519(1)

An assessment against realty represented by a sewer bond created a "lien" against the realty, binding upon all subsequent owners until the bond was paid, and hence purchaser of realty acquired the property subject to the assessment lien already existing against it. Gen.Laws 1937, Act 8199, §§ 63, 66, 75.

See Words and Phrases, Permanent Edition, for all other definitions of "Lien".

2. Municipal corporations ⇐579

The owner in possession of realty, who was not made a party to proceeding to foreclose sewer bond outstanding against the realty and who had neither actual nor constructive notice of the proceeding, could not be divested of his ownership by such proceeding.

3. Municipal corporations ⇐579

Where commissioner's deed issued pursuant to proceeding to foreclose sewer bond outstanding against realty was ineffective to pass to grantee full title to the property because owner of realty in possession was not made a party to proceeding and had no notice either actual or constructive thereof, the grantee, who had procured assignment of commissioner's certificate for value, thereby obtained the assessment lien, represented by sewer bond, which continued to exist against the realty. Gen.Laws 1937, Act 8199, §§ 63, 66, 75.

4. Municipal corporations ⇐579

Where holder of commissioner's deed issued pursuant to proceeding to foreclose sewer bond, acting not as a volunteer but in order to protect his interest in the realty, paid delinquent and current taxes on the realty, he was thereby "subrogated" to the tax liens against the realty and, even though commissioner's deed was ineffective to vest complete title in holder thereof, he acquired a lien against realty not only for the amount paid for assignment of commissioner's certificate but also for such delinquent and current taxes.

See Words and Phrases, Permanent Edition, for all other definitions of "Subrogate".

5. Judgment ⇐251(1)

In action to quiet title to realty in holder of commissioner's deed issued pursuant to proceeding to foreclose sewer bond to which owner in possession was not made a party, judgment, which, pursuant to request contained in owner's answer, quieted title in owner conditioned on payment of amounts expended by holder of commissioner's deed in payment of the sewer bond and taxes, did not afford relief outside the issues raised by the pleadings.

6. Equity ⇐66

A party who requests equitable relief must satisfy the equitable claims interposed by the opposing party.

7. Municipal corporations ⇐579

In action to quiet title to realty in holder of commissioner's deed issued pursuant to proceeding to foreclose sewer bond, to which proceeding owner in possession was not made a party, court could not quiet title in the owner in possession without protecting the interests of holder of commissioner's deed who had expended money in payment of sewer bond and taxes.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the District Bond Company against Florence Pollack and others to foreclose a street improvement bond, wherein Marcus Zaslaw, claiming title to realty involved under a commissioner's deed issued pursuant to a prior proceeding to foreclose a sewer bond, intervened, seeking a decree quieting title against E. W. Johnson, a purchaser in possession of the land affected, who was not a party to proceeding to foreclose sewer bond, and who by answer asked that title be quieted in him. From a judgment quieting the title of the defendant in intervention, conditioned on payment of amounts expended by plaintiff in intervention in payment of the sewer bond and taxes, defendant in intervention appeals.

Judgment affirmed.

R. L. Carlisle, of Los Angeles, for appellant.

Thomas J. Clark, of Los Angeles, for plaintiff.

Paul Magasin and Charles H. Heustis, both of Los Angeles, for respondent.

TRAYNOR, Justice.

In 1935, appellant, defendant in intervention in the court below, purchased certain real property located in Burbank, California, and went into immediate possession. In 1936 an action was brought to foreclose a sewer bond outstanding against the property. Appellant was not made a party to this action and had no actual or constructive notice thereof. A judgment of foreclosure was entered, pursuant to which a sale was held. The property was purchased at the foreclosure sale by Eva Zaik, and a commissioner's certificate of sale was issued to her. Eva Zaik assigned this certificate of sale to respondent, plaintiff in intervention in the court below, who secured a commissioner's deed to the property. Respondent paid Eva

Zaik the amount bid at the foreclosure sale, paid delinquent taxes on the property, and costs. In the following year he paid the current taxes on the property. The various expenditures amounted to $656.81.

In 1937 the District Bond Company filed an action to foreclose a street improvement bond outstanding against the property. Respondent obtained leave to file a complaint in intervention, wherein he claimed to be the owner of the property by virtue of the deed obtained pursuant to the prior foreclosure proceeding, offered to pay the Bond Company's lien, and asked that his title be quieted as against appellant, who was named as defendant in intervention. Respondent's ownership of the property was denied by appellant, who asked in his answer that title be quieted in his favor against respondent.

The trial court found that the sewer bond foreclosure proceeding was ineffective as to appellant because he had no notice thereof. It decreed that title to the property should be quieted in appellant's favor and that appellant pay to respondent the $656.81 expended by respondent in payment of the sewer bond and the taxes against the property on condition that respondent deed all his interest in the property to appellant, respondent to have a lien against the property for this amount.

Appellant appeals from that part of the judgment ordering the payment to respondent of the sums expended by him and providing for a lien against the property.

[1-3] The assessment represented by the sewer bond created a lien against the property binding upon all subsequent owners until the bond was paid. Street Improvement Act of 1911, secs. 66, 75, 63; Stats. 1911, page 730; 2 Deering's General Laws, 1937, Act 8199, secs. 66, 75, 63. Appellant therefore acquired the property in question subject to the assessment lien already existing against it. The proceeding to foreclose this lien could not operate to divest appellant of his ownership because he was not made a party to the proceeding and received no notice thereof. Lee v. Silva, 197 Cal. 364, 240 P. 1015; Page v. W. W. Chase Co., 145 Cal. 578, 79 P. 278; Noble v. Blanchard, 120 Cal. App. 664, 8 P.2d 523. The commissioner's certificate of sale and the commissioner's deed issued to respondent by virtue of the foreclosure sale were ineffective to pass to respondent full title to the property. Respondent, however, by his purchase obtained the lien, which continued to exist against the property. Burns v. Hiatt, 149 Cal. 617, 620, 87 P. 196, 117 Am.St.Rep. 157; Tutt v. Van Voast, 36 Cal.App.2d 282, 97 P.2d 869; Warden v. Barnes, 111 Cal.App. 287, 292, 295 P. 569; Chapman v. Rudolph, 58 Cal.App. 233, 208 P. 370; Street Improvement Act of 1911, sec. 75, 2 Deering's General Laws, 1937, Act 8199, sec. 75. The transaction amounted to a transfer to him of the assessment lien for value, and in no way prejudiced the rights of appellant who continued to own the property subject to the lien. Ibid.

[4] Respondent, acting not as a volunteer, but to protect his interest in the property, paid the taxes, past and current, and was thereby subrogated to the tax liens against the property. See cases cited in 16 Cal.Jur. 349-351, secs. 48, 49. The trial court therefore properly adjudged respondent to have a lien against the property for the full amount of his expenditures.

[5-7] Appellant contends that the relief afforded respondent was outside the issues raised by the pleadings. Appellant, however, in his answer affirmatively requested the trial court to quiet title to the property in his favor. Islais, etc., Water Co. v. Allen, 132 Cal. 432, 64 P. 713; Hough v. Wright, 127 Cal.App. 689, 16 P.2d 301; Brooks v. White, 22 Cal.App. 719, 136 P. 500; Beck v. Wilson, 49 Cal.App. 281, 193 P. 158; Green v. Palmer, 68 Cal.App. 393, 229 P. 876. A party who requests equitable relief must satisfy the equitable claims interposed by the opposing party. Lanktree v. Lanktree, 6 Cal.2d 120, 56 P.2d 943; Jeffords v. Young, 98 Cal.App. 400, 406, 277 P. 163. The trial court could not quiet appellant's title to the property without protecting the interests of respondent therein. Ellis v. Witmer, 134 Cal. 249, 253, 66 P. 301; Holland v. Hotchkiss, 162 Cal. 366, 123 P. 258, L.R.A.1915C, 492; Warden v. Barnes, supra; Jeffords v. Young, supra; Sawyer v. Berkeley Securities Co., 99 Cal.App. 545, 279 P. 217; Beck v. Wilson, 49 Cal.App. 281, 193 P. 158; Colkins v. Doolittle, 45 Cal. App. 776, 780, 188 P. 601; Cordano v. Kelsey, 28 Cal.App. 9, 22–24, 151 P. 391, 398; Stege v. Richmond, 194 Cal. 305, 319, 228 P. 461; writ of error dismissed, 273 U.S. 648, 47 S.Ct. 245, 71 L.Ed. 821; Marysville Woolen Mills v. Smith, 178 Cal. 786, 792, 175 P. 13; Hurt v. Pico Investment Co., 127 Cal.App. 106, 113, 15 P.2d 203.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, HOUSER, and CARTER, JJ., concurred.

19 Cal.2d 297

MILGATE et al. v. WRAITH.

Sac. 5504.

Supreme Court of California.

Jan. 21, 1942.

1. Negligence ⇐89(1)

The statute imputing negligence of driver of automobile to the owner for all purposes of civil damages is not limited to actions by third persons against the owner, but includes actions by the owner against third persons. Vehicle Code § 402(a), St.1937, p. 2353.

2. Negligence ⇐89(1)

The construction of the section of the Vehicle Code as imputing of automobile borrower's negligence to automobile owner in an action by owner against a third person does not violate the settled law that a bailor may recover from a bailee for bailee's negligence in injuring the bailed property. Vehicle Code, § 402(a), St.1937, p. 2353.

3. Statutes ⇐117(8)

The section of the Vehicle Code construed as preventing recovery from a third person by an automobile owner because of imputed negligence of borrower of automobile, and entitled as "an act to amend" and add to certain specific sections of the Vehicle Code, relating to civil liability and financial responsibility of owners and operators of vehicles, is not unconstitutional on ground that the subject is not mentioned in the title. Vehicle Code, § 402(a), St.1937, p. 2353; Const. art. 4, § 24.

4. Statutes ⇐109

An amending title of a statute is sufficient if it reads: "An act to amend" a certain section of the code or a statute. Const. art. 4, § 24.

In Bank.

Appeal from Superior Court, Yolo County; Dal M. Lemmon, Judge.

Action by Doris Milgate, a minor, etc., Frank E. Milgate, and Hugh Cunningham against Lawrence Wraith to recover for personal injuries and property damage sustained in automobile collision. From an adverse judgment, Frank E. Milgate appeals.

Judgment affirmed.

Prior opinion, 113 P.2d 503.

Ralph H. Lewis, of Sacramento, and A. G. Bailey, of Woodland, for appellant.

Huston, Huston & Huston and Robert H. Schwab, Jr., all of Woodland, for respondent.

Parker & Stanbury, Raymond G. Stanbury, and Vernon W. Hunt, all of Los Angeles, George E. Sandford and Bronson, Bronson & McKinnon, all of San Francisco, and Reginald I. Bauder, of Los Angeles, amici curiæ, on behalf of respondent.

CURTIS, Justice.

Appellant, Frank E. Milgate, loaned his automobile to Hugh Cunningham, who took appellant's daughter, Doris Milgate, riding with him in the car. While the car was being so used it collided with another driven by Lawrence Wraith. Doris Milgate and Cunningham were injured and the car was damaged. This action was then instituted by Doris Milgate, through her father as guardian ad litem, for recovery for injuries suffered by her, and also by her father, Frank E. Milgate, appellant herein, for damage to his car and for hospital and medical bills incurred by him as the result of the injuries sustained by his daughter. Cunningham joined as plaintiff, requesting damages for personal injuries suffered by him. The trial court, sitting without a jury, found Wraith negligent in the operation of his car but also found Cunningham guilty of contributory negligence. An award of damages was made to the minor daughter, but relief was denied to Cunningham because of his contributory negligence. Relief was also denied to appellant for damages to his car and for money expended for medical and hospital treatment of his daughter. This latter denial of relief was based on the trial court's conclusion that the negligence of Cunningham should be imputed to appellant, as owner of the car, so as to bar appellant's claim, because of the provision of section 402 of the Vehicle Code, St.1935, p. 153, as amended in 1937, St.1937, p. 2353, providing that the negligence of a borrower of a car should be imputed to the owner for all purposes of civil damages. On this appeal it is urged that the trial court erred in holding that the negligence of Cunningham was thus imputed to appellant.

Subdivision (a) of section 402 of the Vehicle Code provides: "Every owner of a motor vehicle is liable and responsible for

the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, *and the negligence of such person shall be imputed to the owner for all purposes of civil damages.*" (Italics added.) The italicized portion was added by amendment in 1937.

[1] Appellant contends that the above-quoted section should be so construed as to limit the imputation of negligence to actions by third persons against the owner. Whatever might have been the proper construction prior to the 1937 amendment, it is now clear that since the passage of that amendment, said section is not susceptible of such construction. The phrase "the negligence of such person shall be imputed to the owner for all purposes of civil damages" can be interpreted in no other sense than to include actions by the owner against third persons. Indeed, that was undoubtedly the very purpose of the amendment. If the section were not so interpreted, the added portion would be meaningless, for as stated by the trial court: "The addition to the section did not add to the liability of an owner; neither did it clarify the existing liability. Its purpose, then, would seem to be that which its wording is sufficiently comprehensive to cover, namely, the imputation of such negligence in all cases where the rights and obligations of the owner are involved in civil actions for damages. Its only effect, which may also be considered its purpose, was to definitely extend the imputation to actions in which the owner sought redress in damages."

Appellant refers to the case of Mills v. Gabriel, 259 App.Div. 60, 18 N.Y.S.2d 78, in support of the contention that the negligence of a driver should not be imputed to the owner in an action by the owner against a third party. Of course, a New York court's interpretation of a statute of that state is not controlling on this court's interpretation of a statute of this state. If the statutes were identical and if the law were clearly established in New York, the opinion would have considerable persuasive force, but such is not the case. The New York statute is similar to the California statute as it read prior to the 1937 amendment, but it was by the 1937 amendment that the legislature of this state clearly included the imputation of negligence to the owner in actions by the owner against third persons. Therefore, the interpretation given to the New York statute by the court in the Mills case, supra, can be of no aid to appellant here. Furthermore, it is questionable whether the New York law has been finally and definitely determined in accordance with the Mills case. The Court of Appeals did affirm the decision of the Appellate Division in a memorandum decision, but it did not express its own ideas on the problem. See Mills v. Gabriel, 284 N.Y. 755, 31 N.E.2d 512. Even under the limited New York statute there are numerous decisions of the Appellate Division directly contrary to the Mills case. See Renza v. Brennan, 165 Misc. 96, 300 N.Y.S. 221; Darrohn v. Russell, 154 Misc. 753, 277 N.Y.S. 783; Shuler v. Whitmore, Rauber & Vicinus, 138 Misc. 814, 246 N.Y.S. 528; Swartout v. Van Auken, 132 Misc. 89, 228 N.Y.S. 671. The Renza case, supra, contains an excellent review of the conflict in the New York decisions. What was said there in regard to the rule that negligence should not be imputed is particularly applicable to the instant situation. For these reasons that opinion will be quoted at some length. Beginning on page 223 of 300 N.Y.S., Judge King states:

"Counsel for plaintiff freely admits that the Legislature has fastened upon his client herein a new responsibility (unknown at common law). He claims, however, that it is a responsibility to answer to others for damage done to them and that the common-law immunity from the negligence of the bailee still exists when the damage is to bailor's car and the bailor is a plaintiff rather than a defendant.

"I do not so construe the statute. Do the words 'responsible for * * * injuries to * * * property' fix responsibility for injuries only to property of others? The statute does not so state. Where are the words that exempt the bailor's property from this 'responsibility'? To hold with plaintiff's counsel in his argument would be to interpolate into the statute something which is not there in order to create an inequality among users of the highways which would be as shocking as it would be unjust.

"Judge Wilder in Darrohn v. Russell, 154 Misc. 753, 754, 277 N.Y.S. 783, 785, stated the problem thus: 'But, in abrogating the common-law rule of non-liability

where the car is not operated in the owner's service, does the statute destroy both immunities or but one? Is it both a sword and a shield? Does it impale him upon a new liability to third persons but protect him from responsibility for his own damage?'

"Judge Wilder goes on to conclude that the owner is barred by the negligence of his bailee, adding that 'he shall not be permitted to capitalize a situation identical with that for which he is expressly made responsible, and, in the phrase of Judge Tompkins of this court, that the Legislature has not generated and the courts will not sponsor, a hybrid offspring.'

"Directly contra is the decision of the Appellate Division, Fourth Department, in Gochee v. Wagner, 232 App.Div. 401, 403, 250 N.Y.S. 102, 105. [Cited and relied upon by the court in Mills v. Gabriel, supra.] There, by a divided court, two justices dissenting, it was held that 'While the statute is remedial, it is remedial solely in favor of an injured third person. It is not to be wrenched out of its intended purpose and its language distorted in order to conform it to the conventional pattern of common-law agency.' Also contra is Nannes v. Ideal Garage, Inc., 150 Misc. 522, 269 N.Y.S. 777, decided by the Appellate Term, First Department.

"Gochee v. Wagner, supra, was reversed by the Court of Appeals, 257 N.Y. 344, 178 N.E. 553, but the reversal is based upon the ground that, since the owner or bailor was present in his car at the time of the accident and had dominion over it, the statute did not apply and the common law made him responsible for his operator's negligence. Thus the decision rests upon common-law grounds and is not helpful to the problem at bar. * * *

"The shocking effect of the holding of the Appellate Division in the Gochee case could hardly have been more strikingly illustrated than in the trial of the case at bar, for tried with it before the same jury was a companion action in which the present plaintiffs were defendants and the defendant Brennan was the plaintiff. He sued for damages to his motorbus. Was the jury to be charged in the case at bar that the sole issue was the negligence of the defendant, because the negligence of John Renza (even if found) could not bar the recovery of Rose J. Renza, and at the same time be charged in the case of Brennan v. Renza that Rose J. Renza was answerable for the negligence of John Renza?

"An even greater absurdity was presented in the City Court of Rochester in Darrohn v. Russell, supra. There two borrowed cars collided, each being operated upon the business of the borrower. The owners sued each other for damages to the respective cars. Both drivers were found to be negligent. The judgment of the court, following Gochee v. Wagner, would be to award each his damage against the other. Is it any wonder that Judge Wilder declined to sponsor such a 'hybrid offspring'?"

If this court were to accept appellant's contention and confine imputed negligence to actions by third persons against an owner, situations as absurd as those referred to by Judge King would inevitably arise at some future time. It is reasonable to assume that the Legislature had this in mind when it passed the 1937 amendment imputing negligence to the owner for all purposes of civil damages.

Other jurisdictions have passed upon the question involved here. An Iowa statute (Section 5026, Code 1927) provided: "In all cases where damage is done by any car driven by any person under fifteen years of age and in all cases where damage is done by the car, driven by consent of the owner, by reason of negligence of the driver, the owner of the car shall be liable for such damage." Under this statute, which is more limited than the California statute, the Supreme Court of Iowa in the case of Secured Finance Co. v. Chicago, R. I. & P. Ry. Co., 207 Iowa 1105, 224 N.W. 88, 61 A.L.R. 855, held that the negligence of the driver was imputable to the owner and consequently barred the owner's recovery in an action against a third party for damage to the owner's car. In the case of DiLeo v. DuMontier, La. App., 195 So. 74, it was held, under a statute making a father liable for the negligent acts of his minor son, that the plaintiff father was barred from recovery from a third person for damage done to his car because of the contributory negligence of his driver son. See, also, Meisenheimer v. Pullen, 271 Mich. 509, 260 N.W. 756; 5 Am.Jur. 781; 5-6 Huddy on Automobiles, 9th Ed. pp. 295–297.

[2] There is no merit to appellant's contention that the imputing of a borrower's negligence to the owner in an action against a third party will violate the settled

law that a bailor may recover from a bailee for the latter's negligence in injuring the bailed property. It is obvious that section 402 of the Vehicle Code has no effect on the bailor-bailee relationship in actions by the bailor against the bailee.

[3, 4] It is further contended by appellant that if section 402 of the Vehicle Code prevents recovery from a third person by an owner because of imputed negligence, then said section is unconstitutional under article IV, section 24, of the state Constitution, in that the subject is not mentioned in the title. The title of the original act reads (Stats.1929, p. 566): "An act to add a new section to the Civil Code to be numbered 1714¼ relating to imputed negligence." In 1935 this section became 402(a) of the Vehicle Code. The title to the 1937 amendment reads (Stats.1937, p. 2353): "An act to amend sections 402, 404, 410, and 415 of the Vehicle Code, and to add thereto sections 410.5, 415.5, 417 and 418, relating to civil liability and financial responsibility of owners and operators of vehicles." The phrase "relating to imputed negligence" in the original title is, of course, sufficient, and apparently the phrase "relating to civil liability and financial responsibility of owners and operators of vehicles" in the title to the amendment refers only to the added sections, and not to the amended sections. An amending title is sufficient if it reads: "An act to amend" a certain section of the code or a statute. In re Elliott's Estate, 165 Cal. 339, 132 P. 439; Beach v. Von Detten, 139 Cal. 462, 73 P. 187; People v. Parvin, 74 Cal. 549, 16 P. 490. Even assuming that the additional words relate to section 402, we are satisfied that the phrase "financial responsibility of owners" is sufficiently broad in meaning to include damage to a person's own property. The addition of further descriptive words cannot vitiate a sufficient title, unless such further words indicate a subject not really related to the matters covered by the body of a bill. In re Elliott's Estate, supra.

The trial court properly concluded that under section 402 of the Vehicle Code the negligence of a borrower of a car should be imputed to the owner in an action by the owner against a third party.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

MUNZINGER v. CAFFREY et al.

Civ. 2952.

District Court of Appeal, Fourth District, California.

Jan. 15, 1942.

Rehearing Denied Feb. 14, 1942.

1. Mortgages ⇐543, 549, 591(1)

The law grants to mortgagor the right to redeem the property and to personally remain in possession pending expiration of period of redemption, but where property is leased to a tenant the title acquired by purchaser at foreclosure sale carries with it the right to receive rent from tenant in possession. Code Civ.Proc. § 700; Civ.Code, § 1111.

2. Mortgages ⇐549

A purchaser at a mortgage foreclosure sale, during period of redemption, is entitled to sue for reasonable value of land occupied by a tenant. Code Civ.Proc. § 700; Civ. Code, § 1111.

3. Mortgages ⇐549

Where mortgaged property is subject to a lease, a sale under foreclosure, in effect, is equivalent to an assignment of the lease until the time for redemption expired. Code Civ.Proc. § 700; Civ.Code, § 1111.

4. Mortgages ⇐549

Where a lease covered both realty and personalty, the realty only being covered by a mortgage, the lessor, following a mortgage foreclosure sale of the realty, was entitled to receive only reasonable value of use of personalty. Code Civ.Proc. § 700; Civ. Code, § 1111.

5. Appeal and error ⇐1013

In action by lessor of realty and personalty for reasonable value of use of furniture and fixtures after foreclosure of a mortgage covering realty, where evidence as to reasonable rental value of property ranged from $5 to $45 per month, District Court of Appeal was not authorized to disturb trial court's finding that reasonable rental value was $5 per month.

6. Landlord and tenant ⇐80½

In action by lessor of realty and personalty against original lessee and others to whom lease was allegedly assigned to recover reasonable rental value of personalty after a foreclosure of mortgage on the realty, evidence supported findings that no assign-

ment of the original lease had been made to one of the defendants sought to be held as an assignee, but that such defendant had signed a later lease for the realty after the foreclosure only as an accommodation to his son to guaranty rental payments, and hence such defendant was not liable for reasonable rental value of personalty. Code Civ.Proc. § 700; Civ.Code, § 1111.

7. Landlord and tenant ⇐208(4)

Where a lease of real property and furnishings and fixtures therein was assigned by lessee, and assignee without a subsequent written assignment turned premises and equipment over to another, assignee was still liable to original lessor for reasonable rental value of furniture and fixtures subsequent to foreclosure of a mortgage on the realty, at least for the time he was occupying premises and using furnishings and fixtures.

8. Landlord and tenant ⇐208(1)

Privity of contract between landlord and tenant is not affected by tenant's assignment of lease, but continues until end of term, notwithstanding tenant is no longer in possession of property.

9. Landlord and tenant ⇐208(1)

Where a lease of real property and furnishings and fixtures therein was assigned by lessee, in absence of any showing of release of liability of original lessee, original lessee was still liable to original lessor for reasonable rental value of fixtures and furnishings subsequent to foreclosure of a mortgage on the realty.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by Leonora Munzinger against Harry Caffrey, John W. McMurray, Roland McMurray and Ray McMurray, for declaratory relief and for money claimed to be due under a lease. From a judgment against only defendant Ray McMurray, the plaintiff appeals.

Reversed in part, and affirmed in part.

Halverson & Halverson, of Los Angeles, for appellant.

Hugh E. Brierly and Glenn E. Tinder, both of Bishop, and Robert Loundagin, of Lone Pine, for respondents.

GRIFFIN, Justice.

Plaintiff and appellant instituted this action against defendants and respondents Harry Caffrey, John W. McMurray, Roland McMurray and Ray McMurray, for declaratory relief and for money claimed to be due under the terms of a lease wherein appellant, on May 19, 1934, leased to respondent Harry Caffrey lot 4, block 12, in Bishop, together with certain card and pool tables, bar and fixtures, candy and cigar cases, and other furnishings and fixtures located in the building on that property. The lease was for a term of five years with a monthly rental of $125. At the time the lease to Caffrey was given the real property, but not the personal property, was subject to a mortgage in favor of Johann Albers. Suit for foreclosure of the mortgage was brought through one Tinder, executor of his estate, on the 21st day of September, 1933, and lis pendens recorded before the lease was made. Order of sale was issued March 12, 1934, and after the execution of the lease to Caffrey, the real property was sold to Tinder, as executor, on July 16, 1934, and a sheriff's certificate of sale issued therefor. On June 24, 1935, Tinder, as executor, sold and assigned the real property and certificate of sale to the city of Los Angeles, the assignment being dated December 23, 1935, and the acceptance by the city of Los Angeles being dated February 18, 1936. After the sale on foreclosure, beginning on the 20th day of September, 1934, Tinder, as executor, collected from John W. McMurray, through Ray McMurray, as manager, the sum of $125 per month, until the real property and certificate of sale was sold to and accepted by the city of Los Angeles, deducting $97.30 each month from that amount, which was one per cent of the total purchase price at the foreclosure sale. The balance of the $125 was paid to appellant. On October 22, 1934, Caffrey assigned the lease, with the consent of appellant, to John W. McMurray. John W. McMurray immediately went into and remained in possession until the end of 1935, when the business was transferred to Ray McMurray under some oral agreement of sale. Thereafter, the respondent Ray McMurray alone occupied the premises. On March 2, 1936, Ray McMurray, with Roland McMurray and wife, took a direct lease from the city of Los Angeles at $80 per month for a period of three years on the above-mentioned real property. On March 3, 1939, at the termination of the former lease, Ray McMurray alone took a new lease thereon on the same terms.

Rentals at $125 per month had been paid by all tenants to the executor and the city of Los Angeles up to March 2, 1936. No rental in excess of $80 per month was paid by Ray McMurray or any one of the lessees or assignees subsequent to March 2, 1936. On July 5, 1935, and prior to the expiration of the period of redemption, appellant Munzinger, the mortgagor, filed her petition for a moratorium and, upon stipulation of the city of Los Angeles and orders of the court made thereon, the period of redemption was extended to August 12, 1940, beyond the date of trial hereof. This action was then brought to determine whether Harry Caffrey, the original lessee, and John W. McMurray, the assignee of Caffrey, Ray McMurray and Roland McMurray were liable under the terms of the lease to appellant in the sum of $45 per month from March 2, 1936, to the date of trial, totaling $1,980, for value of the use and occupation of the property for that period.

The question of the liability of the respondent Ray McMurray for the reasonable rental value of the personal property used by him for the period he used it is not raised on this appeal. It is undisputed that the respondent John W. McMurray paid all rental demanded of him during his period of occupancy of the mortgaged premises, and that the respondent Roland McMurray never at any time personally occupied the premises or personal property. The testimony before the court was that Roland McMurray signed the lease from the city of Los Angeles to Ray McMurray, as an accommodation to his son Ray McMurray. The court rendered judgment for plaintiff and appellant against Ray McMurray only, in the sum of $254.75, being for the reasonable rental value of the personal property mentioned in the lease.

It is now contended by appellant (1) that the lease in the instant case was given subject to the mortgage and that since the mortgage was foreclosed the purchaser could not legally abrogate the lease or lease the property before it received the sheriff's deed; (2) that even though the lease was assigned, both the lessee and assignees are liable to appellant for the amount of the agreed rental price in excess of $80 per month.

[1-4] It has been determined on many occasions in this state that title passes to the purchaser at a foreclosure sale. Sec. 700, Code Civ.Proc. The law grants to the mortgagor the right to redeem the property and to personally remain in possession pending the expiration of the period of redemption, but where the property is leased to a tenant the title acquired by the purchaser carries with it the right to receive rent from the tenant in possession. Pollard v. Harlow, 138 Cal. 390, 71 P. 454, 648; Shintaffer v. Bank of Italy, etc., Ass'n, 216 Cal. 243, 13 P.2d 668. A purchaser at a mortgage foreclosure sale, during the period of redemption, is entitled to sue for the reasonable value of the land occupied by a tenant. Munkelt v. Kumberg, 22 Cal.App. 2d 369, 70 P.2d 997. As the purchaser would be entitled to the rents of the property sold under foreclosure or the value of the use and occupation thereof, it must necessarily follow that the mortgagor, during the redemption period, was not entitled to receive them. Becker v. Munkelt, 27 Cal.App.2d 761, 81 P.2d 1041; Reynolds v. Lathrop, 7 Cal. 43; McDevitt v. Sullivan, 8 Cal. 592. In the last two cited cases it was held, under similar circumstances, that the sale under the foreclosure, in effect, was equivalent to an assignment of the lease until the time for redemption expired. See, also, Clarke v. Cobb, 121 Cal. 595, 54 P. 74. In other words, the tenant in possession is liable as such to account to the purchaser for the value of the use and occupation during the period in question. Walker v. McCusker, 71 Cal. 594, 12 P. 723; sec. 1111 Civ.Code; Title Insurance & Trust Co. v. Pfenninghausen, 57 Cal. App. 655, 207 P. 927; Harris v. Foster, 97 Cal. 292, 32 P. 246, 33 Am.St.Rep. 187. The appellant in the instant case, therefore, not being entitled to receive the rents from the real property, is confined to a recovery for the reasonable value of the use of the personal property for the period from March 2, 1936, to the date of trial.

[5] The trial court awarded judgment against Ray McMurray only, on this count, in effect holding that the remaining defendants were not liable. The reasonable value of the use of the furniture and fixtures used by Ray McMurray was found to be the sum of $5 per month from March 2, 1936. The evidence discloses that much of the furniture and fixtures leased under the original lease had been stored by previous assignees of the lease and had become antiquated or destroyed and was not used by Ray McMurray during the period in question. The evidence produced on the question of the reasonable value of the use of the fixtures remaining in his possession

during this period was that the rental value of this property was from the sum of $5 to $45 per month. Under the evidence we are not authorized to disturb this finding. Donato v. Lopopolo, 20 Cal.App.2d 409, 66 P.2d 1256.

The only other question is whether the remaining defendants are jointly and severally liable with Ray McMurray for this amount.

[6] The complaint in this case alleges that Caffrey, as the original lessee, was in possession of the property and paid full rent therefor until November 22, 1934, when he assigned the lease, by written consent of appellant, to John W. McMurray, who occupied the premises and paid the rent in full until about January 1, 1935. It is also alleged that about that date John McMurray assigned the lease to the remaining defendants, Roland McMurray and Ray McMurray, who have occupied the premises ever since but who have paid rent only to March, 1936. The answers of Caffrey and John W. McMurray admit these general allegations, but allege that all rental was paid. Ray McMurray denied that he went into possession under the terms of any lease executed by appellant. Roland McMurray denied generally all of the allegations of plaintiff's complaint and alleged that no assignment of appellant's lease was ever made to him by any person; that he never did own any interest therein; that he never entered into possession of the property; and that he was made a party to the lease from the city only to guarantee to it the rental payments therein provided. The trial court so found. Although this respondent was named as a lessee of the real property under the lease from the city of Los Angeles, this fact would not be conclusive evidence that he was liable for the reasonable rental value of the furniture and fixtures. The court's determination that he was not liable therefor cannot be disturbed on this appeal.

The nature of the assignment of the lease from Caffrey to McMurray is not before us. The record indicates that there was some form of written assignment made and the lease turned over to John W. McMurray or his attorney about October 22, 1934. The evidence shows that John W. McMurray never assigned the lease to Ray McMurray, but about the end of the year 1936, while Ray McMurray was working for him he, John, "just stepped out" and the premises and equipment were turned over to Ray, apparently under some oral contract of sale.

[7, 8] So far as the evidence is concerned, this respondent John W. McMurray was still liable for the reasonable rental value of the fixtures and furnishings subsequent to March 2, 1936, at least for the time he was occupying the premises and using the furnishings and fixtures. Treff v. Gulko, 214 Cal. 591, 595, 7 P.2d 697; Ellingson v. Walsh, O'Connor & Barneson, 15 Cal.2d 673, 675, 104 P.2d 507. Privity of contract between landlord and lessee is not affected by the latter's assignment, but continues until the end of the term notwithstanding he is no longer in possession of the property. Samuels v. Ottinger, 169 Cal. 209, 146 P. 638, Ann.Cas.1916E, 830. The original lessee was "to have and hold the premises together with the said personal property unto the said lessee, from June 19, 1934, for and during the full term of five years * * * paying therefor * * * every month * * * $125 * *."

[9] In Samuels v. Ottinger, supra, it was held that such a lease expressed a contractual obligation on the part of the lessees to pay the stipulated rent, and that such obligation continued notwithstanding the lease had been assigned with the consent of the lessor. In the absence of any showing of release of liability of the original lessee, Harry Caffrey, he is liable for the reasonable rental value of the fixtures and furnishings during the period in question.

That portion of the judgment in favor of Harry Caffrey and John W. McMurray is reversed with directions to the trial court to enter judgment in accordance with the conclusions expressed. That portion of the judgment in favor of Roland McMurray is affirmed. Judgment against Ray McMurray is affirmed.

BARNARD, P. J., and MARKS, J., concurred.

49 Cal.App.2d 95

YURKAS v. ZAMPATTI.

Civ. 6605.

District Court of Appeal, Third District, California.

Jan. 12, 1942.

1. Appeal and error ⇐113(3)

Where superior court rendered judgment dismissing action with prejudice after plaintiff failed to file an amended complaint within time specified when defendant's demurrer to complaint was sustained, plaintiff's proper procedure was by motion to set aside the default and appeal from order made thereon.

2. Appeal and error ⇐544(3)

Where plaintiff appealed from superior court's judgment dismissing action with prejudice after plaintiff failed to file an amended complaint within time specified when defendant's demurrer to complaint was sustained, and only record before reviewing court on appeal was judgment roll, order sustaining demurrer and notice of service of order upon plaintiff could not be considered by reviewing court, since they were not part of "judgment roll", and reviewing court was bound to assume that time to amend had expired before entry of judgment. Code Civ. Proc. §§ 472b, 472c; § 670, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment Roll".

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Rosalie Yurkas against Victor Zampatti. From a judgment dismissing the action with prejudice after plaintiff's failure to file an amended complaint within specified time, plaintiff appeals on the judgment roll.

Affirmed.

S. T. Hogevoll, of San Francisco, for appellant.

Victor Zampatti, of Eureka, in pro. per., for respondent.

CURLER, Justice pro tem.

Plaintiff brought action in the Superior Court of Humboldt County. Defendant demurred to plaintiff's complaint, and on the 27th day of January, 1941, defendant's demurrer was sustained and plaintiff granted twenty days in which to amend. On the *17th day of February, 1941,* no amended complaint having been filed by plaintiff, the court rendered judgment dismissing the action with prejudice. Plaintiff appeals from the judgment of dismissal.

[1] Appellant contends that the record on appeal shows that default judgment was entered prematurely. Respondent contends that the notice of sustaining the demurrer, and service thereof, and upon which appellant relies, are not a part of the judgment roll, and that the proper proceeding in such a situation was a motion to set aside the default and appeal from the order made thereon. The latter relies upon the case of Bailey v. Sloan, 65 Cal. 387, 4 P. 349, which appears to support his vew, and which we believe to be correct.

The only record before this court on appeal is the judgment roll.

The judgment roll in this case should be one prepared under subdivision 1 of section 670 of the Code of Civil Procedure, which provides as follows:

"In superior courts and municipal courts the following papers, without being attached together, shall constitute the judgment roll:

"1. In case the complaint is not answered by any defendant, the summons, with the affidavit or proof of service; the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; if defendant has appeared by demurrer, and such demurrer has been overruled, then notice of the overruling thereof served on defendant's attorney, together with proof of such service; and in case the service so made is by publication, the affidavit for publication of summons, and the order directing the publication of summons."

[2] However, in the clerk's transcript there is a paper purporting to be an affidavit that notice of sustaining the demurrer was served on plaintiff by depositing the same in the United States Post Office at Eureka, California, on the *29th day of January, 1941,* and that plaintiff's residence was in San Francisco, California. The order sustaining demurrer and the notice are not legally a part of the record, and therefore cannot be considered by us. Section 472b of the Code of Civil Procedure pro-

vides that when a demurrer is sustained, time to amend runs from service of notice of decision. If this court could consider the affidavit of service of notice of sustaining of demurrer, it would appear clear that the default judgment of the trial court was prematurely entered. However, in view of the fact that the only part of the record which is properly before this court is the judgment roll, as defined in said section 670, there is nothing upon which the court can act to set aside or reverse the judgment. We must therefore assume that the time to amend had expired prior to the entry of judgment.

Plaintiff cites section 472c of the Code of Civil Procedure as being conclusive of the issues involved in this case, but inasmuch as that section simply sets forth that one may appeal from an order sustaining a demurrer without leave to amend, even though no request to amend the pleading was made—we do not find the section helpful on the question of how a record on appeal should be prepared.

The judgment is affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.



49 Cal.App.2d 125

LOGAN et al. v. RICHARDS et al.

Civ. 6625.

District Court of Appeal, Third District, California.

Jan. 13, 1942.

1. Appeal and error ⇐1011(1)

The appellate court is without authority to disturb trial court's conclusions from sharply conflicting evidence on issues raised by pleadings, unless such conclusions were erroneous or there were errors prejudicial to appellants' rights in admission or rejection of evidence.

2. Appeal and error ⇐1056(1)

In action to quiet title to realty, conveyed by one plaintiff's wife, since deceased, to her son by previous marriage, rejection of evidence that defendant son's complaint, in prior action by him, omitted all mention of or reference to deed, claimed to have been delivered to him by plaintiff husband after execution and delivery of wife's deed, *held* not prejudicial to plaintiffs, in view of entire evidence.

3. Husband and wife ⇐193

Failure to designate husband as party in wife's deed, conveying her separate property to her son by previous marriage, was immaterial, as husband had no interest to convey and his signature to and acknowledgment of execution of deed were all that was required.

4. Appeal and error ⇐1010(1)

The trial court's fact finding supported by evidence cannot be disturbed by appellate court.

5. Appeal and error ⇐1011(1)

In action to quiet title to realty, where trial court found on conflicting evidence against plaintiffs' position respecting effect of certain deeds, their contention, based on their view of evidence, respecting such deeds, cannot be sustained on their appeal from judgment for defendants.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Michael M. Logan and another against John Vernon Richards and others to quiet title to certain realty. Judgment for defendants, and plaintiffs appeal.

Affirmed.

John J. Taheny, of San Francisco, for appellants.

W. H. Morrissey, of Redwood City, for respondents.

MONCUR, Justice pro tem.

This is an action to quiet title of appellants in and to certain real property situated in Daly City, San Mateo County, California. The complaint contains the usual allegations in an action to quiet title and in addition some six separate counts in which practically all of the probative facts are also alleged. In the answer of respondents it is alleged that John Vernon Richards is the owner of the property and therein the allegations as to the probative facts set forth in the complaint are specifically denied. The trial court found against the appellants on the allegations of the complaint and in favor of John Vernon Rich-

ards and entered judgment quieting the latter's title to the property. It is from this judgment that the appeal is taken.

The negotiations for the purchase of the property involved were carried on by Ellen Logan, wife of Michael Logan, the mother of respondents by a former marriage. Ellen Logan died on May 27, 1935, and on March 9, 1937, appellant Anna Nieri was appointed adminstratrix of her estate by the superior court in and for the City and County of San Francisco, and she duly qualified as such. The deed was taken in the name of Ellen Logan. It is claimed by appellant Michael Logan that he furnished the money with which to purchase the property and that it was the understanding that it should be the community property of himself and his wife Ellen Logan. Ellen Logan and Michael M. Logan were married on or about December 10, 1922. Respondents claim that between them they furnished the money for the purchase of the property and that it was, until the execution and delivery to respondent John Richards of the deeds hereinafter referred to, the separate property of Ellen Logan.

The first of these deeds was one executed and delivered to respondent John by his mother, on August 31, 1931, conveying to him the property. Michael M. Logan was not named as a party in this deed, but he signed and acknowledged it. The other deed was one by appellant Michael M. Logan, dated June 1, 1935, and acknowledged June 3, 1935. There were at least two other deeds involved and also a lease. This lease was from respondent John to appellant Michael. It was for the term of Michael's life and the rental was $1 per year.

In view of the findings of the trial court, it is not deemed necessary to notice particularly the two last-mentioned deeds or to discuss the controversy arising concerning them. The question of the consideration for this lease was involved, respondents contending that this consideration had failed. The court found specifically in accordance with the contention of respondents. Also, at the trial appellant Michael M. Logan testified that he was not claiming any title under the lease.

[1-4] The evidence was sharply conflicting. These conflicts were resolved in favor of respondents, the court having found in favor of respondents upon all of the issues raised by the pleadings. Unless the conclusions reached by the trial court were erroneous or there were errors in the admission or rejection of evidence which were prejudicial to the rights of appellants, this court is without authority to disturb the conclusions reached by the trial court. It is the contention of appellants that the court erred prejudicially in rejecting proffered evidence on behalf of appellants; that in a prior action in which respondent John Richards was plaintiff his complaint omitted all mention or reference to a deed which he claims was delivered to him by Michael Logan on June 3, 1935. We do not find it necessary to determine whether it was erroneous for the court to reject this proffered evidence. After an examination of the entire evidence, we conclude that no prejudice resulted to appellants by reason of its rejection. It is not material that Michael was not designated as a party in this deed to John Vernon Richards on August 31, 1931. In view of the findings of the trial court that at that time the property involved was the separate property of Ellen Logan, Michael M. Logan had no interest to convey and his signature to, and acknowledgment of the execution of the deed was all that was required. Ingoldsby v. Juan, 12 Cal. 564; Dentzel v. Waldie, 30 Cal. 138; Cordano v. Wright, 159 Cal. 610, 115 P. 227, Ann.Cas.1912C, 1044. It appears that respondent John withheld the deed of August 31, 1931, from record; it is claimed that this was done for the purpose of making it appear that the property was Mrs. Logan's, as she was entitled to a tax exemption by virtue of Michael M. Logan's having served in the Spanish-American War, respondent John not being entitled to an exemption; that this was a fraud upon the county of San Mateo; and that by reason of this fact respondent John Richards is precluded from asserting the title to the land as against his mother's administratrix, as he does not come before the court with clean hands. This matter was gone into quite thoroughly at the trial. The court found against the contention. As there is evidence to support this finding, it cannot be disturbed by this court.

[5] In relation to the contention of appellants respecting the other deeds which we have deemed it unnecessary to specifically mention, these contentions are based upon appellants' view of the evidence favoring these contentions. However, as the trial court found upon conflicting

evidence contrary to appellants' position respecting the effect of these deeds, their contention cannot be sustained.

The trial court having made its findings of fact and conclusions of law upon conflicting evidence; the conclusions reached by the trial court being found to be supported by the evidence; and there appearing no error resulting in prejudice to the rights of appellants, it is ordered that the judgment be, and it is hereby affirmed.

TUTTLE, J., and THOMPSON, Acting P.J., concurred.



49 Cal.App.2d 186

HAWKINS v. FARIES et al.

Civ. 13253.

District Court of Appeal, Second District, Division 1, California.

Jan. 16, 1942.

Hearing Denied March 16, 1942.

1. Attorney and client ⇐123(1)

All dealings between an attorney and client for benefit of the former are presumptively invalid on ground of constructive fraud and the presumption can be overcome only by clearest and most satisfactory evidence.

2. Attorney and client ⇐123(1)

Where transaction between attorney and client for benefit of attorney is attacked, attorney must show by clear and satisfactory evidence that transaction was fair and equitable and no advantage was taken by him, and that client was fully informed of all matters relative to the transaction and was so placed as to be able to act understandingly and to deal with the attorney at arm's length.

3. Attorney and client ⇐123(1)

Where transaction between attorney and client for the benefit of attorney is attacked, proof of mere negative conduct of attorney is not sufficient to overcome presumption of fraud and unfair dealing which is automatically raised by law as a protection to the client.

4. Appeal and error ⇐931(1)

On appeal from a judgment, all conflicts in evidence must be resolved in favor of the judgment, and all reasonable inferences must be drawn in support thereof.

5. Appeal and error ⇐994(3)

In client's action against former attorneys for an accounting, credibility of the witnesses was for the trial court.

6. Appeal and error ⇐1011(1)

Trial court's conclusion on an issue of fact drawn from conflicting testimony could not be disturbed on appeal.

7. Attorney and client ⇐127

Where client sold his interest in oil permits either through or to attorneys who acted for him in obtaining permits, and thereafter client sought an accounting for alleged secret profits made by attorneys, evidence sustained conclusion that client received fair and adequate price for the interest which he sold and that attorneys acted honestly and in good faith and handled all matters entrusted to them to the best of their ability and with the exercise of sincere judgment in client's behalf.

8. Limitation of actions ⇐60(2)

Where client sold his interest in oil permits either through or to attorneys who represented him in obtaining permits, action by client against attorneys for accounting for alleged secret profits instituted some nine years after transaction from which alleged cause of action arose was barred by limitations. Code Civ.Proc. §§ 337(1, 2), 338(4), 339(1), 343.

9. Attorney and client ⇐127

Where client sold his interest in oil permits either through or to attorneys who acted for him in obtaining permits, and client thereafter sought an accounting for alleged secret profits and trial court found that client knew that attorneys were the actual purchasers of one-half royalty interest ostensibly sold to an oil company, and that the sale of the interest was fair and valid, refusal to permit client to amend complaint to show proceeds received by the attorney from sale of property was not error.

10. Attorney and client ⇐123(2)

Burden was on the client to show that habitual use of intoxicants had temporarily or permanently impaired his mind, so as to render him incapable of comprehending effect of his act in selling his interest in oil permits to or through attorneys.

11. Attorney and client ⇐127

Where client sold his interest in oil permits either through or to attorneys who acted for him in obtaining permit, and client sought an accounting for alleged secret profits, and failed to offer proof that his intoxication produced such an abnormal condition of mind as to render him incapable of comprehending the effect of his act, and trial court found that client was sober at the time of transaction, refusal to admit evidence as to client's drinking habits was not error.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Samuel C. Hawkins against David R. Faries and others for an accounting of alleged "secret profits" allegedly made by defendants while acting as attorneys for plaintiff. From a judgment for the defendants, plaintiff appeals.

Affirmed.

Roland Rich Woolley, Joseph F. Rank, and Ralph C. Curren, all of Los Angeles, for appellant.

Faries & McDowell, Charles E. McDowell, Leonard S. Janofsky, and Wayne R. Hackett, all of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from a judgment rendered in favor of respondents as defendants in an action brought against them by appellant, wherein the complaint was denominated one for an accounting of "secret profits." Respondents had acted as attorneys for appellant in obtaining certain permits for the drilling of oil wells on tidelands owned by the state; and thereafter appellant sold his interest in the said permits either through or to respondents. The basis of the instant action is appellant's claim that in procuring the sale of his interest, respondents fraudulently withheld certain material information from appellant affecting the value of the permits in question. The complaint in effect charges that respondents, while acting as attorneys for appellant, and under authority from him, sold the certain properties owned by appellant, and failed to account to plaintiff for all the proceeds from such sales. The events from which the alleged cause of action arose took place some eight or nine years prior to the commencement of the action and about ten years prior to the trial thereof. The trial of the action consumed approximately three months and the transcript of the proceedings had thereat runs over 4,700 pages. The supplement to appellant's brief, summarizing the proceedings, consists of four volumes totaling over 1,800 pages.

The following constitutes appellant's statement of the questions involved:

"In this action where the fiduciary relationship of attorney and client is involved: (a) Did the defendant attorney, who purchased from his client valuable oil interests for $30,000, overcome the presumption that said sale was fraudulent by clear and convincing proof that he made a full and complete disclosure to his client of all facts pertinent to such purchase? (b) When the attorney sold said interests less than four months later as part of an entire transaction wherein he also sold other interests of his client, did the attorney actually shift the respective consideration properly due to his client and himself so as to allow himself a purported profit of approximately $700,000 at the expense of his client? (c) Where the fiduciary relationship existed and continued to exist until shortly before action was commenced, can the attorney avoid liability on the ground that the action is barred by the Statute of Limitations where it appears that the fraudulent nature of the transactions was kept secret and was only accidentally discovered shortly before the action was commenced?"

[1, 2] Respondents state that the question involved on this appeal is whether there is any substantial evidence in the record of the case to support the findings of the trial court. Actually, the transactions here involved having been between attorneys and their client, the question is whether the respondent attorneys overcame by clear and satisfactory evidence the presumption of invalidity which arises from such transactions. "All dealings between an attorney and his client for the benefit of the former are not only closely scrutinized, but are presumptively invalid, on the ground of constructive fraud, and such presumption can be overcome only by the clearest and most satisfactory evidence. Not only must the attorney offer clear and satisfactory evidence that the transaction between himself and his client was fair and equitable, and no advantage was

taken by him, but he must also offer proof that the client was fully informed of all matters relative to the transaction, and was so placed as to be able to act understandingly and to deal with the attorney at arm's length." In re Estate of Witt, 198 Cal. 407, 419, 245 P. 197, 202. To the same effect see Kisling v. Shaw, 33 Cal. 425, 91 Am.Dec. 644; Cooley v. Miller & Lux, 156 Cal. 510, 105 P. 981; Clark v. Millsap, 197 Cal. 765, 242 P. 918. Upon appeal, the inquiry in this connection is directed toward a determination of whether the trial court made a proper finding as to the nature and character of the transaction, supported by substantial evidence.

The trial court found the following facts. That the respondent firm of Faries & Williamson was employed by the respective permittees involved and by appellant to represent them as attorneys at law in connection with the filing of applications for the permits referred to in the complaint herein, and in obtaining the said permits on the property in question, together with leases thereon, and in the bringing and defending of any litigation in connection with the said permits and other matters which might require legal services in connection with the said permits or leases; and that this employment continued up to and including portions of the year 1930, but was terminated in the year 1930 by reason of the sale or disposal by the permittees and appellant of all of their right, title and interest in the said permits and leases issued thereon, and in and to any and all operating agreements relating to said leases, and in and to any proceeds resulting from the sale or other disposal of oil, gas and other hydrocarbons to be produced therefrom. That the termination of the said employment was promptly followed by an accounting by the said permittees and the respondent firm to appellant during the years 1929 and 1930 of any and all sums of money to which the appellant was entitled upon any sale or disposal of any right, title or interest of any permittee, or otherwise, in and to the said permits or leases, or otherwise. That the respondent firm of attorneys was dissolved on or about April 30, 1932, and that thereafter appellant did not employ said firm for any purpose in connection with any matter; and that at no time prior to the dissolution of the said firm did the appellant employ or deal with any member of the said firm as an individual, but that subsequent to the dissolution of the said firm appellant has employed respondent David R. Faries as his attorney in connection with various matters up to, and subsequent to, the time of the filing of this action, but not as to any matters referred to in the complaint herein. That "as to said permits and as to any leases based thereon, and as to any real property described in said permits and/or leases, and as to all matters and transactions pertaining to or affecting plaintiff's rights or interests therein or any financial benefit that plaintiff might derive therefrom, that the plaintiff (appellant) himself was at all times mentioned in plaintiff's complaint, trained and experienced in the oil business and particularly in buying, selling, leasing and dealing in tideland permits, oil-bearing lands and oil leases, and was familiar with the value of each and all of the said permits * * * and each and all of the interests of all of the persons interested therein or the proceeds to be derived from any sale or disposal thereof, and was at all such times familiar with the preparation of, and accustomed to draw, contracts and agreements relating to the sale, lease, disposal or operation of real property for the purpose of producing or endeavoring to produce, oil, gas, or other hydrocarbon substances therefrom, and was familiar at all times mentioned in said complaint with the statutes and laws relating to tideland permits, and that the plaintiff did not at any time referred to in plaintiff's said complaint implicitly, completely, wholly, or at all, rely upon any advice, instructions or request of the defendant attorneys * * * in fixing or agreeing to, the terms upon which he disposed of any of his interests in, or related to, said permits"; and that appellant knew the said attorneys were not experienced in the oil business or in matters relating thereto. That for their legal services in connection with the said permits respondents were to receive one-sixth of the gross proceeds received by the permittees and appellant as a result of the issuance of such permits and the sale or disposal thereof or of any interest therein, or from any operations for the production of oil or gas conducted on the property therein described; and that respondents as attorneys, for their services in selling any royalty or other interest, were to receive an additional compensation equal to 10 per cent of the gross selling price thereof. The court

made specific findings as to the disposal and sale of appellant's interest in the permits in question; that the sales thereof made to respondents were at the instance and request of appellant; that appellant disposed of all of his said interests in the permits; that a portion of said interests were transferred in settlement of pending litigation; that all such sales, assignments and transfers were made with appellant's knowledge and consent; and that respondents fully accounted to appellant for all moneys received from the sales, transfers and assignments in question; and that the sale of appellant's certain interests to respondents was not induced by concealment on the part of respondents; that appellant was fully informed by respondents of all facts known to them; that the price paid for said interests was fair and adequate; and that the transaction was not void but was a valid sale, by which respondents obtained title to the property in question; and that the subsequent sale of the said property by respondents was a sale of their own property. That the members of said respondent, firm, or any of them, never conspired or agreed or attempted with the buyers or buyer of any interest in any of the properties involved in this action to juggle or misrepresent or conceal or depress the price or consideration paid or agreed to be paid therefor, for the purpose of depriving plaintiff (appellant) of a fair return, or of the true return from such sale or of enabling the members of the said firm, or any of them, to obtain for themselves an excessive price or any advantage which they would not otherwise have obtained. "* * * that the said plaintiff was fully and completely advised by the said firm of Faries & Williamson and the members of said firm as to all facts relating to all sales and transactions had by or through them or any of them, in which was involved any right, title or interest of the plaintiff, or any right, title or interest claimed now or at any other time by the plaintiff in or to any permit, lease, land, contract, or any proceeds from the sale or disposal of any interest in any such or other property, or in or to any oil, gas or other hydrocarbon substances to be produced or saved or sold from any such permit * * * that at all times while the defendant attorneys, Faries, Williamson and Heizman, represented the plaintiff in any transactions referred to in these findings, they exercised their best and sincere judgment in his behalf, handled all matters entrusted to them diligently, efficiently, to the best of their ability, and with marked success, dealt with him fairly, acted throughout in good faith and with honest purpose and intent in his behalf * * * that throughout all such transactions, they made a continuing and conscientious endeavor to keep him fully and correctly advised as to all matters with reference to which the said firm of Faries & Williamson or any member thereof, were acting for said plaintiff, and for the purpose of obtaining his approval of every transaction affecting his interests; that they carried out to the best of their ability and their sincere judgment in his behalf, all his instructions to them, and faithfully, to their best judgment, performed every task assigned to them by him * * *."

[3] It is true that many of the court's findings are in negative form; and "in a case such as this, proof of mere negative conduct on the part of an attorney dealing with his client is not sufficient 'to overcome the presumption of fraud and unfair dealing which is automatically raised by the law as a protection to a client.'" Thornley v. Jones, 96 Cal.App. 219, 229, 274 P. 93, 97. However, it is to be noted that the trial court also affirmatively found that appellant, the client, had knowledge of the facts relative to the transactions here in question, that respondents had fully informed appellant of all facts within their knowledge, that appellant had received a fair and adequate price for the interests which he sold, and that respondents had acted honestly and in good faith and had handled all matters entrusted to them to the best of their ability and with the exercise of sincere judgment in appellant's behalf. It is to be inferred from such findings that the trial court was satisfied with the manner in which respondents had met the burden of proof cast upon them.

[4, 5] Appellant's brief reveals that the evidence was largely conflicting and that even where a conflict did not exist the evidence was not of such a conclusive nature as to compel the drawing of only one inference therefrom. Appellant has expended much of his efforts in attacking the credibility of the witnesses for respondents. Upon an appeal from a judgment all conflicts in the evidence must be resolved in favor of the judgment, and all reasonable inferences must be drawn in support there-

of. The evidence adduced on behalf of respondent is not shown to be inherently improbable, and it was for the trial court to pass upon the credibility of the witnesses.

[6, 7] The record reveals that the transaction forming the basis of the complaint herein was the outgrowth of business brought to respondents as attorneys by appellant. The transaction, as a result of which respondents profited, was one in competition with appellant's interests. However, respondent Faries testified that he fully informed the appellant of the transaction; and although this statement of respondent is emphatically denied by appellant, nevertheless, this serves but to raise a conflict in the testimony, which conflict was resolved in favor of respondents by the trial judge. Whether the uncorroborated testimony of the respondent under such circumstances is that substantial evidence required by the law to support a finding was a question addressed to the trial judge. However controversial the question of the propriety of such a conclusion might be in this or any other similar situation attending a trial, it is well settled that such a conclusion cannot be disturbed on appeal. See Cox v. Delmas, 99 Cal. 104, 33 P. 836; Zeller v. Knapp, 115 Cal.App. 486, 1 P.2d 1071; Moore v. Hoar, 27 Cal.App.2d 269, 81 P.2d 226. It must of course be assumed that the trial court gave to the evidence that close scrutiny required in cases involving a transaction between an attorney and his client. There is, therefore, no ground upon which this court may set aside the findings of the trial court as not supported by the evidence. The efforts of appellant in this regard amounts to little more than an attempt to retry the issues of the case upon appeal.

[8] The trial court also found for respondents upon three affirmative defenses of accord and satisfaction, upon one of laches, and found that appellant's cause of action was barred by sections 337 (1) (2), 338 (4), 339 (1), and 343 of the Code of Civil Procedure. These findings likewise may not be said to lack support in the evidence.

Appellant sought to avoid the defense of the statute of limitations by showing that the facts constituting respondents' concealment of vital information were not discovered until a time within the period provided for commencement of an action such as the instant one; but the trial court expressly rejected appellant's theory of discovery as unsubstantiated; and for the reasons already given the court's finding in this regard may not be disturbed.

[9] Appellant contends that the court erred in making a finding that appellant knew respondents were the actual purchasers of one-half of a royalty interest ostensibly sold to the Signal Oil Company and in refusing to permit appellant to amend his complaint to include that transaction. Appellant's proposed amendment set out the entire transaction in question, the proceeds received by respondents as a result of their purchase, in excess of the amount paid for the interests, and prayed judgment for the amount of this difference. Inasmuch as the court found that the sale of appellant's interest to respondents was fair and valid and that respondents thereby acquired title to the property in question, proceeds thereafter received by respondents from said property were the property of respondents, for which they were not accountable to appellant; and appellant's attempt to amend his complaint in order to show the proceeds thus received by respondents was without relevance or materiality. The proposed amendment was properly refused under the circumstances.

[10, 11] Appellant contends that the court erred in refusing to allow evidence as to appellant's drinking habits, stating that "the habitual use of intoxicants leaves an imprint upon the mind in some instances to the extent that one may suffer a temporary or permanent impairment thereof." If appellant's case was such an instance the burden was upon him to show it. Appellant fails to point out where there was any showing or offer to prove that his intoxication produced such an abnormal condition of mind as to render him incapable of comprehending or appreciating the effect of his acts, and the court found that appellant was sober at the time of the transactions and negotiations above mentioned. Obviously, there could be no error in refusing to permit evidence as to appellant's drinking habits under the circumstances here presented.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and WHITE, J., concurred.

49 Cal.App.2d 174

HAKE et al. v. CITY OF BAKERSFIELD et al.

Civ. 2687.

District Court of Appeal, Fourth District, California.

Jan. 15, 1942.

1. Appeal and error ⇐781(4)

Where parking meter ordinance had been repealed at time for hearing on appeal from judgment refusing to enjoin operation of parking meters, all questions raised by the appeal became "moot" and appeal must be dismissed.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

2. Costs ⇐232

Rule for assessing costs is the same where appeal is dismissed because questions raised have become moot as where appeal is dismissed for other reasons. Code Civ.Proc. §§ 955, 1034.

Appeal from Superior Court, Kern County; Frank Lamberson, Judge.

Action by Harry E. Hake and others against the City of Bakersfield and others for injunction against operation of parking meters. From a judgment for defendants, plaintiffs appeal.

Appeal dismissed.

Frederick E. Hoar and Siemon & Siemon, all of Bakersfield, for appellants.

Walter Osborn, City Atty., R. Y. Burum, Asst. City Atty., and John Shortridge, Deputy City Atty., all of Bakersfield, for respondents.

PER CURIAM.

This was an action attacking the validity of an ordinance of the city of Bakersfield providing for the installation and operation of parking meters on portions of certain streets in that city, and seeking to enjoin and restrain the defendants from operating said parking meters. The court found for the defendants and entered a judgment, from which the plaintiffs appealed.

[1, 2] When this appeal came on for hearing the court was informed that the ordinance in question has been repealed, and it therefore appears that all questions raised have become moot. The only thing argued at the hearing was with respect to the right of the respondents to recover their costs on appeal in the event of a dismissal. We know of no reason for a different rule, with respect to costs, where an appeal is dismissed because the questions raised have become moot than in a case where the appeal is dismissed for other reasons. The usual rule should be applied here (see secs. 955 and 1034 of the Code of Civil Procedure), and it is so ordered.

The appeal is dismissed.



49 Cal.App.2d 144

CRUIKSHANK v. CRUIKSHANK.

Civ. 13311.

District Court of Appeal, Second District, Division 2, California.

Jan. 14, 1942.

1. Appeal and error ⇐907(3)

On appeal on the judgment roll, the evidence considered by the trial court must be deemed to be adequate to support its conclusions on the merits of the case in absence of a showing in the record of an abuse of discretion.

2. Divorce ⇐241

Though a lump sum award to a divorced wife for her support may be upheld, the possible termination by death or remarriage of the right of a divorced wife to claim support supplies a cogent reason for preferring a judgment which by its terms provides for installment payments. Civ.Code, § 139.

3. Divorce ⇐240(5)

Where trial court retained jurisdiction to modify divorce decree awarding allowance to divorced wife for her support in event it became necessary, an award of $2,500 to wife for her future support and maintenance, payable in installments, was not excessive under the circumstances if wife lived and remained unmarried until the last installment was paid. Civ.Code, § 139.

4. Divorce ⇐241

Where trial court retained jurisdiction to modify divorce decree awarding allowance to divorced wife for her support, payable in installments, construction of decree as providing for payment in installments did not invalidate provision of decree impressing a lien on husband's property for payment of installments as they became due, but its only practical effect would be to terminate payments in event of wife's death or remarriage. Civ.Code, §§ 139, 140.

5. Divorce ⇐240(5)

Where husband had separate property worth $6,000 producing $30 per month income, and husband's income at time of trial of divorce action was $12 per week sick benefit payments, but as soon as he returned to regular duties as a postal employee he would receive $150 per month, there were no children, and there was no finding that wife, who was awarded divorce decree, was incapable of obtaining and holding employment, award to wife totalling one-half of husband's gross income after deducting payments for taxes, encumbrances, and repairs was excessive, and husband was entitled to an additional monthly deduction of $50 for his own living expenses before an equal division was made.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Suit for divorce by Fred B. Cruikshank against Sophie S. Cruikshank, wherein defendant filed a counterclaim for divorce. From a decree granting a divorce and awarding an allowance for her support to defendant and cross-complainant, plaintiff appeals on the judgment roll.

Decree modified and as modified affirmed.

William E. Fox and Joseph A. Sprankle, Jr., both of Pasadena, for appellant.

William B. Etheridge, of Pasadena, for respondent.

SCOTT, Justice pro tem.

Plaintiff appeals on the judgment roll from a decree granting a divorce and awarding an allowance for her support to defendant and cross-complainant.

The parties were married in June, 1938, and separated in November, 1939. The decree of divorce was granted to the cross-complainant on the ground of extreme cruelty. Plaintiff appealed from the judgment in its entirety, but now objects to that portion only which relates to an award to his wife for her support. The only community property was found to be some furniture and an equity in certain real property amounting to $240.17. Plaintiff was found to have separate property of a total value of $6,000, consisting of interest in real estate and securities and producing $30 per month income, with "the prospect of receiving several hundred dollars" from certain investments. It was found that the husband's income at the time of the trial was $12 per week sick benefit payments, and that as soon as he returned to regular duties as postal employee he would receive $150 per month. Defendant's separate property consisted of certain furniture. It was found that she "has received no income for several years past and has no immediate prospect of earning or otherwise receiving an income." There was no finding that she was physically or mentally incapable of obtaining and holding employment, or that she had made any effort to do so.

The trial court awarded to the defendant wife the furniture which was found to be community property, and the judgment directed the husband to pay to her for future support and maintenance the total sum of $2,500, for attorney's fees the sum of $175, plus her court costs, and an additional sum of $240.17 as the value of the total equity in the community real property. A lien was impressed upon the husband's separate property to secure the payment of the amounts thus awarded. One-half of the husband's gross income, after deducting payments for taxes, incumbrances and repairs, was ordered paid to the wife to be credited on the amounts ordered. Forty per cent was to go to the wife and ten per cent to the attorney until his fee should be paid, after which the entire one-half was to be paid to the wife. The trial court retained jurisdiction to modify its decree in the event it became necessary.

[1-4] This appeal being on the judgment roll, the evidence considered by the trial court must be deemed to be adequate to support its conclusions as to the merits of the case, in the absence of a showing of abuse of discretion in the record before us. As to the total assistance the divorced wife should receive from her former husband, we cannot say that the award was excessive if defendant lives and remains unmarried until the last installment shall

have been paid. From the reservation of jurisdiction in the decree it is apparent that the trial court had in mind the provision of Civil Code section 139, added by the amendment of 1933 (Stats.1933, p. 1039), terminating the obligation of the husband to support his former wife in case of her remarriage. Even in the absence of the paragraph of the section which was added by the 1933 amendment, it was held that the husband's duty toward the wife from whom he was divorced terminated upon her death or remarriage. Although a lump sum award may be upheld (Robinson v. Robinson, 79 Cal. 511, 21 P. 1095), the possible termination by death or remarriage of the right of a divorced wife to claim support supplies a cogent reason for preferring a judgment which by its terms provides for installment payments. Tremper v. Tremper, 39 Cal. App. 62, 177 P. 868. In Honey v. Honey, 60 Cal.App. 759, 214 P. 250, 251, while upholding a judgment for a lump sum under circumstances substantially different from those in the instant case, the court observed that "as this provision for support money is intended to cover prospective wants of the wife it is more in keeping with the reason of the law that the judgment should provide for installment payments." This construction of the decree would not have the effect of invalidating the provision impressing a lien on the husband's property for the payment of the installments for maintenance as they became due. Civ.Code, § 140; Huellmantel v. Huellmantel, 124 Cal. 583, 57 P. 582. See, also, Murray v. Murray, 115 Cal. 266, 47 P. 37, 37 L.R.A. 626, 56 Am.St.Rep. 97. Its only practical effect would be to terminate the payments in the event of the wife's death or remarriage, when in equity they should no longer be subject to her claim.

[5] The question remaining is whether an award totalling one-half the monthly gross income, after deducting payments for taxes, repairs and on encumbrances, is excessive. The findings do not show definitely to what sum the deductions thus allowable would amount, although there is some intimation they may equal the amount which the plaintiff receives in addition to his salary or sick benefits. The monthly amount, therefore, that would be left for division between the parties would appear to be $50 in time of illness and $150 in time of health of plaintiff. It would appear that if the husband has continued disabled the award would be unfair, because the remaining one-half would not be adequate to supply his needs at a time during which his former wife was not shown to be unable to contribute substantially toward her own support, if she made the effort. Upon his return to work it would appear that an equal division of the income would be excessive. A man who is regularly employed by the federal government in a responsible position requiring an alert mind, healthy body and good character must be able to do his work free from worry or undue fatigue. His requirements for transportation, clothes, food, recreation, social and religious obligations are such that he should not be limited to one-half of his salary. The marital venture herein was brief; no children are involved and the wife is not shown to be in any way disabled. A monthly deduction of $50 by the husband to help provide his own living expenses should be permitted in addition to the other deductions provided by the decree before an equal division is made between the parties.

The judgment is therefore modified to provide: (1) that plaintiff shall pay defendant as alimony one-half of his gross income after making the following deductions: (a) payments for taxes, repairs and on encumbrances as provided in the judgment in this case; (b) $50 per month toward plaintiff's own living expenses; (2) that these payments shall be applied toward the support of defendant and the attorney's fees in the proportion provided in the judgment; (3) that these payments shall continue until the total sums provided in the judgment shall have been paid, and shall then terminate; provided, however, that in case of death or remarriage of the defendant before the total sum shall have been paid, the trial court shall make an order terminating such payments as of the date of such death or remarriage, and upon such payment in full or the making of such order the lien on plaintiff's property to secure such payments shall thereupon be terminated. In all other respects the judgment is to remain the same.

As so modified the judgment is affirmed, appellant to pay the costs of this appeal.

MOORE, P. J., and McCOMB, J., concurred.

48 Cal.App.2d 709

GAINES v. CALIFORNIA TRUST CO. et al.

Civ. No. 13297.

District Court of Appeal, Second District, Division 2, California.

Dec. 24, 1941.

Rehearing Denied Jan. 22, 1942.

Hearing Denied Feb. 19, 1942.

1. Appeal and error ⇐1178(6)

In surviving wife's action to cancel written waiver and election to take under husband's will, judgment refusing cancellation would be reversed in order that specific evidence could be taken on question whether husband's property was community or separate, where minds of counsel did not meet on stipulation relating to nature of property, and trial judge was misled as to nature of property by statements of counsel, and decision could not be upheld if in fact the property was community property.

2. Wills ⇐785

If there was a "hurt" to the wife, a husband, procuring wife's signature to waiver and election to take under husband's will, derived an "advantage" within rule that all transactions between husband and wife by which one obtains any advantage from the other are presumed to be entered into by the latter without consideration and under undue influence. Civ.Code, § 158.

See Words and Phrases, Permanent Edition, for all other definitions of "Advantage".

3. Appeal and error ⇐909(4)

On appeal from judgment refusing to cancel wife's written waiver and election to take under husband's will, District Court of Appeal was required to presume that the entire estate which passed under husband's will was community property, in absence of evidence on the point.

4. Wills ⇐785

A wife signing waiver and election to take under husband's will was "hurt", and therefore husband obtained "advantage" within rule that all transactions between husband and wife by which one obtains any advantage from the other are presumed to be entered into by the latter without consideration and under undue influence, where wife would receive a lesser amount through waiver and election than she would have received had she not signed waiver and election. Civ.Code, § 158.

See Words and Phrases, Permanent Edition, for all other definitions of "Hurt".

5. Wills ⇐785

In surviving wife's action to cancel written waiver and election to take under husband's will, finding that it was not true that wife did not receive any consideration for her waiver and election was not sustained, where the presumption was that the property was all community property, and was not that the property was all the husband's separate property.

6. Wills ⇐785

In surviving wife's action to cancel written waiver to take under husband's will, husband's representatives had the burden to show not only that there was some consideration, but an adequate consideration for the waiver and election by the wife, in view of rule that all transactions between husband and wife by which one obtains any advantage from the other are presumed to be entered into by the latter without consideration and under undue influence. Civ.Code, § 158.

W. J. WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Edith Gaines against the California Trust Company and others to cancel plaintiff's written waiver and election which she signed in her husband's lifetime to take under his will. From an adverse judgment, the plaintiff appeals.

Reversed.

Rehearing denied; W. J. WOOD, Acting P. J., dissenting.

Hearing denied; SHENK and EDMONDS, JJ., dissenting.

William Klein, of San Francisco, and George I. Devor, of Los Angeles, for appellant.

Swanwick, Donnelly & Proudfit, of Los Angeles, and Clarence Thomason, of North Hollywood, for respondent California Trust Co.

J. B. Irsfeld, Douglas Fawcett, and James B. Irsfeld, Jr., all of Los Angeles, for respondents Andrews et al.

HANSON, Justice pro tem.

This is an appeal by the surviving wife of the decedent testator from a judgment refusing to cancel her written "waiver and

election," which she signed in her husband's lifetime, to take under his will. The instrument, in question, not only authorized the husband to dispose of his separate property but the community property as well, with an election on the wife's part to take in accordance with the will. There was no consideration for the wife's unilateral promise at the time the instrument was executed by her, other than a legally implied promise of the husband that he would not make a testamentary disposition except by the will, to which her written "waiver and election" was annexed. On the record before us the controlling question is whether the evidence sustains the judgment.

The facts necessary to be stated as a background in the light of which our decision must be resolved are these: Plaintiff-appellant was born and reared in England. She was educated by a governess until she was 15 years of age, and thereafter by her mother until her marriage. She married the testator in 1906. The following year they came to America to reside, and from 1918 to the death of her husband in October, 1936, they lived in California. They had no children. The record indicates that the parties were on the very best of terms throughout their married life. The wife had no business experience whatsoever, and so she was accustomed to sign whatever leases, deeds or business papers her husband placed before her without reading them or questioning him concerning them.

On or prior to March 4, 1936, the testator wrote out his will in longhand. While the record is not too clear on the point, it seems that the waiver and election clause here involved, which likewise was in his own hand, was not appended to the will at the time he first brought the will to his wife's attention. But whether it was or was not, it is clear that she did not see the clause until she actually attached her signature to it. According to her testimony the first intimation she had that her husband proposed to draft or had drafted his will was in their home on March 4, 1936, when he brought it out and proceeded to read it to her. In the course of his reading he got as far as the paragraph which provided that his own sister was to receive the sum of $100 per month for the balance of her natural life. At that point in his reading his wife interrupted to observe that the amount was inadequate, as his sister had been accustomed to much more in the past. It appears that this observation nettled the husband, and he immediately got up, threw the will upon his chair and stalked from the room. While the wife then, and for several days after, had an opportunity to read the will, as he had left it with her, she did not do so. After the incident mentioned the wife placed the will on her husband's desk in his den. In the course of a few days he took it and then kept it until on a morning subsequently, when he called his wife into the den, handed her a pen and requested that she sign the will. When she then asked him why it was necessary for her to sign *his will*, he replied: "Edith, I am in a hurry. Sign this will." Thereupon she signed the waiver and election clause upon the blank line provided for her signature, without reading either the will or the clause, and without knowledge of the contents of either and without having had the waiver and election clause read over to her or by her. She testified that she did not know she was making an election with reference to her property rights, and that her husband never explained the provision he was making for her in his will nor the effect of her act. Moreover, she did not have the slightest knowledge of the size of his estate or how much of it was community property. As a matter of fact, the testimony is that for some time prior to his death his monthly allowance to her for the payment of living expenses was in the neighborhood of $100. During that period it was her understanding that "he had lost all of his possessions." Actually, when he died his estate inventoried in excess of $500,000.

[1] In his opening statement on the trial below, counsel for the executors announced that as the action was for cancellation of the "waiver and election" it appeared to him it was unnecessary that any evidence should be introduced showing the nature of the property of which the husband died possessed—that is to say, whether it was community or separate property—and accordingly he sought a stipulation to that effect from counsel for the wife. Counsel for the wife thereupon, in substance, stated that he saw no need for an exact determination as to what property was community and what was separate, if it was understood, for want of evidence on the point, that the presumption would be that the property was communi-

ty property and hence that the wife, by her waiver and election, had given up one-half of the property without any adequate consideration therefor. Without relating in detail the statements made by respective counsel, we think it is clear from the record that the minds of the respective counsel never met on the stipulation; that counsel for the executors did not appreciate the point made by counsel for the wife, and that the trial judge was misled by the various statements of counsel into believing that not only would there be no issue as to separate or community property upon which he would have to find, but additionally we think that he understood that he was entitled to class the estate as being separate property rather than community property. As we are of the opinion that the trial court was required to assume that all of the property was community property, and if it in fact was community property that the decision below cannot be upheld, we conclude that the case must be reversed in order that specific evidence may be taken on the question. Our reasons for so holding will be made clear as we proceed.

Initially it needs to be pointed out that the trial court specifically found that when the wife signed the waiver and election she had complete trust and confidence in her husband and in his business ability and legal knowledge, and that she did not know the nature of community or separate property or her rights thereto, nor did she know the extent of her husband's estate. The court additionally found she was not familiar with business practices, customs or usages, and that her husband did not explain to her the nature and extent of her act in signing the waiver and election.

Notwithstanding these findings the court found that the husband did not use any coercion in procuring his wife's signature; that he made no misrepresentations respecting the "waiver and election," and did not exert any undue influence upon her; that she could have sought independent counsel and advice before she signed, and that there was plenty of opportunity on her part to have done so. Additionally the court found that it was not true, as she had averred, that she received no consideration for signing the waiver and election. Upon the findings as made the court drew the conclusion that the waiver was valid and that there was no ground for its cancellation as prayed.

Upon the facts as narrated appellant bases her claim that, as a matter of law, there was undue influence and coercion of a character that should permit her to avoid the waiver and election, thus enabling her to claim her statutory right in the estate.

[2] Our statute (Civ.Code, sec. 158) provides that all contract transactions between a husband and wife are subject to the general rules which control the acts of persons occupying confidential relations with each other, as defined in the title on trusts. In passing upon that statute our Supreme Court, in White v. Warren, 120 Cal. 322, 49 P. 129, 52 P. 723, said: "As applied to the relations of husband and wife, the aforesaid section 2235 may be read as follows: 'All transactions between the husband and wife, by which one obtains *any advantage* from the other, are presumed to be entered into by the latter *without consideration, and under undue influence.*'" (Italics ours.) The foregoing case lays down the test which we must apply in consideration of the facts of the instant case.

The phrase "any advantage," as used in the statute and in the case cited above, has not been defined by any decision in this state. Yet the same phrase is found in a federal statute; and while it is there used in an altogether different setting, it has been defined by the Supreme Court of the United States in a manner which we think suggests the definition we should likewise give to the phrase as here used. In Gorin v. United States, Jan. 13, 1941, 312 U.S. 19, 61 S.Ct. 429, 435, 85 L.Ed. 488, it was held that under the Espionage Act, 50 U.S.C.A. § 31 et seq., making it a crime for a person to obtain information relating to the national defense "to be used * * * to the *advantage* of any foreign nation," the word "advantage" meant *"either to our hurt or another's gain."* (Italics ours.) In short, the Supreme Court held that it was not necessary in a case involving the statute to show that a foreign country had gained an advantage, but it was sufficient to show the "hurt" to the United States. If that definition be here accepted as appropriate, then an advantage may be said to have been derived by the husband in this case if it be shown that there was a "hurt" to the wife.

[3, 4] In the instant case we are required to presume, as no evidence was in-

troduced on the point, that the entire estate which passed under the decedent's will was community property. Estate of Bryant, 3 Cal.2d 58, 43 P.2d 529; Estate of Jolly, 196 Cal. 547, 238 P. 353.

That being true, it follows that except for the waiver and election the wife would have been entitled to one-half of the estate, or in excess of $250,000. All she gets under the will of her husband, except for a small amount of personal property, is a monthly payment, to be made to her by the trustees of the will, of $250 for a period of 15 years, and thereafter at the age of 69, if she should live so long, she will be entitled to receive one-third of the then existing estate. In short, if she lives until she attains 69 years of age she will have received over the fifteen years period the sum of $45,000, and she will then be entitled to one-third of the then existing estate. Whether these two items, added together, would amount to as much as $250,000 is of course problematical. But aside from that, she will not receive the interest which the one-half of the estate has earned over the years. Accordingly it is clear that through the waiver and election she will receive a lesser amount, in any view, than she would have received had she not signed it—assuming, of course, that the entire estate is community property, which is the assumption which we must here make. Therefore it is clear that the wife was "hurt"; and likewise it seems clear that except for the mutual promises there was no consideration whatever for the signature, and that the husband received a definite advantage.

[5, 6] While the court did find that it was not true that the wife did not receive *any* consideration for her waiver and election, there is no evidence to sustain the finding. Such a finding could be sustained on this record only if there was a presumption that the property was the husband's separate property; but, as we have seen, the presumption is that it was all community property. Moreover, the statute which is here controlling places the burden upon the husband's representatives to show not only that there was some consideration, but an "adequate consideration," for the waiver and election by the wife.

In Estate of Cover, 188 Cal. 133, 204 P. 583, 589, the wife by a post-nuptial agreement relinquished her right in her husband's estate, valued upon his death at $200,000, for a present consideration, which was paid to her, of $14,000 in cash. In affirming a holding that the consideration was inadequate the court said: "* * * she [the wife] * * * released her expectancy to a substantial portion of a $200,000 estate in return for a consideration obviously inadequate; * * * the agreement was drafted at the direction of the deceased and executed by the widow at his instigation 'in respect for the wishes' of the deceased, without any disclosure by him to her of the then value and character of his estate or of the rights which she was called upon to surrender by the agreement. * * * Accepting the agreement in the belief that the deceased was dealing honestly with her, she was justified in resting in that belief, and was not called upon then or thereafter to make independent inquiry as to his good faith." The following later cases cite the rule stated in the Cover case, supra: Locke Paddon v. Locke Paddon, 1924, 194 Cal. 73, 227 P. 715; Bryson v. Byrer, 1927, 87 Cal.App. 320, 262 P. 461—wherein the court states that it was the duty of the defendant to overcome the statutory presumption of lack of sufficient consideration and the exercise of undue influence; Dale v. Dale, 1927, 87 Cal.App. 359, 262 P. 339; Smith v. Lombard, 1927, 201 Cal. 518, 258 P. 55; Donze v. Donze, 1928, 88 Cal.App. 769, 264 P. 294; Brown v. Canadian Industrial Alcohol Co., Ltd., 1930, 209 Cal. 596, 289 P. 613.

Accordingly, as we are of the view that the judgment cannot stand because no adequate consideration for the waiver and election is shown, we need not stop to discuss the other contentions urged by appellant.

Judgment reversed.

McCOMB, J., concurred.

W. J. WOOD, Justice (dissenting).

I dissent. In my opinion the evidence is sufficient to sustain the findings of the trial court. In Estate of Cover, cited in the majority opinion, the trial court found that the agreement between the husband and the wife was brought about by undue influence, and the reviewing court held that the evidence was sufficient to sustain the findings. In the case now before us the findings are in favor of respondents.

48 Cal.App.2d 690

PEOPLE v. GRIJALVA.

Cr. 3507.

District Court of Appeal, Second District, Division 1, California.

Dec. 23, 1941.

1. Criminal law ⇐1023(10)

An appeal would not lie from sentence imposed on accused.

2. Criminal law ⇐1023(3)

An order denying application for probation which was made before judgment was not appealable.

3. Poisons ⇐9

Evidence that police officer gave accused money on two different occasions and on each occasion accused obtained marihuana cigarettes, returned, and gave them to the officer, established a "sale" of the cigarettes by the accused. St.1939, p. 758, § 11160.

See Words and Phrases, Permanent Edition, for all other definitions of "Sale".

4. Criminal law ⇐330

The defense of entrapment is a "positive defense" imposing on accused the burden of showing that he was induced to commit the act for which he was prosecuted.

See Words and Phrases, Permanent Edition, for all other definitions of "Positive Defense".

5. Criminal law ⇐569

In prosecution for selling marihuana, evidence that officer of narcotic division of police department was introduced to accused by third party and that after discussion the officer gave accused money with which to obtain marihuana did not establish defense of "entrapment". St.1939, p. 758, § 11160.

See Words and Phrases, Permanent Edition, for all other definitions of "Entrapment".

6. Criminal law ⇐1175

Where verdicts referred to information and unmistakably expressed intention to convict accused of violating provisions of health and safety code relating to the selling of marihuana, fact that verdicts stated that jury found accused guilty of violation of the state narcotic act did not authorize reversal on ground that verdicts did not refer to the information because there was no state narcotic act. St.1939, p. 758, § 11160; Pen.Code, § 1404.

7. Criminal law ⇐507(4)

One who feigns complicity in the commission of a crime merely for purpose of detecting and prosecuting the perpetrators is not an "accomplice" and his testimony does not need corroboration.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

8. Criminal law ⇐507(4)

An officer of narcotic division of city police department who procured marihuana from accused in order to detect and prosecute him was not an "accomplice" and officer's testimony was not required to be corroborated. St.1939, p. 758, § 11160.

9. Criminal law ⇐1001

The granting or denying of an application for probation is a matter within the discretion of the trial judge.

10. Criminal law ⇐1001

The fact that trial judge remarked that accused who was convicted of selling marihuana seemed to believe the way to get out of difficulty was to make false accusations against officers on some theory that would relieve accused from liability for offense committed by him and that the judge had no doubt in his mind concerning accused's guilt and fact that the judge read excerpt from probation officer's report which showed that the accused was considered to be a persistent violator of narcotic laws did not establish an abuse of discretion on the part of the trial judge in denying accused's application for probation. St.1939, p. 758, § 11160.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Alex L. Grijalva was convicted of selling marihuana and from judgment of conviction and an order denying application for probation and from the sentence, he appeals.

Appeals from order denying probation and from sentence dismissed and judgment of conviction affirmed.

Jesse Bach Porter, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant was found guilty by a jury of violations of section 11160 of the Health and Safety Code, St.1939, p. 758, as charged in an information containing two counts, to-wit: (1) of selling, furnishing or giving away marihuana on or about February 27, 1941; (2) a similar offense committed at a later date. This appeal is taken from the judgment of conviction, from the order denying application for probation and from the sentence.

[1, 2] No appeal lies from the sentence (People v. Dunlap, 12 Cal.App.2d 333, 336, 55 P.2d 522), and the order denying the application for probation is not appealable, it having been made before judgment. People v. Brock, 21 Cal.App.2d 601, 604, 70 P.2d 210.

Appellant urges that the verdict is contrary to the law and the evidence and is not supported by competent evidence; that because of prejudice of the trial court, error was committed in the pronouncement of sentence and in the denial of appellant's application for probation; and that the court acted without jurisdiction in pronouncing the judgment and sentence.

The evidence presented by the prosecution reveals that officer Simmons of the Narcotic Division of the Los Angeles Police Department was introduced to appellant on February 27, 1941, by a man named Willis, who was acquainted with appellant, and who told officer Simmons that appellant "would be in a position to maker proper connections." Said officer and appellant drove to a place designated by the latter and after considerable discussion the officer gave appellant $5 "to go and get the marihuana from the particular connection where he was going." A short time thereafter appellant returned in company with one Ramon Contreras, and handed officer Simmons a package containing twenty cigarettes (People's Exhibit 1) which was identified by said officer by markings which he had made thereon. The police chemist testified that these were marihuana cigarettes.

It was testified by officer Simmons that he again saw appellant on March 6, 1941, the date on which it is alleged the second offense was committed. On this occasion said officer again gave appellant $5, but this time asked for a can rather than for cigarettes. Appellant returned in about half an hour and "said he was sorry he could not get a can but he could get me sticks which would be the same as cigarettes, the term for cigarettes." After an interval and some conversation, appellant returned and gave said officer "two packages of sticks * * * twenty cigarettes," which, when introduced in evidence, were marked "3-6-41" together with the initials of officer Simmons.

At a later date, testified by officer Simmons as being "on Sunday morning about 10 o'clock the 30th of March of this year," officer Smith accompanied officer Simmons to a meeting place with appellant, where officer Simmons talked to appellant and spoke about the good quality of the marihuana appellant had furnished theretofore. At this time officer Simmons gave appellant $6 in the presence of officer Smith, and appellant left to obtain a can of marihuana. On this occasion appellant failed to obtain the drug and officer Simmons called the police department and had officers Chitwood and Kearney come out and place appellant under arrest.

Officer Chitwood testified to a conversation with appellant after his arrest, to-wit:

"We arrested the defendant at—down on Stanford Avenue—that is, on Pico near Stanford, I should say, and had him brought into the office. This was about 7:15 p. m., I believe. When he saw Simmons—I introduced Simmons to him as an officer, and I said, 'Do you recall selling some marihuana cigarettes?' and mentioned the date to him, 'to this officer here?' 'Well,' he said, 'I remember selling them, but I wasn't in the business.' He said, 'I just sold them for another fellow on commission;' and he said, 'I needed a little money, I wanted to make 50 cents for myself to buy a drink or something like that, so I sold the marihuana.' As I recall, I then asked him about the time that the two officers testified to, regarding the sale of six dollars worth, and he laughed and said, 'Well, I just meant to take them for that $6.00'."

As a defense witness, appellant produced Ramon Contreras who, according to officer Simmons' testimony, was present when appellant made the first delivery of marihuana cigarettes to him. In testifying for the defense, Contreras stated the first time he had ever seen officer Simmons was in the county jail on April 8, 1941, subsequent to the time the offenses here charged were committed. On cross-examination, however, Contreras admitted that he had been convicted of selling narcotics and that the officers who testified against him were officers Simmons and Smith.

Appellant took the stand in his own defense and denied ever having had any marihuana in his possession or of ever having known any of the officers prior to the time of his arrest.

Appellant argues that there is no evidence that he made a sale of marihuana, and that if he did make a sale the evidence discloses the defense of entrapment.

[3] It was shown by the prosecution that the officer gave appellant $5 on two different occasions and on each occasion appellant returned and gave to the officer twenty marihuana cigarettes. In each transaction appellant took the money of the officer, obtained the cigarettes and delivered them to said officer. This constituted a sale.

On the question of entrapment, it was stated in the case of People v. Rucker, 121 Cal.App. 361, 364, 8 P.2d 938, 939:

"The appellant claims that he was entrapped. The evidence furnishing the basis for this argument is to the effect that one Aristo introduced one Robinson, a police officer, to the defendant; that Robinson thereupon asked defendant for some morphine. The defendant left the officer and Aristo, brought some of the forbidden drug and gave it to Robinson in exchange for ten dollars. In People v. Harris, 80 Cal.App. 328, 251 P. 823, the defendant was asked to sell liquor to one of the arresting officers, and we held that there was nothing to authorize the jury in believing that the defendant was inveigled into the commission of the crime, or that the officers had been the procuring cause or instigators of the criminal intent. That authority forecloses appellant's argument."

[4, 5] In the case of People v. Lee, 9 Cal. App.2d 99, 109, 48 P.2d 1003, 1007, the court stated on the same subject: "It is our understanding that the defense of entrapment is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is being prosecuted. The invocation of the defense necessarily assumes that the act charged as a public offense was committed. The record shows that both appellant and his wife testified in his behalf during the trial. Neither of these witnesses at any time admitted that appellant made the sales or either of them. On the contrary, both denied that any sale was made or that appellant had any narcotics in his possession. There was no intimation that appellant was ever lured or persuaded into making a sale to Ng Loon. The record is bare of any evidence which tends to show that any persuasion or inducement was offered to appellant to make the sales outside the ordinary transaction of purchase and sale between a willing purchaser and a willing seller. People v. Makovsky, supra, [3 Cal.2d 366, 44 P.2d 536]. It is our conclusion that appellant's claim that the evidence established the defense of entrapment is untenable. People v. Harris, 80 Cal.App. 328, 251 P. 823; People v. Rucker, 121 Cal.App. 361, 8 P.2d 938."

[6] Appellant contends that the verdicts rendered do not refer to the information for the reason that there is no "State Narcotic Act." The verdicts read: "We, the Jury in the above entitled action, find the Defendant guilty of Violation of the State Narcotic Act, a felony, as charged in Count #1 of the Information * * * as charged in Count #2 of the Information."

Section 1404 of the Penal Code provides: "Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect of a substantial right."

Both verdicts refer to the information and unmistakably express an intention to convict appellant of the crimes charged therein, therefore the form of the verdict must be regarded as immaterial.

[7, 8] Appellant urges there is no competent evidence to support the verdict in that officer Simmons was an accomplice and there was no corroboration of his testimony. There is no merit in this contention. One "who feigns complicity in the commission of a crime merely for the purpose of detecting and prosecuting the perpetrators is not an accomplice." 8 Cal.Jur. 175; People v. Fitzgerald, 14 Cal.App.2d 180, 199, 58 P.2d 718.

It is contended that certain remarks made by the trial judge at the time he denied appellant's application for probation indicated that he "had pre-judged the defendant." The remarks objected to are as follows:

"This defendant seems to believe the way to get out of difficulty is to make false accusations against the officers on some theory that relieves him from liability for the offense committed by him."

In answer to the statement of appellant's counsel: "I am thoroughly convinced there is some doubt as to his guilt," the trial judge replied: "There isn't any doubt in my mind.

I think one of the officers on the Los Angeles Police force whose integrity I have never heard questioned is Captain Chitwood, who for quite a long while was head of the Narcotic Squad. Among other things there appears in this file the following: 'This subject is well known to the officers of this Department as a persistent violator of the Narcotic Laws. This man was a partner of Ramon Contreras, one of the larger dealers in marihuana who was recently convicted. This subject is known as a bad man and has made threats to get the officers who apprehended him when he gets out'."

[9, 10] The granting or denying of an application for probation is a matter within the discretion of the trial judge, and the fact that he made the quoted remark and read the quoted excerpt from the probation officer's report is not sufficient to show an abuse of such discretion.

There is no merit in appellant's final point.

The appeals from the order denying probation and from the sentence are dismissed; the judgment of conviction is affirmed.

DORAN and WHITE, JJ., concurred.



49 Cal.App.2d 108

WESTERN PIPE & STEEL CO. OF CALIFORNIA v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 11755.

District Court of Appeal, First District, Division 1, California.

Jan. 13, 1942.

Rehearing Denied Feb. 11, 1942.

Hearing Denied March 12, 1942.

1. Workmen's compensation ⇐768

Generally, compensation is not allowed under the Compensation Act for injuries received by an employee while going to or from meals, since an employee on such an errand is not rendering any service for his employer.

2. Workmen's compensation ⇐719

Generally, under what is known as the "going or coming rule," compensation is denied under the Compensation Act for injuries received by an employee while going to or coming from work, since such injuries normally do not arise out of, nor occur in course of, the employment.

See Words and Phrases, Permanent Edition, for all other definitions of "Going or Coming Rule".

3. Workmen's compensation ⇐766

For recovery of compensation under the Compensation Act, it is not indispensable that at time of injury an employee was rendering service to his employer.

4. Workmen's compensation ⇐654, 655, 660

Acts of an employee for his personal comfort and convenience, while at work, such as taking a drink of water, lighting a cigarette, warming himself, etc., do not interrupt the continuity of the employment, and do not preclude recovery of compensation under the Compensation Act, and such exception to the general rule is not limited to acts performed on the employer's premises.

5. Workmen's compensation ⇐768

Though injuries received by employees while going to or from their meals are generally not compensable, the employer may expressly or impliedly agree that service shall continue during such period, and when the employer pays the employee at an hourly rate during his meal hours, especially when the meals are taken during an overtime period, the employer is deemed to have impliedly agreed that the service will continue during the meal hours.

6. Workmen's compensation ⇐719, 721

Generally, an injury sustained by an employee in going to or from work is not an injury "arising out of and in course of employment" within meaning of the Compensation Act, but an exception is made where the employee's compensation covers the time involved in going to or from his work, or an allowance is made for the cost of transportation.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out Of And In Course Of Employment".

7. Workmen's compensation ⇐768

When an employee is required to work overtime immediately after his normal period of work, and such overtime period includes the normal eating period, and the employer agrees that the employee may eat off the premises and shall be paid during the period, the finder of fact is justified in in-

ferring that by such arrangement the employer has impliedly agreed that the employment shall continue and that the employee shall be deemed to be rendering service during such period, so as to entitle the employee to compensation for injuries sustained during that period.

8. Workmen's compensation ⇐1575

Where employer allowed employees working overtime a half hour off for dinner, paid them during the dinner period, and permitted them to eat off premises, and employee left employer's premises to eat dinner and was struck by automobile during dinner period, evidence sustained commission's finding that the injuries were compensable as "arising out of and in course of employment".

9. Workmen's compensation ⇐1558

Where employer allowed employees working overtime a half hour off for dinner, paid them during the dinner period, and permitted them to eat off premises, and employee left employer's premises for purpose of eating dinner, and during the dinner period employee received fatal injuries when he allegedly stopped to buy cigarettes, evidence supported commission's implied finding that the alleged purchase of cigarettes was such a slight "deviation" that it did not take employee outside his employment and did not preclude recovery under the Compensation Act.

See Words and Phrases, Permanent Edition, for all other definitions of "Deviation".

10. Workmen's compensation ⇐610

If a particular act is reasonably contemplated by employment, injuries received by an employee while performing the act are compensable injuries "arising out of employment".

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out Of Employment".

11. Workmen's compensation ⇐606

In determining whether a particular act is reasonably contemplated by employment so that an injury received while performing such act may be compensable, the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and other factors should be considered, and any reasonable doubt as to whether the act is contemplated by the employment, in view of the policy of liberal construction in favor of the employee, should be resolved in favor of the employee.

Proceeding by the Western Pipe & Steel Company of California, petitioner, to annul a death benefit award made under the Workmen's Compensation Act by the Industrial Accident Commission, respondent, in favor of Harriet E. Henderson, respondent, widow of John H. Henderson, deceased employee.

Award affirmed.

Hearing denied; GIBSON, C. J., and HOUSER, J., dissenting.

Keith & Creede, of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

PETERS, Presiding Justice.

By this review proceeding petitioner, Western Pipe and Steel Co. of California, seeks to annul a death benefit award made by the Industrial Accident Commission in favor of the widow of John H. Henderson. Henderson was employed by petitioner at the time of his death. It is urged by petitioner that the death of Henderson did not arise out of, nor did it occur in the course of, Henderson's employment.

The facts are not substantially in dispute and are as follows: The decedent was employed as a shipwright-carpenter at the shipyards of petitioner. His regular hours of work were from 8 a. m. to 4:30 p. m., with half an hour off for lunch. Employees were frequently required to work overtime because part of their work had to be adjusted to the tides. When they did work overtime they would work from 4:30 p. m., their normal quitting time, to 8:30 p. m., and would receive compensation for these four hours at a rate stated by petitioner to be double their regular hourly wage. Under the arrangement with petitioner the employees were permitted to take half an hour off for dinner during the four-hour overtime period, and the company paid them during this dinner period at the double time rate. The employees took this half hour for dinner at no set time, but whenever the employee in charge found it most convenient. The company maintained a cafeteria on its premises for the convenience of its employees. If employees ate at the cafeteria the meals were paid for by the employees. The employees were free to eat elsewhere if they desired.

A fellow employee of decedent testified that on the evening in question the cafeteria was closed at the period when decedent took time off for dinner. He communicated this fact to decedent shortly before 6 p. m. The decedent determined to eat at a restaurant in nearby South San Francisco. He, thereupon, left in his automobile for the purpose of securing his dinner. While on this errand, and apparently while crossing the street after parking his car, he was struck by an unidentified passing motorist, and was injured so severely that he died a short time thereafter.

The commission found, and in support of its holding urges, that the death arose out of, and in the course of, the employment. The petitioner contends that the law is well-settled that an employer is not responsible for the act of, or injury to, an employee while the latter is off the premises for the purpose of securing his personal meals. There are many cases holding that injuries received by an employee while on his way to or from meals are normally not compensable. California C. I. Exch. v. Industrial Acc. Comm., 190 Cal. 433, 213 P. 257; Peccolo v. City of Los Angeles, 8 Cal.2d 532, 66 P.2d 651; Kish v. California S. Automobile Ass'n, 190 Cal. 246, 212 P. 27; Clapp's P. Station v. Industrial Acc. Comm., 51 Cal.App. 624, 197 P. 369; Adams v. Tuxedo Land Co., 92 Cal. App. 266, 267 P. 926; Carnes v. Pacific Gas & Elec. Co., 21 Cal.App.2d 568, 69 P.2d 998, 70 P.2d 717; Helm v. Bagley, 113 Cal.App. 602, 298 P. 826; Cain v. Marquez, 31 Cal. App.2d 430, 88 P.2d 200; Martinelli v. Stabnau, 11 Cal.App.2d 38, 52 P.2d 956; California Highway Comm. v. Industrial Acc. Comm., 61 Cal.App. 284, 214 P. 658.

[1-4] The basis of some of the cases which deny the employee compensation for injuries received while going to or from meals is that while the employee is on such an errand he is not rendering any service for his employer. Other cases recognize that this is merely one part of the so-called "going or coming" rule—i. e., that injuries received while going to or coming from work normally do not arise out of, nor occur in the course of, the employment. There are, of course, many exceptions to both rules. It is not indispensable to recovery that at the time of the injury an employee must be rendering service to his employer. Acts of the employee for his personal comfort and convenience while at work, such as taking a drink of water, lighting a cigarette, warming himself, etc., do not interrupt the continuity of the employment. This exception is not limited to acts performed on the employer's premises. In Western Pac. R. R. Co. v. Industrial Acc. Comm., 193 Cal. 413, 224 P. 754, a messenger was struck by an automobile while returning on his bicycle to his place of employment from his home where he had gone to get his raincoat when a storm came up while he was outside performing service for his employer. The injury was held conpensable. In Leffert v. Industrial Acc. Comm., 219 Cal. 710, 28 P.2d 911, the deceased employee, a salesman, was required to report each morning at the employer's plant to receive directions for the day. After getting their instructions, salesmen customarily had a cup of coffee together at a nearby coffee shop. On the morning in question the salesmen, on arrival, found the plant on fire and were directed to report at another office to receive instructions. Before going to this office the employees followed their usual custom of having a cup of coffee. The deceased, after finishing his coffee, announced his intention of returning to the burning building to retrieve his overcoat. While crossing the street to the building he was hit by an automobile. It is held that the injury was compensable, and an award denying recovery was annulled. See, also, Whiting-Mead Commercial Co. v. Industrial Acc. Comm., 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518.

There are also many exceptions to the "going and coming" rule. These exceptions need not be summarized here except to point out that in two recent decisions the Supreme Court has considerably broadened the scope of such exceptions. Freire v. Matson Navigation Co., 19 Cal.2d 8, 118 P.2d 809; Smith v. Industrial Acc. Comm., 18 Cal.2d 843, 118 P.2d 6.

[5] Although the above cases have only an indirect bearing on the specific problem involved in this proceeding, they do demonstrate that the "going and coming" rule, and the rule that the employee must be rendering service for the employer at the time of injury are not of inevitable application. The cases cited by petitioner certainly establish that injuries received while going to or coming from meals are normally not compensable. None of the cases cited, however, involved a factual and legal situation comparable to that involved in the instant case. Here we have an employee

whose normal day's work would terminate at 4:30 p. m. When he came to work in the morning he had no way of knowing whether or not he would be asked to work overtime that night, so that it was impossible to plan for his dinner. When he worked overtime, as he did on the night of his death, the overtime period started at 4:30 p. m., his normal quitting time, and continued to 8:30 p. m. He was paid double his normal hourly wage during this four-hour period. The employer apparently realized that men could not be expected to work at their highest efficiency without food during this overtime period, and for that reason agreed that they should have half an hour off for the purpose of securing their dinner. As already pointed out, normally when employees are going to or from their meals they are not rendering a service to their employers and for that reason injuries received during those periods are not compensable. But, of course, the employer may expressly or impliedly agree that service shall continue during the period the employee is going to or coming from his meals taken off the premises. When the employer pays the employee at an hourly rate during his meal hours, especially when those meals are taken during an overtime period, it seems to be, and is a reasonable inference, that by such an arrangement the employer has impliedly agreed that service will continue during such period.

[6] This is not a new or novel concept. The problem has frequently been presented in connection with cases where the employee's compensation covers the time he is going to or coming from work. In such situations the courts have quite uniformly held that injuries received while going to or from work are compensable. The problem is discussed in an annotation appearing in 87 A.L.R. 250 entitled: "Right to compensation for injury while going to or from work as affected by fact that compensation covers the time involved or cost of transportation, or both." It is there stated:

"It is a general though not invariable rule, so common as to require no citation of authority, that an injury sustained in going to or from work does not arise out of and in the course of the employment within the meaning of workmen's compensation acts.

"An exception to this rule, however, is generally recognized where the employee's compensation covers the time involved in going to or from his work, or an allowance is made for the cost of transportation."

Many cases are then discussed. Running through the cases is the thought that by agreeing to pay the employee from the time he leaves home until the time he returns, the employer has agreed that the employment shall be continuous during such period. The courts frequently emphasize that such rule has special application to cases where the employee is required to work extra hours. This thought was expressed by the United States Supreme Court in Voehl v. Indemnity Ins. Co., 288 U.S. 162, at page 169, 53 S.Ct. 380, 383, 77 L.Ed. 676, 87 A.L.R. 245, in the following language: "While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere. Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return. An agreement to that effect may be either express or be shown by the course of business. In such case the hazards of the journey may properly be regarded as hazards of the service, and hence within the purview of the Compensation Act." See, also, MacClelland v. Dodge Bros., 233 App. Div. 504, 253 N.Y.S. 773, appeal dismissed, 259 N.Y. 565, 182 N. E. 183; Ohmen v. Adams Bros., 109 Conn. 378, 146 A. 825; Cymbor v. Binder Coal Co., 285 Pa. 440, 132 A. 363; Sapulpa Refining Co. v. State Industrial Commission, 91 Okl. 53, 215 P. 933; and other cases cited in the A.L.R. note, supra.

[7, 8] Obviously, if an employee is deemed to be acting in the course of his employment in going to or coming from his work when his compensation covers that time, it would seem clear that he is likewise acting within the course of his employment when his hourly wage continues during the time he is permitted to eat lunch or dinner off the premises. Certainly it can at least be said that, when the employee is required to work overtime immediately after his normal period of work, and such overtime period includes the normal eating period, and the employer agrees that the employee may eat off the premises and shall be paid during the period, the finder of the fact is justified in inferring that by such arrangement the employer has impliedly

agreed that the employment shall continue and that the employee shall be deemed to be rendering service during such period.

The above discussion is based on the premise that the employee was either going to or coming from his dinner when he was killed. In its petition for rehearing, which was denied, the employer offered to prove by after-discovered evidence, that decedent, at the time he was struck, was crossing the street to his parked car after having purchased cigarettes. The evidence introduced at the original hearing was quite sketchy. It was simply that shortly before 6 p. m. decedent left the employer's premises for the purpose of going to South San Francisco to get his dinner, and that a very short time thereafter he was killed in South San Francisco.

[9-11] Even if it be assumed that the deceased at the immediate moment was crossing the street after purchasing cigarettes, if the commission was justified in finding that the implied agreement was that service should continue during the half-hour eating period, such service would not terminate simply because the employee stopped to buy cigarettes. If such evidence had been introduced on the original hearing or on the rehearing, the commission could have found as a fact that such personal act was reasonably contemplated by the employment. In such event the act would be deemed to have arisen out of and to have occurred in the course of the employment. Whiting-Mead Commercial Co. v. Industrial Acc. Comm., supra; Employers' Liability Assur. Corp. v. Industrial Acc. Comm., 37 Cal.App.2d 567, 99 P.2d 1089. The question is one of fact. By its denial of the petition for rehearing, it may be assumed that it was the opinion of the commission that, had the evidence in reference to the purchase of the cigarettes been introduced, nevertheless it would have found as a fact that such slight deviation did not take the employee outside his employment. Such implied finding is amply supported by reasonable inferences from the record. As was said in Employers' Liability Assur. Corp. v. Industrial Acc. Comm., supra, 37 Cal.App.2d at page 573, 99 P.2d at page 1092: "If the particular act is reasonably contemplated by the employment, injuries received while performing it arise out of the employment, and are compensable. In determining whether a particular act is reasonably contemplated by the employment, the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and perhaps other factors should be considered. Any reasonable doubt as to whether the act is contemplated by the employment, in view of this state's policy of liberal construction in favor of the employee, should be resolved in favor of the employee."

For the foregoing reasons the award is affirmed.

KNIGHT and WARD, JJ., concurred.



48 Cal.App.2d 682

SIMMONS et al. v. BOARD OF POLICE PENSION FUND COM'RS OF SAN MATEO COUNTY et al.

Civ. 11749.

District Court of Appeal, First District, Division 2, California.

Dec. 23, 1941.

1. Evidence ⇐29

It is common knowledge that the act enacted in 1889 to create a police relief pension fund was designed when passed to reach the police department of the city and county of San Francisco. Gen.Laws 1937, Act 6012.

2. Statutes ⇐225

Where two acts bear on the same or on kindred subjects, they must be construed together to ascertain the meaning of either.

3. Counties ⇐69(3)
Towns ⇐29

The County Peace Officers' Retirement Law constitutes a legislative declaration that the Police Pension Act, which refers expressly to a regularly constituted police department as distinguished from the miscellaneous group of peace officers such as sheriffs, constables, and their deputies, does not apply to elective peace officers of a county or township, and the provisions of the Police Pension Act are limited to those public agencies which maintain a regularly constituted police department. Gen.Laws 1937, Act 5848, §§ 9, 10; Act 6012, §§ 3, 12.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Proceeding in mandamus by Fred A. Simmons and another against the Board of Police Pension Fund Commissioners of the County of San Mateo, State of California, and others, to effect petitioners' retirement under the Police Pension Act. From a judgment for defendants following the sustaining of a demurrer to the petition without leave to amend, petitioners appeal.

Affirmed.

E. C. Mahoney, of Burlingame, for appellants.

Gilbert D. Ferrell, Dist. Atty., and D. E. Sullivan, Asst. Dist. Atty., both of Redwood City, for respondents.

NOURSE, Presiding Justice.

The two petitioners sought a writ of mandate to effect their retirement under the Police Pension Act. The demurrer was sustained without leave to amend.

The petitioners are both constables who have served as such in separate townships of San Mateo County for more than thirty years. The respondents are the three public officials of the county designated by the act of March 4, 1889 (Deering's Gen. Laws 1937, Act 6012) to serve as the board of police pension fund commissioners of the county, except that the sheriff is sued as one of said commissioners instead of the "chief of police" who is named as such in the act.

It is the contention of appellants that they are entitled to retire under the provisions of the foregoing act because of their service as "peace officers" for the required number of years. It is the contention of respondents that the act does not apply to "peace officers" of a county, or township, but is made applicable only to those public agencies "where a regular police department is maintained"; that a constable is an officer of a township, chosen by the electors of the township, which is a distinct political entity, citing Kenyon v. Johnson, 97 Cal.App. 552, 555, 276 P. 110. Reference is made to the statute of May 5, 1931 (Deering's Gen. Laws 1937, Act 5848), which in plain terms creates a pension fund and provides for the retirement of sheriffs, constables, and other "peace officers," but which is not applicable to San Mateo County because it provides that its terms shall be approved and accepted by the board of supervisors before it shall become effective or applicable in any specific county.

The question presented is simply one of statutory construction—whether the legislature intended Act 6012 to apply to the elective peace officers of a county or township, or whether its provisions were limited to those public agencies which maintained a "regularly constituted police department."

Section 9 of Act 5848 defines "county peace officers" as including "all sheriffs, under-sheriffs * * * constables, deputy constables * * *." Section 10 makes all such "peace officers" eligible for participation in the act after a fixed term of employment. It is entitled an act relating to "county peace officers as defined in the act" and is commonly known as the "County Peace Officers' Retirement Law."

[1] Act 6012 is entitled "an act to create a police relief * * * pension fund * * *." It was enacted in 1889 and was designed for and made use of by the city and county of San Francisco. Pennie v. Reis, 80 Cal. 266, 22 P. 176. It was made available to anyone who had served for more than twenty years as a member "of the regularly constituted police department of any such county, city and county, city, or town * * *." Section 3. The "pension fund" out of which the benefits are to be paid is made up of certain license fees, fines for certain misdemeanors, fines imposed upon the members of the "police force" for violations of the rules of the police department and from a special appropriation "equal to two per cent of the salaries paid to the policemen * * * payable from the funds of such municipal corporation." Section 12. Prior to the amendment of 1917 this section required the treasurer to "retain from the pay of each member of police department the sum of two dollars per month" to be added to the "pension fund." It is a matter of common knowledge that this act when passed was designed to reach the police department of the city and county of San Francisco, as stated in the early case of Pennie v. Reis, supra; it was made to apply to all "counties, cities and counties, cities, and towns of the state" to avoid the constitutional inhibition against special legislation. It expressly refers to a "regularly constituted police department" as such organization is distinguished from the miscellaneous group of "peace officers" such as sheriffs, constables, and their deputies. It

left the administration of the act to the "board of police commissioners" or to a special commission of three of which the "chief of police" was one. None of these officers is known to the political organization of the ordinary county.

[2] We are in accord with the view of the trial judge that "It is a familiar principle of statutory construction that where two acts bear upon the same, or upon kindred subjects, to ascertain the meaning of either they must be construed together. * * *"

[3] "It is my opinion that 5848 constitutes a legislative declaration that 6012 is inadequate to cover the instant situation which it was contemplated might arise, and it was adopted with a view of giving relief under the circumstances here involved."

The judgment is affirmed.

SPENCE and STURTEVANT, JJ., concurred.



49 Cal.App.2d 214

FOWLER et al. v. ALLEN.

Civ. 2957.

District Court of Appeal, Fourth District, California.

Jan. 20, 1942.

1. Appeal and error ⇐1064(1)

In action for death of highway workman struck by defendant's backing dump truck, evidence *held* not to preponderate in plaintiffs' favor, as contended by them in support of their claim on appeal that errors in instructions were prejudicial to them.

2. Trial ⇐296(9)

In death action, instruction that contributory negligence meant deceased's want of ordinary care, contributing proximately to accident, was not erroneous as assuming deceased's contributory negligence and in effect directing verdict for defendant, in view of following instruction correctly stating law of contributory negligence as involved in case.

3. Appeal and error ⇐1066
Trial ⇐251(8)

In action for death of highway workman struck by defendant's backing dump truck, where assumption of risk doctrine was not relied on, instructions, relating to issue of deceased's contributory negligence, that he assumed all ordinary reasonable risks of dangers involved in general conditions at place of work, and that one voluntarily placing himself in position of danger cannot recover for injury proximately caused by his momentary forgetfulness of danger or failure to make reasonable use of his faculties under circumstances, *held* not erroneous as covering such doctrine, which was inapplicable, nor prejudicial to plaintiffs, in view of issues and evidence.

4. Trial ⇐296(3)

In action for death of highway workman struck by defendant's backing dump truck, instruction that defendant could presume that decedent would exercise ordinary care was not prejudicial error, warranting reversal of judgment on verdict for defendant, because of failure to include statement that defendant must exercise ordinary care, in view of other instructions that it was defendant's duty to exercise ordinary care in operating truck and that deceased was entitled to presume that defendant would exercise such care.

5. Trial ⇐260(8)

In action for death of highway workman struck by defendant's backing dump truck, instruction that duty rested on deceased to exercise amount of care commensurate with danger surrounding his position, that both deceased and defendant owed duty to exercise ordinary care under all circumstances, and that deceased was required to keep such lookout for passing trucks as ordinarily prudent person would keep under similar circumstances, were not erroneous as placing greater burden of care on decedent than on defendant because of court's refusal of defendant's requested instructions, substance of which was sufficiently covered in other instructions given

6. Trial ⇐251(8)

In action for death of highway workman struck by defendant's backing dump truck, where no claim was made that deceased was guilty of contributory negligence as matter of law, but such issue was presented to jury as question of fact, refusal of instruction that deceased was not charge-

able with contributory negligence as matter of law merely because he momentarily forgot existence of dump trucks was not error.

7. Trial ⇐260(8)

In death action, refusal of plaintiffs' requested instruction that forgetfulness of known danger, to constitute negligence, must be such as to constitute failure to use ordinary care, was not error in view of instructions that forgetfulness of known danger must be such as to be failure to exercise care under circumstances in order to constitute negligence.

8. Appeal and error ⇐1050(1)

In action for death of highway workman struck by defendant's backing dump truck while shoveling on berm between old highway pavement and new highway under construction, error, if any, in admitting another workman's testimony that he watched out for trucks backing into area where accident occurred when he shoveled on such berm was not prejudicial to plaintiffs, in view of testimony, admitted without objection, by three witnesses for plaintiff, that that was customary procedure.

9. Appeal and error ⇐1050(1)

In action for death of highway workman struck by defendant's backing dump truck, error in admitting testimony of superintendent on job that defendant had been driving a truck thereon for nearly three weeks and that witness had had no trouble with defendant in methods of his operation was not prejudicial to plaintiffs.

Appeal from Superior Court, Riverside County; Vaughn N. Thompson, Judge Assigned.

Action by Beulah Ann Fowler and others against Verner Lee Allen for the death of John Fowler as result of being struck by defendant's backing dump truck while working on a highway. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Francis J. Gabel and John L. Kearney, both of Los Angeles, for appellants.

Sarau & Thompson, of Riverside, for respondent.

BARNARD, Presiding Justice.

This is an action for damages arising from the death of John Fowler, who was struck and killed by a truck owned and operated by the defendant. A jury returned a verdict in favor of the defendant and the plaintiffs have appealed from the judgment.

The deceased was employed by a contracting firm which was engaged in building a new portion of the state highway between Beaumont and Banning. The new portion was just south of the old highway so that when it was completed there would be two roads with an unpaved strip between them. The work had commenced at Banning and was proceeding west toward Beaumont. The pavement on the new road was 26 feet wide and the paving was being done in two parallel sections each 13 feet wide. On the day in question, the southerly 13 feet of the new road had been paved several hundred feet further toward Beaumont than had the northerly 13 feet. The ground on the northerly 13 feet had been prepared for the paving material and on the northerly edge thereof a ridge of dirt about nine inches high, called a "berm," had been built up for the purpose of keeping the paving material in its proper bed.

The method used was to bring the paving material in dump trucks from a plant near Beaumont, some ten of these trucks being used on this occasion. These trucks were driven easterly on the old highway and when they arrived near the scene of the operations the drivers would turn south and after crossing the berm would head west and stop on the northerly 13 feet of the new road. The truck would then be backed between the berm and the completed half of the pavement to the point where the work was going on, where the load would be dumped in front of a spreader operated by a diesel engine. The truck would then drive away and another truck would back in, the trucks coming and unloading as often as every two or three minutes.

As these trucks passed back and forth the berm at the northerly edge of the new road would be broken down in spots and it was constantly necessary to build up and straighten this berm. This work was done with shovels by some of the men assisting in the spreading operations. At the time of the accident, John Fowler and another employee were thus working on this berm at the northerly edge of the new road and at a point about midway between the spreader and the westerly end of the completed pavement on the south half of the

new road. Fowler had been employed by the general contractor for two or three months before the accident, working half a day as a truck driver and half a day as a helper around the job. For two or three weeks he had been spending half his time shoveling on this berm. He was a young man with good eyesight and hearing. In addition to the knowledge that may be assumed from his experience there was testimony that he had been warned several times by his superiors and fellow employees to watch out for the trucks, the last time being but a few days before the accident. One witness, an inspector for the State Highway Department, testified that on one occasion he pulled Fowler out of the way of a truck that was backing into the spreader and pointed out to him that he was working on the blind side of the trucks and that the truck drivers could not see him.

At the time in question, a clear day about 10 o'clock in the morning, while Fowler was thus working on the berm he was struck and killed by respondent's truck as it was being backed in to dump the load in front of the spreader. The respondent was an independent contractor, owning his own truck. It was customary, while the trucks were backing in for a man on the front end of the spreader to indicate where he wanted the truck to come on the 13-foot strip by holding a shovel at a spot near the front of the spreader where he desired the left-hand wheels of the truck to come. The respondent testified that on this occasion he lined up his left wheels with the shovel held by the man on the spreader, as he had done on previous trips, and that for this purpose he was looking back through the left cab window of his truck. There is evidence that at the time of the impact the respondent's truck was traveling at about the center of the 13-foot strip down which it was backing. There is also evidence that at the time Fowler was struck he had his back partly toward the spreader and that he was hit partly on his left side and partly on his back.

[1] The appellants mainly rely for reversal upon asserted errors in instructions and in this connection argue that the evidence presents a close case with a preponderance thereof favoring them and, therefore, "errors in the instructions readily assume prejudicial proportions." We are unable to agree with this contention as to the preponderance of the evidence. Had the verdict been the other way a rather close question would have been presented as to whether it was sufficiently supported.

[2] An instruction that "contributory negligence as used in these instructions means the want of ordinary care on the part of the deceased person which contributed proximately to the accident" is first attacked. It is argued that the instruction as thus given assumed that the deceased was guilty of contributory negligence and, in effect, directed a verdict for the defendant. No such assumption appears and the contention is without merit. The instruction was offered by the appellants but then contained another portion applying the rule more directly to John Fowler and this accident. The court struck out that portion because the same was included, almost word for word, in another instruction which was given. The net result is that the court gave a general definition of contributory negligence which was followed by another instruction correctly giving the law of contributory negligence as it was involved in this case.

[3, 4] The appellants next contend that two instructions were improperly given as covering the doctrine of assumption of risk, which doctrine was not applicable here. The first of these instructions stated that Fowler, when he went upon the premises, "assumed all of the ordinary reasonable risks of dangers involved in the general conditions as they existed there, as they were apparent or should have been apparent to him." The second was as follows: "You are instructed that one who works at a dangerous vocation, or one who voluntarily places himself in a position of danger, cannot close his eyes to such danger or momentarily forget a known danger, but is required to exercise a quantum of care that is commensurate with such danger as may be known to him. And if he momentarily forgets such known danger or closes his eyes to such danger, and is thereby injured, and the proximate cause of his injury is his forgetfulness of such danger, or his failure to make reasonable use of his faculties under such circumstances, he cannot recover for the injury."

No attempt was made to rely on the doctrine of assumption of risk and these instructions related to the issue of contributory negligence on the part of the deceased, and they were neither erroneous nor preju-

dicial in view of the issues and the evidence. Potts v. Crafts, 5 Cal.App.2d 83, 42 P.2d 87; Warnke v. Griffith Co., 133 Cal.App. 481, 24 P.2d 583; Ramos v. Service Bros., 118 Cal.App. 432, 5 P.2d 623. It is next urged that an instruction to the effect that the defendant could rely on the presumption that the decedent would exercise ordinary care was prejudicially erroneous because it failed to include a statement that the defendant himself must be exercising ordinary care. While the omitted matter should have been included, as has been frequently pointed out, it does not follow that the omission thereof constitutes reversible error especially under such a factual situation as here appears. This was held in a case which was strikingly similar in its essential facts to the one now before us. Ramos v. Service Bros., supra. In other instructions the jury was told that it was the duty of the defendant to exercise ordinary care in operating his truck and to avoid injuring persons engaged in working near his truck; that just as the respective rights of the deceased and the defendant were equal in every respect so also was the duty of each to exercise ordinary care under all the circumstances; and that the deceased was entitled to a similar presumption that the defendant would exercise ordinary care and obey the law. While the instruction in the form given is not to be commended no reversible error appears under the circumstances of this case.

[5] Error is next assigned in the giving of two instructions which were to the general effect that a duty rested upon the deceased to exercise an amount of care commensurate with the danger surrounding his position at the time, that the amount of care required of him must be measured by the circumstances and conditions surrounding him, and that while the rights of the deceased and of the defendant were equal in every respect, including the right to be where they were at the time, it was the duty of each to exercise ordinary care under all of the circumstances and the deceased could not rely upon the assumption that he would not be injured by a passing truck but was required to keep such a lookout for such trucks as an ordinarily prudent person would keep under similar circumstances. The appellants concede that these instructions are in themselves correct but argue that they become erroneous and prejudicial for the reason that the court refused to give two other instructions offered by them, with the result that the criticized instructions placed a greater burden of care on the decedent than on the defendant. The instructions were not only proper but they were not rendered erroneous by the refusal of the two other instructions referred to, the substance of which was sufficiently covered in other instructions which were given. The instructions did not place a greater burden of care on the decedent than on the defendant and the point thus raised is without merit.

[6, 7] The appellants next complain of the court's refusal to give an instruction to the effect that forgetfulness of a known danger in order to constitute negligence must be such that the forgetfulness or lack of memory constitutes a failure to use ordinary care, and that the deceased was not chargeable with contributory negligence, as a matter of law, merely because he momentarily forgot the existence of the trucks. No claim was made that the deceased was guilty of contributory negligence as a matter of law and the issue was presented to the jury as a question of fact. The first part of this refused instruction was sufficiently covered in another instruction which was essentially to the same effect and in which the jury was told that while a person could not close his eyes to known dangers it was necessary that forgetfulness of a known danger must be such as to be a failure to exercise care under the circumstances in order that the same constitute negligence. The jury was sufficiently instructed in this regard and no error in that connection appears.

[8, 9] The last point raised is that the court erred in admitting two items of evidence over the objection of the appellants. One of the other workmen was allowed to testify that when he shoveled on this berm he watched out for trucks backing into the area where the accident occurred. Conceding that this was error no prejudice appears since at least three witnesses for the appellants testified, without objection, that this was the customary procedure. In the other instance, a witness who had been a superintendent on this job, was allowed to testify that the respondent had been driving a truck on that job for nearly three weeks and that he had had no trouble with him in the methods of his operations. While we think this evidence should not have been admitted no prejudice appears and it cannot be held,

under the circumstances of this case, that its reception could have conceivably affected the result. As we view it, this is not a close case and any errors which appear are neither sufficient to justify nor to require a reversal.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.



49 Cal.App.2d 203

MEANLEY v. McCOLGAN, Franchise Tax Com'r.

Civ. 11899.

District Court of Appeal, First District, Division 1, California.

Jan. 17, 1942.

1. Taxation ⇐363½

Extraordinary attorneys' fees incurred by executor in adjustment and payment of extensive and complicated estate and inheritance taxes and in collecting income and conserving and managing estate for production of income, though constituting "ordinary and necessary expenses", were not incurred in "carrying on any trade or business" so as to be deductible from income for state income tax purposes. Gen.Laws 1937, Act 8494, § 8(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Carrying on Any Trade or Business" and "Ordinary And Necessary Expense".

2. Statutes ⇐226

The decisions of United States Supreme Court interpreting federal income tax statute, though entitled to great weight in interpreting identical language in state income tax statute, were not binding on state court in interpreting state statute copied from the federal statute, the federal court decisions having been rendered after such adoption.

3. Statutes ⇐225

There is a strong "public policy" favorable to interpreting similar statutes dealing with same subject matter in similar fashion.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

4. Taxation ⇐363½

The mere taking care of personal investments, no matter how extensive, and how much time and help are required, does not constitute engaging in "trade or business" within Income Tax Act provision permitting deductions from gross income of all ordinary and necessary expenses incurred in carrying on trade or business, but to reach that status there must be activity for profit in connection with dealings, directly or indirectly, with general public. Gen.Laws 1937, Act 8494, § 8(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Trade or Business".

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Nackey S. Meanley, as administratrix with the will annexed of the estate of Ellen Browning Scripps, deceased, against Charles J. McColgan, as Franchise Tax Commissioner, etc., to recover state income taxes paid under protest. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Earl Warren, Atty. Gen., and H. H. Linney and Valentine Brookes, Deputy Attys. Gen., for appellant.

Irve C. Boldman, of San Diego, for respondent.

PETERS, Presiding Justice.

Defendant Franchise Tax Commissioner appeals from a judgment in favor of plaintiff ordering that certain state income taxes paid by plaintiff under protest be refunded. The action involved several different items and the judgment entered was a lump sum money judgment. Defendant has appealed from the entire judgment. On this appeal, however, appellant concedes the correctness of the judgment in part, and attacks only the items hereafter mentioned.

So far as the issues involved on this appeal are concerned, the amended complaint alleges that Ellen Browning Scripps died testate on August 3, 1932; that the will of decedent was duly admitted to probate; that certain persons who later died were appointed executors; that plaintiff was appointed administratrix with the will

annexed in June of 1939; that the executor of the estate employed two sets of attorneys to represent him as counsel in the administration of the estate; that statutory attorneys' fees allowed to the executor totaled $33,287.26; that the attorneys rendered extraordinary services "in the adjustment and payment of extensive and complicated estate and inheritance taxes, and in collecting income and conserving and managing the estate for the production of income as distinguished from the usual administrative duties incident to the collection and distribution of the assets and payment of the debts of the estate;" that the total attorneys' fees paid by the executor was $90,000. The action involves a portion of the above-mentioned fees paid for extraordinary services of the attorneys for the taxable years 1936-1937, and 1937-1938. The amended complaint alleges that during 1936-1937 $11,712.74 was paid to one attorney for his extraordinary services, and that during the second period $17,500 was paid to the other firm for such services. These sums were claimed by the estate as deductions from the income of the estate as a business expense. The complaint further alleges that the Franchise Tax Commissioner refused to allow the $11,712.74 for 1936-1937 as a deduction and reduced the $17,500 to $8,750; that the taxpayer paid a tax on these sums under protest, and instituted this action for a refund.

The trial court found that the above allegations of the amended complaint were true, and, as a conclusion of law, stated that the extraordinary attorneys' fees were paid "for extraordinary services rendered to the executor * * * in carrying on a trade or business," and, further, that the estate during the period here involved "was engaged in carrying on a trade or business in the collecting of income and in conserving and managing the assets of the estate for the production of income." Based on these findings and conclusions it was determined that the items involved were deductible and a refund ordered.

[1] The question presented on this appeal is whether the extraordinary attorneys' fees are deductible from the income of the estate under the provision of the state income tax act which permits deductions from gross income to be made for "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. * * *." Personal Income Tax Act of 1935, Stats. of 1935, p. 1090, at page 1097, § 8(a); Deering's General Laws 1937, Act 8494. There can be no doubt that the attorneys' fees paid were "ordinary and necessary expenses," within the meaning of the above-quoted section, so that the real question presented is whether the estate was engaged "in carrying on any trade or business."

The record shows the following as to the activities of the estate: The assets of the estate consisted of bonds of the value of $286,550; notes of the value of $2,774,641; stocks of the value of $770,235; real property of the value of $201,933; miscellaneous $21,064. From 1935 to 1939 some of the promissory notes were renewed from time to time, some refinanced, some paid off, and some new notes issued. From 1935 to 1939 the estate received $4,894,500, as repayment on the principal of the notes, $713,140 in interest, $276,937 in dividends, $280,540 from the sale of bonds, $181,950 from the sale of stock, and $7,000 from rentals of its real property.

From 1935 to 1939 the executor employed four persons for the management of the estate in addition to the attorneys whose fees are involved in this proceeding. At least two of these employees had been employed by the testatrix in similar capacities since 1924. The attorneys rendered constant services to those in charge of the affairs of the estate, not only in connection with tax matters but in connection with the management of the estate generally.

The question as to whether such activities constitute the carrying on of a trade or business has frequently been presented to the federal courts in interpreting a similar provision of the Federal Income Tax Act from which our section was copied. In one sense, any activity that has for its aim the production of income or the conserving of assets is the carrying on of a "business." Such a definition has in fact been given by the United States Supreme Court in interpreting a different statute. Flint v. Stone Tracy Co., 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389, Ann.Cas.1912B, 1312. That court has determined, however, that the words "trade or business" as used in the Federal Income Tax Act have a much more limited meaning. It has been held that active concern over one's own financial interests is not sufficient to constitute the carrying on of a trade or business within the meaning of the income tax law; that before an individual or an estate can be held to be engaged in a trade or business there

must be activity for profit by service to the general public. Mr. Justice Frankfurter clearly expressed this thought in his concurring opinion in the case of Deputy v. Dupont, 308 U.S. 488, at page 499, 60 S.Ct. 363, at page 369, 84 L.Ed. 416, where he stated: "To avail of the deductions allowed by § 23(a) [26 U.S.C.A. Int.Rev. Code, § 23(a)], it is not enough to incur expenses in the active concern over one's own financial interest. '* * * carrying on any trade or business,' within the contemplation of § 23(a), involves holding one's self out to others as engaged in the selling of goods or services. This the taxpayer did not do. Expenses for transactions not connected with trade or business, such as an expense for handling personal investments, are not deductible."

This concept has been applied to a variety of factual situations. In Van Wart v. Commissioner, 295 U.S. 112, at page 113, 55 S.Ct. 660, 79 L.Ed. 1336, it was held that an attorney's fee paid by a guardian "for conducting litigation to secure income for [his] ward" was not a business expense. In this case the commissioner and Circuit Court of Appeals had held the expenditure personal, while the Board of Tax Appeals had held it deductible as a business expense.

Higgins v. Commissioner of Internal Revenue, 312 U.S. 212, 61 S.Ct. 475, 85 L. Ed. 783, involved a taxpayer with extensive interests in stocks and bonds and some real estate. He devoted a considerable portion of his time to managing his investments. He maintained an office for the supervision of his investments and paid his employees there employed $16,000 per year. He claimed that the salaries of these employees and expenses of his office were deductible as a business expense. The commissioner, Board of Tax Appeals, and circuit court held that these items were not deductible as business expenses except in so far as they were based on activities in connection with the rental of the real property. This position was affirmed by the United States Supreme Court. The court specifically rejected the contention of the taxpayer that where an investor continuously and regularly devotes his time to his investments he is engaged in a business, and adopted the contention of the commissioner that "mere personal investment activities never constitute carrying on a trade or business, no matter how much of one's time or of one's employees' time they may occupy." Page 477 of 61 S.Ct. The court specifically refused to follow the definition of "business" contained in its decision in Flint v. Stone Tracy Co., supra, and expressly disapproved that definition for income tax purposes. The court emphasized that no matter how large the estate may be, or how continuous or extended the work in connection therewith may be, such facts do not establish as a matter of law, that the person involved is carrying on a business.

This case was followed by City Bank Farmers Trust Co. v. Helvering, 313 U.S. 121, 61 S.Ct. 896, 85 L.Ed. 1227. Here the question presented was whether two testamentary trusts aggregating $10,000,000 were engaged in a trade or business. The specific question presented was whether trustees' fees paid to the trustees for handling the extensive investments of the trusts were deductible as a business expense. The Board of Tax Appeals and the Circuit Court of Appeals had denied the deduction. This was affirmed on the authority of the Higgins case, supra. The important holding in the case, so far as the problem involved in the appeal in the instant case is concerned, was that in determining whether or not a testamentary trust is engaged in the carrying on of a trade or business the same tests must be applied as are applied to an individual.

In all of the above cases the trier of the fact had found that the item in dispute was not a business expense, and in each case the Supreme Court of the United States emphasized that the question was one of fact, and that they were affirming the lower court. However, in United States v. Pyne, 313 U.S. 127, 61 S.Ct. 893, 85 L.Ed. 1231, that court held, as a matter of law, that activities substantially similar to those involved in the instant case did not constitute the carrying on of a trade or business, and reversed the court of claims that had held to the contrary. In the Pyne case the question involved was whether an estate could deduct attorneys' fees incurred in the administration and management of the investments of the estate. The court of claims, the trier of the facts, had held that such fees were properly deductible as a business expense. The facts were that the decedent, before his death, was a financier with extensive interests. He maintained an office with seven employees to assist him in handling his investments. After his death the estate adopted substantially the same method of operation. The lower

court found that the attorney advised the executors with reference to both legal and economic problems that arose in connection with the business activities of the estate, with reference to tax matters, and with reference to investments. The court held that these activities did not constitute the carrying on of a trade or business as those terms are used in the income tax act, again held the definition of business contained in Flint v. Stone Tracy Co. inapplicable to income tax cases, reaffirmed its holding in the Higgins case, supra, and stated (page 895 of 61 S.Ct.): "Nor can the judgment of the Court of Claims be supported by that court's statement that the executors were engaged 'in the business of conserving the estate and protecting its income.' Such activities are the traditional duty of executors. Executors who engage actively in trade and business are the exception and not the rule. Rather obviously, there could be clear cases where executors 'carry on * * * business' by continuing to operate a store, a factory or some other well known, well marked type of business activity. But in the absence of evidence showing activities coming within the general acceptation of the concept of carrying on a trade or business, it cannot be said as a matter of law that an executor comes into this category merely because he conserves the estate by marshalling and gathering the assets as a mere conduit for ultimate distribution. And determination of what constitutes 'carrying on * * * business' under the Revenue Act does not depend upon the size of the estate or the number of people whose services are required in order properly to conserve it."

If the reasoning adopted by the United States Supreme Court in the above cases is sound, it requires a reversal of the judgment in the instant case. It should be stated that the decision in the instant case was rendered by the trial court before the United States Supreme Court had decided the Higgins, City Bank Farmers Trust Co. and the Pyne cases, supra. The record discloses that the trial court relied partially at least on the lower court's decision in the Pyne case which was favorable to the taxpayer and which contained a definition of doing business consonant with the taxpayer's contentions in the instant case.

[2, 3] The above decisions of the United States Supreme Court are, of course, not binding on this court as to the proper interpretation of the state statute. Although the state statute was copied from the federal statute, the decisions having been rendered subsequent to such adoption constitute but argumentative authority, and are not binding authority as to the proper interpretation of the state statute. However, such decisions of the highest court in the land are obviously entitled to great weight in interpreting identical language appearing in a state statute. There is a strong public policy favorable to interpreting similar statutes dealing with the same subject matter in a similar fashion. For this reason, and because we are convinced that the reasoning of the Supreme Court is sound, we are of the opinion that the activities of the estate here involved do not constitute the carrying on of a trade or business within the meaning of the state income tax statute.

[4] Respondent urges that the Pyne and other cases cited, supra, only hold that activities aimed at conserving an estate and preparing it for distribution do not constitute engaging in a trade or business, but that activities aimed at producing income should be held to constitute engaging in a trade or business. This is a far too technical interpretation of these cases. A fair reading of them demonstrates that merely taking care of personal investments, no matter how extensive, and how much time and help are required, does not constitute the engaging in a trade or business—to reach that status within the meaning of the income tax law there must be activity for a profit in connection with dealings directly or indirectly with the general public.

As already pointed out, the estate owned, managed, and rented some real property. That activity admittedly constitutes the carrying on of a trade or business. No attempt was made by the plaintiff taxpayer to segregate the portion of the attorneys' fees involved attributable to the real estate activities. The commissioner did allow a deduction of $8750 to be made. Whether this was done on the theory that that sum was reasonably attributable to the real estate activities does not appear. Such deduction constitutes approximately one-third of the attorneys' fees here involved. Considering the small amount of real property in the estate as compared with the total estate it would appear that this deduction is amply sufficient to take care of any activities in connection with the real property. However, if the taxpayer desires to offer proof that more than this amount was attributable

to the real property activities of the estate he should be permitted to do so.

As already pointed out, the action involved several items in addition to the attorneys' fees. The trial court rendered a lump sum judgment. The commissioner does not challenge the correctness of the refund except as to the attorneys' fees items. The refund as to all the other items should be affirmed. However, the findings, conclusions, and judgment will have to be modified, and, if the taxpayer be so advised, a new trial had on the issue above-discussed.

The judgment is reversed with instructions to the trial court to proceed as in this opinion indicated.

KNIGHT and WARD, JJ., concurred.



49 Cal.App.2d 155

STEWART v. THORN VALLEY JOINT UNION SCHOOL DIST.

Civ. 6561.

District Court of Appeal, Third District, California.

Jan. 14, 1942.

1. Schools and school districts ⇐40

After adjoining school districts were united to constitute a joint union school district, offices of trustees of former separate districts terminated, and such trustees were without authority to employ teachers or control affairs of joint union district, and trustees of joint district regularly selected in the manner provided by statute had exclusive authority to employ teachers for joint district. School Code, §§ 2.200 et seq., 2.252–2.254, 2.910 et seq.

2. Schools and school districts ⇐28

Where attempt is made in good faith to organize a school district pursuant to or under color of law and officers have actually exercised duties in conducting district's affairs, district may be deemed to be a "de facto corporation" so as to enforce its just obligations, even though it subsequently develops that there were legal defects in procedure of accomplishing organization, or even where statute under which district was incorporated proves to be unconstitutional.

See Words and Phrases, Permanent Edition, for all other definitions of "De Facto Corporation".

3. Schools and school districts ⇐28

A school district which united with adjoining district to form joint union school district, was thereafter nonexistent, and did not continue to operate as a "de facto corporation" so as to make joint district liable for salary of teacher employed by trustees of nonexistent district to teach in nonexistent district's school while legality of organization of joint district was being challenged. School Code, § 2.200 et seq.

4. Schools and school districts ⇐30

Two elementary school districts cannot exercise separate jurisdiction at the same time over the same territory.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by Frances E. Stewart against the Thorn Valley Joint Union School District to recover salary as a teacher. From an adverse judgment, the plaintiff appeals.

Affirmed.

Wayne P. Burke and Newell Rawles, both of Ukiah, for appellant.

Jeremiah R. Scott, Delos Mace, and George A. Corbett, all of Eureka, for respondent.

THOMPSON, Acting Presiding Justice.

Judgment was rendered against the plaintiff in a suit to recover her salary as a teacher in an elementary school district in Mendocino County. That district was united with an adjoining district in southern Humboldt County to constitute a joint union school district pursuant to section 2.200 et seq. of the School Code. The joint district was managed by a separate board of trustees and school was conducted in buildings on the Humboldt side of the district. The plaintiff was not employed by the Board of Trustees of the joint district. After the union of the two districts the defunct board of the former Mendocino County district purported to renew her contract from year to year and she continued to teach in the old school building of the Mendocino County district. After serving

in that manner for three years she brought suit for compensation against both the former Mendocino County district and the joint union district. During the trial she dismissed the action against the Mendocino County district. Findings were adopted favorable to the joint union district to the effect that plaintiff was not employed by it, and that she never did teach in the schools of or for that district. Judgment was rendered against the plaintiff that she take nothing by her suit. From that judgment this appeal was perfected.

Prior to April 28, 1933, the Bear Harbor School District, adjacent to the northern boundary of Mendocino County, maintained an elementary school therein. For several years the plaintiff, who had attained the status of a permanent teacher, had previously taught school in that district. Prior to that date the White Thorn School District of Humboldt County, which was contiguous to the district above mentioned, also maintained a separate school within its territory. These two districts were united on April 28, 1933, as a joint union district, by means of an election which was held for that purpose pursuant to law. The joint district was named the Thorn Valley Joint Union School District. A board of trustees was duly selected which employed teachers and regularly maintained school in buildings located on the Humboldt side of the district. The plaintiff was not employed by that board and never taught school in the buildings maintained therefor by the joint district.

There were some residents of the former Bear Harbor School District in Mendocino County who were opposed to the organization of the joint district. The legality of the joint district was challenged by means of a writ of quo warranto. It was finally decided that the joint union district was lawfully organized. In the meantime the defunct board of trustees of the former Bear Harbor District purported to continue to perform their former duties, in spite of the termination of their offices. They maintain school in the old school building on the Mendocino County side of the joint district, renewing their contract of employment with the plaintiff for three successive years at $1,260 per annum. She continued to teach school therein until June 30, 1936. No part of that salary was paid after the creation of the joint union district. This suit was commenced in 1938, against both the former Bear Harbor School District and the joint union district. During the trial the action was dismissed as to the Mendocino County district. Findings were adopted adverse to the plaintiff. A judgment was rendered against her that she take nothing by this suit. From that judgment she has appealed.

The appellant concedes the legality of the organization of the joint district. She also acknowledges that she was not employed by the trustees of the joint district. But she asserts that she was regularly employed as a teacher by the Board of Trustees of the Bear Harbor School District and performed services as a teacher for three years, during the time when the legality of the organization of the joint district was challenged in good faith; that the Mendocino County district was a part of the joint district and constituted a de facto corporation entitling her to compensation for her services.

[1] The findings and judgment are adequately supported by the evidence. It appears that the plaintiff had actual knowledge of the formation of the joint union district, in April, 1933. She was not employed by the trustees of the joint district. She did not teach in the school building maintained by the joint district. After July 1, 1933, the Bear Harbor School District ceased to exist and its school property vested in the joint district. §§ 2.252 and 2.253, School Code. The control and management of the affairs of the joint district, including the hiring of teachers, thereafter devolved exclusively upon the trustees of the joint district. § 2.254, School Code. After the uniting of the two districts into a joint union district the offices of the trustees of the former separate districts terminated and they were without authority to employ teachers or control the affairs of the joint union district. The trustees of the joint district were regularly selected in the manner provided by section 2.910 et seq. of the School Code. They had the exclusive authority to employ teachers for that joint district.

[2] We are of the opinion the theory of appellant that the Bear Harbor School District continued to operate as a de facto corporation after the union of the two districts has no application to the present situation so as to make the joint district liable for plaintiff's salary. It is true that when an attempt is made in good faith to organize a school district pursuant to or under color

of law and its officers have actually exercised duties in conducting its affairs, it may be deemed to be a de facto corporation so as to enforce its just obligations, even though it subsequently develops there were legal defects in the procedure of accomplishing the organization, or even when the statute under which it was incorporated proves to be unconstitutional. Hamilton v. County of San Diego, 108 Cal. 273, 41 P. 305; Hancock v. Board of Education, 140 Cal. 554, 74 P. 44; Westlake Park Inv. Co. v. Jordan, 198 Cal. 609, 246 P. 807; Tulare Irr. Dist. v. Shepard, 185 U.S. 1, 13, 22 S.Ct. 531, 46 L.Ed. 773; 56 C.J. 254 § 90.

[3, 4] The rule, however, has no application to the facts of this case to bind the joint union district for the obligation created by the defunct officers of a district which had ceased to exist. The Bear Harbor School District became non-existent when the joint district was created. Both the plaintiff and the trustees of the Mendocino County district knew that the joint district was formally created in April, 1933. They knew the two contiguous districts, by a majority vote of each, had merged in one joint district. That merger effectively terminated the existence of both former districts. The Mendocino County district and the joint district could not exercise jurisdiction over the same territory at the same time. It has been held that two elementary school districts may not exercise separate jurisdiction at the same time over the same territory. 56 C.J. 206, § 52b.

It is not contended the Bear Harbor School District attempted to reorganize a separate district after the creation of the joint district. It made no effort to withdraw or to sever its connection with the joint district, as it might have done under section 2.270 of the School Code. The rule with relation to de facto organizations might have applied to the Thorn Valley Joint Union School District, since it was created according to law and continued to function in good faith as a union school district if there had been defects in the process of its creation, but we are unable to perceive how that principle could apply to a district which has ceased to exist under the plain letter of the law. After the creation of the joint district the former Mendocino County district had no authority to employ teachers for its own territory, and certainly not for the joint district which included a portion of Humboldt County. It possessed no de facto, or other jurisdiction, over the joint district. It had no authority to even attempt to maintain a separate school district. Even though the defunct officers of the former district might incur an obligation which would be binding on that district, which we do not concede, certainly they had no authority to create an obligation which would be binding on the joint union district, over a considerable portion of which territory they never claimed to have jurisdiction. The plaintiff was not employed by the joint union district. No contract existed between them. She was never recognized as a teacher in that joint district and she never taught in the school which was maintained by that district. The joint union district is therefore not indebted to plaintiff.

The judgment is affirmed.

TUTTLE, J., concurred.



49 Cal.App.2d 97

FISHER v. CHAFFEE et al.

Civ. 2936.

District Court of Appeal, Fourth District, California.

Jan. 12, 1942.

Rehearing Denied Feb. 11, 1942.

Hearing Denied March 12, 1942.

1. Chattel mortgages ⇐138(1)
Vendor and purchaser ⇐87

Where purchasers of land had repudiated purchase contract and refused to further perform its terms, neither they nor holder of crop mortgage executed by them could rely upon contract provisions governing manner of termination of vendee's rights.

2. Vendor and purchaser ⇐299(1)

A vendor may recover possession in ejectment from a purchaser in possession who repudiates his contract.

3. Vendor and purchaser ⇐86

Where a purchaser in possession has refused to complete the contract, he may be treated as one who has abandoned the contract.

4. Vendor and purchaser ⇐296

When purchaser has repudiated the contract and refused to pay anything further upon it, vendor may take possession and proceed to clear title and is no longer bound by the contract.

5. Quieting title ⇐7(2)

Where vendor was able and willing to comply with purchase contract and purchaser was not able to do so and had declared that he intended to pay no more, vendor could maintain a quiet title action.

6. Quieting title ⇐7(2)
Vendor and purchaser ⇐299(1)

Where purchasers repudiated the purchase contract and refused to comply with its terms, vendor could maintain ejectment to recover possession, and after taking possession without objection from purchasers, who were not living upon the land, could quiet title thereto.

7. Quieting title ⇐44(3)

In action by vendor of land to quiet title, evidence *held* to sustain findings that purchasers refused to perform the contract.

8. Vendor and purchaser ⇐87

A letter by vendor's attorney to purchaser, written after vendor had taken possession and harvested part of crop on the land, and suggesting a conference to determine whether purchaser would like to continue with the contract and what arrangements could be made therefor, was at most an "offer" which was never accepted and was not sufficient to constitute a renewal of the contract which had previously been terminated.

See Words and Phrases, Permanent Edition, for all other definitions of "Offer".

Appeal from Superior Court, San Bernardino County; Frank A. Leonard, Judge.

Action by Florence E. Fisher against Franklyn T. Chaffee and others to quiet title to land. From a judgment for plaintiff, defendant Randolph Marketing Company appeals.

Affirmed.

Hearing denied; TRAYNOR, J., dissenting.

Gibson, Dunn & Crutcher and John Henry Peckham, Jr., all of Los Angeles, for appellant.

Richard A. Ibanez, of Upland, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title and for declaratory relief.

On December 1, 1936, the plaintiff and the defendants Chaffee entered into a written contract for the sale and purchase of a 10-acre orange orchard on deferred payments. The Chaffees took possession and on December 2, 1936, executed a crop mortgage to the defendant Randolph Marketing Company covering the oranges to be produced on the land until the debt was paid. Sometime in December, 1939, the defendants Chaffee, being delinquent in some seven payments called for by the contract, refused to further perform the contract and notified the plaintiff that they would not make any further payments thereunder. Thereupon, the plaintiff took possession of the property and shortly thereafter directed the defendant Etiwanda Citrus Fruit Association to pick the oranges then growing thereon. This association picked that crop and still has in its possession the money accruing from the sale thereof.

This action was filed on September 6, 1940, the plaintiff praying that her title to the land be quieted and that she be given a judgment declaring that the defendant Randolph Marketing Company has no right, title or interest in and to the returns from the crop of oranges picked during the 1940 season or in the crops growing or to be grown on said land. At the trial, it was stipulated that there was no controversy insofar as the defendant Etiwanda Citrus Fruit Association is concerned and it seems to be conceded that that defendant is merely holding the proceeds of the 1940 crop pending a determination of who is entitled thereto. The court found in all respects in favor of the plaintiff and entered a judgment quieting her title to the real property and declaring that the defendant Randolph Marketing Company has no lien upon the crops harvested during 1940, or upon any crops to be produced upon the land in question, and further ordering the Etiwanda Citrus Fruit Association to pay the proceeds of the 1940 crop to the plaintiff. From this judgment the defendant Randolph Marketing Company alone has appealed.

It is conceded, as it must be, that appellant's rights under its crop mortgage are dependent upon whether the Chaffees still had any interest in the property as vendees under the purchase contract. Ap-

pellant's main contention is that the rights of these vendees had not been terminated and that the plaintiff and respondent, who will be hereafter referred to as the respondent, wrongfully took possession of the premises and harvested the 1940 crop. It it argued that the parties had by their contract agreed that, in the event of a breach or default, the rights of the vendees were to be terminated in either of two ways; that the setting forth of these two ways excluded any others; and that the contract was not terminated in either of those ways. The contract provided that in the event of a default the vendor could at her option declare the entire remaining indebtedness due and payable, advertise, and sell the property at public auction, either party being allowed to bid, and the proceeds to be applied so far as necessary in payment of the amounts due, with the alternative provision that the vendor might bring an action to recover the entire principal and interest and to foreclose and determine the interest of the vendees. It is conceded that neither of these methods was pursued and the appellant contends that it follows that the respondent has not terminated the contract in the manner provided for therein, and that the same is still in force in favor of the vendees with the resulting protection to the lien of appellant's crop mortgage.

[1-3] The appellant may not thus rely upon the provisions of the contract when, as the court found, the vendees had repudiated and refused to further perform its terms. In Mayer v. West, 96 Cal.App. 31, 273 P. 849, 851, the court reviewed many of the authorities, and said: "It is elementary that a vendor may recover possession in ejectment from a vendee in possession who repudiates his contract." Where a vendee in possession has refused to complete the contract he may be treated as one who has abandoned the contract under which he entered. Andrews v. Karl, 42 Cal.App. 513, 183 P. 838. In Whittier v. Stege, 61 Cal. 238, it is said: "When, therefore, the defendants, after they had obtained possession lawfully, substituted repudiation of the contract and refusal to comply with its terms, for performance or willingness to perform, they divested themselves by their wrongful act of the equitable estate which they acquired under the contract, and became trespassers or tenants at will, against whom their repudiated vendors could maintain ejectment. The vendors were remitted to their legal title, and in an action upon it the defendants could not invoke as a defense to it a contract of sale which they repudiated and refused to perform."

[4-6] When a vendee has repudiated the contract and has refused to pay anything further upon it a vendor is entitled to take possession and proceed to clear his title and is no longer bound by the provisions of the contract. Woodard v. Hennegan, 128 Cal. 293, 60 P. 769. When it appears, as it does here, that a vendor was able and willing to comply with the contract and that the vendee was not able to do so and had declared that he intended to pay no more, the vendor may maintain a quiet title action. Stratton v. California Land & Timber Co., 86 Cal. 353, 24 P. 1065. It follows, under these established rules, that having refused to further perform the contract these vendees could not invoke or rely upon the terms of the contract as against the vendor. Mayer v. West, supra. The vendor was, therefore, free to maintain an action in ejectment to recover possession of this land and equally free, having taken possession without objection from the vendees who were not living upon the land, to quiet her title thereto. Having repudiated the contract the vendees had no right to insist that the respondent proceed in accordance with the terms of the contract and the appellant, claiming under the vendees, is in no better position.

[7, 8] The appellant contends that there is no evidence to sustain the finding that the defendants Chaffee refused to further perform the contract. While the evidence is conflicting in that regard it amply sustains the findings made. The appellant particularly relies upon a letter written to Mr. Chaffee by the respondent's attorney on February 17, 1940, after possession had been taken by the respondent and a part of the orange crop harvested. The letter suggested a conference for the purpose of finding out if Mr. Chaffee would like to continue with the contract and if so what arrangements he could make for doing so. At most, the letter was an offer which was never accepted and it was far from sufficient to constitute a renewal of the contract which had previously been terminated. Viewed in its entirety the record discloses nothing more than a conflict in the evidence.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.

49 Cal.App.2d 211

TRKLJA et al. v. KEYS et al.

Civ. 6644.

District Court of Appeal, Third District California.

Jan. 19, 1942.

Mines and minerals ⇐55(6)

Where a deed contained reservation excepting minerals from a creek bed deposit, the expressed mineral reservation carried with it, by necessary implication, the right of owners of surface minerals to remove the minerals in the usual methods practiced generally in conducting placer mining operations, even though it might result in injury or destruction of surface of lands, as against contention that right of owners of surface minerals to extract the minerals should be exercised only in so far as not inconsistent with use of owner of surface rights.

Appeal from Superior Court, Amador County; J. A. Smith, Judge Assigned.

Action by Krsto Trklja and others against J. A. Keys and others, to enjoin mining operations on plaintiffs' lands. From a judgment for defendants, following the sustaining of a demurrer to the complaint without leave to amend, the plaintiffs appeal.

Affirmed.

C. W. Pearson, of Placerville, for appellants.

Rowan Hardin, of Sonora, for respondents.

STEEL, Justice pro tem.

This is an action for injunctive relief wherein plaintiffs sought to restrain the defendants from mining certain creek bottom lands situated in Amador County, the fee in which vests in the plaintiffs, subject to a reservation of the mineral rights vesting in the defendants. Both parties deraign title through a common grantor.

To the complaint in the action, the defendants interposed a demurrer alleging that the complaint failed to state a cause of action against the defendants for the reason that plaintiffs purchased only the surface rights in the property, subject to the mineral reservation reserved and owned by the defendants, which, it was argued, carries with it the right to extract said minerals from the property. The trial court sustained the demurrer without leave to amend, hence this appeal.

The sole issue presented, therefore, is whether or not the defendants, respondents herein, have a right to extract the minerals so owned by them, even though they may injure or destroy the surface of said lands in so doing.

While this point is somewhat novel in this jurisdiction we do find that it has received the attention of the Supreme Court of this state in considering two cases arising in Yuba County, to-wit: Yuba Investment Co. v. Yuba Consolidated Gold Fields, 184 Cal. 469, 194 P. 19, and again in the same entitled case reported in 199 Cal. 203, 248 P. 672, wherein the court affirmed the judgment of the trial court rendered pursuant to the law and directions of the court as set forth in the opinion in the first case supra.

While one of the points considered in the Yuba County cases, supra, had to do with the right of the defendant, successor in title to the United States Government, to deposit detritus in a settling basin on another tract of land to which plaintiff had succeeded as owner of the minerals therein, the court very thoroughly considered the respective rights of the parties arising by virtue of the deed involved which contained the same mineral reservation as the one we are here considering.

The court held that the expressed mineral reservation contained in the deed carried with it, by necessary implication, the right to remove such minerals by the usual or customary methods of mining and thus reduce them to possession even though the surface ground may be wholly destroyed as the result thereof.

After a consideration of the authorities submitted, many of which are here cited by appellant, the Supreme Court, in the case reported in 184 Cal. 481, 194 P. 25, states:

"The principle that the right to precious metals implies the right to mine the same, fortified by the statutory rule that reservations and exceptions are to be construed in favor of the grantor, and by the express reservation and exception of the right to use the premises, in any manner not inconsistent with the use by the grantee, and by the further fact that the premises could still

be used by the grantee as a settling basin, if the minerals were extracted with due regard to that use, and that the only known method of extraction in contemplation by the parties was dredge mining, all lead to the conclusion that the plaintiff, as grantee of O'Brien's mining rights in tract 'First,' is entitled to extract the precious metals therefrom, even though the effect thereof is to wholly destroy the surface."

It is contended by the appellant here that the two cases, supra, limit the rule to the right to extract the minerals so far as not inconsistent with the use of the owner of the surface rights. We do not think such a limitation can reasonably be accepted as the rule stated in the decision. The court had before it the interpretation of a quitclaim deed containing the reservation hereinbefore referred to, and the question presented was whether the deed conveyed the fee or merely an easement. The court held, after considering the facts and circumstances involved, that the deed, on its face, was sufficient in form to convey the fee to the government, and that it was clear from the deed itself that the government intended to use the premises for the construction of reclamation works and a portion thereof as a settling basin; that dredge mining was not inconsistent with such use, although the deed contained no express provision limiting the use by the government to that purpose but on the contrary it was expressly provided that the premises may be used for any and all purposes. Continuing, the court says that dredge mining destroys the surface, leaving the top composed of cobblestones and its value destroyed for agricultural purposes, but on the other hand, it is pointed out, that if the reservation and exception of the precious metals do not authorize the owners to operate a mining dredge in the customary manner, the reservation would be of no effect and of no value, as no other method of mining was practicable.

In the instant case we have a similar situation, a reservation excepting the minerals from a comparatively shallow creek bed deposit of gravel, which is unlike an underground river channel such as may be found in the higher altitudes, and worked by means of a shaft and tunnel or drifts far beneath the surface in much the same manner as a vein or lode claim is worked, and in such cases a different rule applies as to the rights of the surface owner as the deposits may be extracted without injury to the surface.

It is generally recognized that the only methods used in mining surface gravel deposits is by hydraulic mining, the use of sluice boxes which were used to a considerable extent in the early days, or the more recent dredge or dragline process, all of which methods of extracting the gold from the gravel deposits necessarily mean the destruction of the surface ground.

We conclude, therefore, that the logical rule is the one that will permit the owner of surface minerals to remove them in the usual methods practiced generally in conducting placer mining operations. To hold otherwise would, in effect, amount to a determination that the deed is void as the owner of the mineral rights would be precluded from enjoying or recovering that which he owned.

The judgment is affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.



COBER et al. v. CONNOLLY et al.

Civ. 6503.

District Court of Appeal, Third District, California.

Jan. 17, 1942.

Hearing Granted March 16, 1942.

1. Bills and notes ⇐427(1)

One co-payee can accept payment of a note for his fellow payee on the theory that co-payees are mutual agents of each other, at least impliedly, to receive or collect performance on behalf of either. Civ.Code, § 1475.

2. Mortgages ⇐298(3)

An indebtedness evidenced by a promissory note, calling for payment of specified sum in money to three co-obligees, and secured by trust deed on realty was not "extinguished" by the receipt by one co-obligee of services and goods under an arrangement

between such co-obligee and the obligor for liquidation of the indebtedness in such manner, where another co-obligee neither participated in such arrangement nor received any money, services or goods either from the obligor or the co-obligee. Civ.Code, § 1475.

See Words and Phrases, Permanent Edition, for all other definitions of "Extinguish".

3. Principal and agent ⇐105(9)

An agent, who is authorized to receive payment, has no authority to accept or receive anything in extinguishment of a debt other than money.

4. Bills and notes ⇐427(1)

Where a note is made payable to several joint payees, generally, one joint payee cannot authorize payment to a third person without consent of all co-payees.

5. Mortgages ⇐298(2)

The rule that a joint payee cannot authorize payment of a note to a third person without the consent of all co-payees was not applicable so as to preclude extinguishment of indebtedness evidenced by note payable to three co-payees and secured by trust deed on realty by the rendition of services and furnishing of goods under an arrangement between maker and one co-payee, where, although only a portion of such services was rendered directly to such co-payee, all services rendered were primarily for his benefit. Civ.Code, § 1475.

6. Mortgages ⇐298(3)

The statute, providing for extinguishment of an obligation by performance in a particular manner directed by a creditor or any one of two or more joint creditors, even though benefit of such performance is not received by creditor, refers to the "manner", including both method and mode, of transmission of the consideration called for by the obligation, and does not authorize one co-payee to arrange with maker for liquidation of an indebtedness, evidenced by a note calling for the payment of a specified sum in money and secured by a trust deed on realty, by the rendition of services and the furnishing of goods by the maker. Civ.Code, § 1476.

See Words and Phrases, Permanent Edition, for all other definitions of "Manner".

Appeal from Superior Court, Mendocino County; Donald Geary, Judge.

Action by Benjamin A. Cober and others against P. Connolly and others to quiet title to realty, which had been conveyed in trust by plaintiffs as security for a promissory note, and to compel a reconveyance thereof by the trustee. From a judgment for plaintiffs, defendants appeal.

Judgment reversed.

Preston & Gibson, of Ukiah, for appellants.

Hale McCowen, of Ukiah, for respondents.

PER CURIAM.

In this action defendants appeal from a judgment quieting plaintiffs' title to certain real property situated in Ukiah, Mendocino County, California. The essential facts may be summarized as follows:

On October 30, 1929, the plaintiffs, husband and wife, executed their promissory note in the sum of $850, payable one year after date, together with a deed of trust of even date therewith and as security therefor, in favor of Keith C. Eversole, W. D. L. Held, and P. Connolly. Shortly thereafter the note, together with the deed of trust, was delivered to the defendant Mendocino County Title Company, trustee named therein, and in whose custody the documents remained thereafter.

In the year 1932 it appears that plaintiff Cober, and Eversole, then a practicing attorney and one of the payees of the note, agreed between themselves that Cober might liquidate this indebtedness by rendering services to Eversole in the way of job printing, newspaper subscriptions, publication of legal notices, and the use of hotel credit cards issued to Cober, all to be done and performed as Eversole might direct. This arrangement continued along over a period of some five years, according to the testimony of Cober, and the total of the services so rendered and credits received amounted to the sum of $1,255.97, which, it is claimed, paid the note in full.

The record shows, and it is not disputed, that the defendant Connolly did not participate in this arrangement, nor did he at any time receive any money, services, or goods of any nature, either from the plaintiff Cober or through Eversole as co-payee. It further appears that Eversole is insolvent.

Plaintiffs by this action sought to quiet their title to the property involved and to compel a reconveyance thereof by the de-

fendant trustee. After trial judgment was rendered in their favor accordingly.

[1] It is the contention of appellants that Eversole, in his dealings with Cober, acted as an agent for his co-payees, and that consequently he could not, as such agent, accept performance by Cober in any manner other than to receive *payment of the note in cash.* Section 1475 of the Civil Code provides as follows: "An obligation in favor of several persons is extinguished by performance rendered to any of them, except in the case of a deposit made by owners in common, or in joint ownership, which is regulated by the title on deposit."

The law appears settled and it is conceded that one co-payee can accept payment for his fellow payee, the rule being based upon the proposition they are mutual agents of each other, at least impliedly, to receive or collect performance on behalf of either.

[2, 3] As to the question of whether or not a co-payee, such as Eversole, in this case acting in the capacity of an agent, could accept payment in goods or services in lieu of cash, the general rule appears to be that an agent who is authorized to receive payment has no authority to accept or receive anything in extinguishment of a debt other than money. 1 Cal.Jur. 722 and cases cited.

[4, 5] It is next contended by appellants that the respondent Cober cannot be entitled to credit for goods or services rendered to third parties. The record here discloses that of the total credits claimed by Cober only a portion thereof was rendered directly to Eversole, while the balance of the credits such as printing legal notices, newspaper subscriptions, etc., were rendered to third parties for which Eversole took credit. While generally a joint payee cannot direct or authorize payment to a third person without the consent of all co-payees (48 Corpus Juris 590; Moore v. Bevier, 60 Minn. 240, 62 N.W. 281) we do not consider that the facts here bring the case within such rule. Cober dealt with Eversole, and all services rendered were primarily for the benefit of Eversole who profited by reason thereof and was no doubt compensated therefor through his clientele.

[6] Respondents herein, while conceding that a joint creditor in accepting performance is acting in the capacity of an agent for the others, and that the payees here were joint creditors, urge most strenuously that the question for decision is not dependent upon section 1475 of the Civil Code, but argue that section 1476 of the Civil Code is controlling. This section provides as follows: "If a creditor, or any one of two or more joint creditors, at any time directs the debtor to perform his obligation in a particular manner, the obligation is extinguished by performance in that manner, even though the creditor does not receive the benefit of such performance."

This section of the code enacted in 1872 codifies the common-law rule, and we find no case wherein it has had the attention of the courts of this state. The issue, therefore, is whether section 1476 of the Civil Code permits performance to be rendered by paying something other than the consideration called for in the obligation, which in the instant case is money. (We are not here concerned with accord and satisfaction as will later be referred to.)

Respondents contend that the word "manner" is the important word in the section, and is defined by Webster's International Dictionary as "way of performing or effecting anything," and by the Century Dictionary as "the way in which an act is performed, method of doing anything, mode of procedure in any case, or situation; mode, way or method"; and that "manner" embraces both method and mode, which of course is correct. It will be noted that the section states that if the creditor at any time directs the debtor to *perform* his obligation in a particular manner—the gist of the obligation and the important word therefore is the word "perform," and to perform means to deliver or render the consideration mentioned in the obligation. Consequently the section must necessarily mean in what manner (which as we have seen includes the method and mode) shall the consideration called for be paid? For instance, a creditor may direct the debtor to remit money by mail, if the letter is lost the risk falls upon the creditor, as the posting of the letter as directed would constitute payment *"even though the creditor does not receive the benefit of such performance."*

It will be observed that the last-quoted portion of the section, if applied here, could have no significance whatever, as the goods and services were accepted by the joint creditor and obviously some benefit was received.

In Kerr's Cyc. Codes under section 1476, Civil Code, the cases cited relate not to a *substituted performance* but to the *manner* in which the money or consideration is to be transmitted to the creditor. See, also, Annotations Field's Code of New York, section 702, which section contains the same language as our Civil Code, section 1476.

The case of Peck v. Lampkin, 200 Ala. 132, 75 So. 580, 581, cited by appellant, contains the following pertinent language: "But we apprehend that, if one of the joint obligees would accept property, other than money, in satisfaction, in whole or in part, of the jointly held demand, he, and the debtor as well, must be able to refer their act to some express previous authorization to that end by the co-obligee, or else present a ratification of the act by the co-obligee."

As heretofore mentioned, we are not concerned with the question of an accord and satisfaction as that is covered in sections 1521–1524 of the Civil Code, but solely with whether or not this particular section (1476, Civil Code) in effect applies to the facts involved in the instant case.

We are of the opinion that it does not, for as already indicated, it relates to the manner of transmission of the consideration called for, and that question is not an issue here.

For the reasons stated the judgment must be reversed, and it is so ordered.



49 Cal.App.2d 168

JOHNSON et al. v. CAMUFFO et al.

Civ. 11247.

District Court of Appeal, First District, Division 2, California.

Jan. 15, 1942.

1. Quieting title ⇐47(2)

In an action to quiet title, the trial court's finding, supported by competent evidence, that the deed to the lot in controversy was delivered by plaintiff to defendant in payment of a previous indebtedness, and not as security, was sufficient to dispose of the case, since it met plaintiff's contention that the deed was delivered to an escrow holder as security for plaintiff's note to defendant, and was wrongfully delivered to defendant by the escrow holder.

2. Appeal and error ⇐1011(1)

The Court of Appeal is concluded by the trial court's findings on conflicting evidence.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action to quiet title by Gus Johnson and wife against Richard J. Camuffo and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

John E. Truman, of San Francisco, for appellants.

Walter McGovern, of San Francisco, for respondents.

DOOLING, Justice pro tem.

The question presented on this appeal is purely a factual one. Appellant Gus Johnson and respondent Elizabeth Petzold, who will be hereinafter referred to as Johnson and Petzold, had engaged in a long series of business transactions prior to August 7, 1933. On that date they entered into an agreement of settlement of their respective claims which contained the following provision: "First party (Petzold) consents that F. R. Webb, escrow holder, shall return to the second parties (Johnson and wife) a certain mortgage on farm property, as well as a deed to certain property in San Francisco."

Thereafter Johnson and his wife commenced this action to quiet title to a certain lot on Moultrie Street in San Francisco claiming that the "deed to certain property in San Francisco" mentioned in the clause of the agreement above quoted referred to this property.

On the trial Johnson testified that as a part of an earlier settlement of their accounts between himself and Petzold he had delivered a deed of the Moultrie Street property with Petzold as grantee to Webb as escrow holder to hold the deed as security for the payment of a promissory note in Petzold's favor, and that Webb had wrongfully delivered this deed to Petzold who had caused it to be recorded on March 25, 1931.

In defence the note in question was introduced in evidence. It contained the follow-

ing provision: "This note is secured by an unrecorded deed to Munich Street property and unrecorded mortgage on property in Madera County, which are to be recorded on default."

Admittedly the Munich Street property referred to in this provision of the note was also located in San Francisco, and there is no dispute that the "mortgage on property in Madera County" is the "mortgage of farm property" which by the agreement of October 7, 1933, was to be returned to Johnson by Webb as escrow holder.

Johnson testified that the provision of the promissory note that it was secured by an unrecorded deed to Munich Street property was not in the note when he signed it. This was contradicted by Webb who testified that the note as introduced into evidence was in the same condition as when Johnson signed it.

[1] Petzold and Webb both testified that as a part of the 1931 settlement a deed to the Moultrie Street property was delivered to Petzold by Johnson in part satisfaction of her claims against Johnson and that Johnson at that time told Petzold to record it. The trial court found in accordance with this testimony that the deed to the Moultrie Street property was delivered to Petzold by Johnson in payment of a previous indebtedness and not as security. This finding, supported by competent evidence, was sufficient to dispose of the case since it met the contention of Johnson that the deed to the Moultrie Street property was delivered by him to Webb to hold in escrow as security for his promissory note and by Webb was wrongfully delivered to Petzold. With that claim so disposed of it is obvious that the provision of the settlement "that F. R. Webb, escrow holder, shall return to the second parties * * * a deed to certain property in San Francisco" could not refer to the deed to the Moultrie Street property, which the trial court found not to have been delivered to Webb as "escrow holder" but to Petzold absolutely in satisfaction of a debt.

It was Petzold's testimony, which was supported by the provision of the note quoted above, that it was the agreement of the parties in 1931 that Johnson should deliver a mortgage of the Madera County property and a deed to the Munich Street property to Webb as escrow holder to record them upon any default of Johnson in the payment of the note as provided in the provision of the note quoted herein. However, Webb could not remember whether a deed to the Munich Street property had ever been delivered to him and appellants seize upon this uncertainty to argue that since it does not appear that any deed to San Francisco property was ever delivered by Johnson except that to the Moultrie Street property the deed to that property must have been the one referred to as "a deed to certain property in San Francisco" in the settlement of 1933.

Petzold's testimony on this matter is clear that a deed to the Munich Street property was to be delivered to Webb to hold in escrow, that she believed that this deed had been so delivered to Webb, and that it was this deed that was referred to in the settlement of 1933 as "a certain deed to San Francisco property."

[2] The appeal presents no more than the familiar case of findings on conflicting evidence by which this court is concluded.

Judgment affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.



49 Cal.App.2d 176

HOMELAND BLDG. CO. v. REYNOLDS et al.

Civ. 2827.

District Court of Appeal, Fourth District, California.

Jan. 15, 1942.

1. Judgment ⇐780(5)

Legal interests only, as distinguished from equitable interests, are subject to statutory judgment liens. Code Civ.Proc. § 674.

2. Fraudulent conveyances ⇐310

In action for declaratory relief and to set aside transfer of real estate from husband to wife, finding that each allegation of the complaint bearing on the question of fraud was not true, was a sufficient finding on issue of fraud.

3. Fraudulent conveyances ⇐43(2)
Judgment ⇐781

Husband's judgment creditor was not entitled to have set aside transfer of realty

from husband to wife, where evidence supported findings that the property was not community property but wife's separate property, obtained with wife's money including proceeds of husband's soldier bonus given to wife, and hence no judgment lien attached thereto. Code Civ.Proc. § 674.

4. Husband and wife ⇐262(1)

Property conveyed to wife by third party was presumed to be wife's separate property.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by the Homeland Building Company against Glenn Q. Reynolds and another for declaratory relief and to set aside an alleged fraudulent transfer of realty. From a judgment for defendants, plaintiff appeals.

Affirmed.

Liggett & Liggett, of San Diego, for appellant.

Charles B. Provence, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for declaratory relief and to set aside an alleged fraudulent transfer of real property from Glenn Q. Reynolds to his wife Esther Reynolds. The plaintiff sought to have it declared that a judgment it held against Glenn Q. Reynolds was a valid lien against the property and unaffected by a homestead declaration filed by the wife.

The defendants were married in 1919 and had three children. On March 4, 1935, Mrs. Reynolds bought the property in question, which consisted of some lots with an unfinished house thereon, agreeing to pay about $1,000 therefor. At that time she paid $100 down and received some sort of receipt agreement. On March 13, 1936, she entered into a more formal agreement with the owner of the property, which agreement was also signed by her husband. This agreement provided that $450 should be paid from money expected to be received from a veteran's bonus payment due to Reynolds and some $500 out of a loan of $1,880 being made by a savings and loan association.

In December, 1936, through an escrow, this savings and loan association increased its loan to $2,500 and the balance due was paid to the owner of the property who conveyed it to Mrs. Reynolds by a deed which was recorded December 26, 1936. Under the arrangement, the remainder of the loan was used in completing the house on the property. On March 9, 1937, Mrs. Reynolds recorded a declaration of homestead. In the meantime and on June 24, 1936, the plaintiff herein recovered a judgment for $428.15 against Mr. Reynolds, an abstract of which judgment was recorded on June 26, 1936. The record fails to show when this obligation was incurred.

The court found in all respects in favor of the defendants finding, among other things, that at the time the abstract of the judgment was recorded Glenn Q. Reynolds was not the equitable owner of this property; that Mr. and Mrs. Reynolds did not procure a conveyance in the name of Mrs. Reynolds without any consideration paid by her and did not procure such conveyance for the purpose of defrauding the creditors of Mr. Reynolds and in particular this plaintiff; that the property was not the community property of the defendants; that it was the separate property of Mrs. Reynolds; that Mrs. Reynolds has not held and does not hold the legal title as trustee for Mr. Reynolds; that Mrs. Reynolds is the owner of the property; that Mr. Reynolds has never held the legal title to and has never been the legal owner of said property; and that prior to December 26, 1936, he made a gift of any interest he might have in the property to his wife. As conclusions of law, it was found that the judgment lien of the plaintiff has never attached to the property and that the declaration of homestead filed by Mrs. Reynolds is valid as against any claim of the plaintiff. From the judgment which followed the plaintiff has appealed.

The appellant contends that the taking of title in the name of Mrs. Reynolds was fraudulent because it appears that Mr. Reynolds was unable to pay the judgment held by the appellant and that the property was in fact the community property of Mr. and Mrs. Reynolds, that because of this fraudulent conveyance Mr. Reynolds had an equitable interest in the property which was subject to the lien of appellant's judgment under the provisions of section 674 of the Code of Civil Procedure, and that this lien attached to such interest before the declaration of homestead was filed.

The appellant concedes that it had no lien so long as the property was being pur-

chased on a contract (citing Oaks v. Kendall, 23 Cal.App.2d 715, 73 P.2d 1255; Belieu v. Power, 54 Cal.App. 244, 201 P. 620), but maintains that when a deed was taken in the name of Mrs. Reynolds, for the purpose of defrauding the appellant, Mr. Reynolds had an equitable interest in the property which then became subject to the lien of appellant's judgment.

[1] The general rule in this state is that legal interests only, as distinguished from equitable interests, are subject to judgment liens established under section 674 of the Code of Civil Procedure. Poindexter v. Los Angeles Stone Co., 60 Cal.App. 686, 214 P. 241; Graves v. Arizona Central Bank, 205 Cal. 715, 272 P. 1063; McGee v. Allen, 7 Cal.2d 468, 60 P.2d 1026; Belieu v. Power, supra; Oaks v. Kendall, supra. The appellant contends, however, that where property is conveyed to another for the purpose of protecting a judgment debtor's real interest in the property and in order to defeat a judgment the judgment-debtor has an interest, whether legal or equitable, which should be held subject to the judgment lien. Assuming this to be true, we are not here called upon to decide such a question.

[2] The appellant's contention that the court failed to find on the issue of fraud is without merit. The court found that each and every allegation of the complaint bearing on the question of fraud was not true. No failure of the evidence to sustain these findings is pointed out other than the general claim that Mr. Reynolds was insolvent, that the property was community property, and that there was no valid gift of the property to Mrs. Reynolds. It appears without contradiction that Mr. Reynolds, who was gassed in the World War, was in very bad health and unable to work. He testified that between 1930 and 1934 he was very ill and was told by his doctor that he could not live; that during this period he gave the adjusted service certificates which he had received from the United States Government for his services in the World War, amounting to $450, to his wife in order to protect her and the children because of his health and condition; that he never saw this property until after his wife had bought it; and that he signed no papers except as he was required to do so by the loan association from which his wife secured a loan.

[3, 4] In our opinion, the court's findings to the effect that this property was the separate property of Mrs. Reynolds and not the community property of herself and her husband was sufficiently sustained by the evidence. The property was conveyed to Mrs. Reynolds and the presumption is that it was her separate property. There is no evidence that any money went into the purchase of the property, aside from the proceeds of a trust deed thereon, except the original payment of $100 and a subsequent payment of $450. It appears without conflict that Mrs. Reynolds borrowed the $100 for the first payment from a friend in March, 1935, and that in May, 1935, she borrowed $100 on her car and repaid her friend. Mrs. Reynolds testified that she owned this car and there is no evidence to the contrary. The $450 came from Mr. Reynolds' soldier bonus, which was exempt from execution, and the evidence that he gave these certificates to his wife prior to 1934 stands without contradiction. It also appears, without conflict, that Mr. Reynolds did not see the property until after his wife had bought it, that when the escrow was started in December, 1936, he refused to sign instructions which provided that title was to be taken in himself and wife until his own name was scratched out, and that he signed a contract and a trust deed only because this was required by the loan association before a loan would be made. Without further reviewing the tesimony of Mr. and Mrs. Reynolds in this connection and in support of the finding that a gift was made, it must be held that the evidence in its entirety, with the reasonable inferences therefrom, amply sustain the court's findings that this property and the funds going into its purchase were the separate property of Mrs. Reynolds and that Mr. Reynolds had no interest therein. Under the circumstances here appearing, it must be held that no lien attached to this property through the recording of the abstract of the appellant's judgment.

For the reasons given the judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.

STRONG v. STRONG.

Civ. 6628.

District Court of Appeal, Third District, California.

Jan. 12, 1942.

Hearing Granted March 12, 1942.

1. Appeal and error ⇐1009(1)

On appeal from judgment for defendant in quiet title action wherein evidence was conflicting as to whether property involved was the separate property of defendant's divorced husband and hence did not pass to defendant under divorce decree awarding community interest in the property, appellate court would not disturb the implied finding of trial court that property was acquired with community funds and would treat such property as having been community property.

2. Husband and wife ⇐265

Where realty was deeded to husband during marriage and thereafter husband and wife executed a deed of trust to secure a loan, a reconveyance under such deed of trust to husband and wife vested no title in the wife.

3. Husband and wife ⇐265

Prior to 1927 the wife had no "vested interest" in community property, but title to such property was vested in the husband, subject to the statutory restraints upon his power to alienate or encumber the property without wife's consent, and the power given the wife to devise a portion thereof. Civ. Code, § 172a.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Interest".

4. Husband and wife ⇐247

The rights of husband and wife in realty acquired by husband during marriage in 1925 and by them conveyed in 1932 must be measured by the statute in effect in 1925 where wife had no vested interest in community property. Civ.Code, § 172a.

5. Husband and wife ⇐267(1)

Where, under statute in effect at time of husband's acquisition of community property, title to such property was in the husband alone, it was necessary only that wife join with him in executing deed to such property in order to make deed completely effective and wife was not required to be named as a party to deed since she was conveying no estate. Civ.Code, § 172a.

6. Deeds ⇐190

In action to quiet title to realty which defendant and her husband, prior to divorce decree which awarded to defendant all community interest in the property, had deeded to plaintiff, if fraud was relied upon as a defense it was required to be pleaded.

7. Husband and wife ⇐267(1)

A mere attempt by husband to defraud the wife of her interest in community property would avail the wife nothing against husband's mother to whom husband and wife conveyed property by a grant deed signed by husband and wife.

8. Deeds ⇐190

In action to quiet title to realty which defendant and her husband, prior to divorce decree which awarded to defendant all community interest in the realty, had conveyed to plaintiff, if want of consideration for the conveyance to plaintiff was relied upon as a defense it should have been pleaded.

9. Divorce ⇐254

A divorce decree awarding to wife all community interest in the realty which husband and wife had conveyed to husband's mother by grant deed signed by husband and wife did not vest title in the wife on theory that because the husband allegedly told wife that deed to his mother was being made merely for convenience, title remained in husband regardless of the name in which it stood, since what husband told his wife out of presence of his mother and without her knowledge was not binding upon the mother, and mother was not a party to nor bound by decree in divorce proceeding. Civ. Code, § 172a.

10. Quieting title ⇐10(2)

In action to quiet title to realty which defendant and her husband, prior to divorce decree which awarded to defendant all community interest in the realty, had deeded to plaintiff, wherein no issue was tendered as to any equitable title in defendant, plaintiff was entitled to decree quieting title on ground that legal title vested in plaintiff since all that divorce decree would have operated upon would be an equitable interest allegedly remaining in the husband or in husband and the wife after the conveyance to his mother.

11. Quieting title ⇐43

Where a defense in quiet title action consists merely of a denial of plaintiff's ownership and assertion of title in defendant, such defense is not established by proof that plaintiff is the owner of the legal title subject to an equity in favor of defendant or of a third person under whom he claims.

12. Husband and wife ⇐267(1)

Where community real property was acquired by husband prior to 1927 when wife had no interest in community property, and in 1932 a grant deed to such property was delivered to husband's mother which deed was signed and acknowledged by husband and wife and only the husband was named in the body thereof, such deed complied with the statute as it applied in 1932 to community property acquired prior to 1927 standing of record in the name of the husband alone. Civ.Code, § 172a.

13. Quieting title ⇐10(2)

A husband's mother to whom husband and wife conveyed community property acquired by husband prior to 1927 when wife had no vested interest in community property was entitled to a judgment quieting title in such property as against the wife who in 1932 obtained a divorce decree awarding to her all community interest in the property even if wife's joinder in deed to husband's mother had been procured by husband's fraud, since deed to mother would then be treated as his sole deed subject to being avoided within one year from filing for record of deed in recorder's office of county in which property was situated, and no such action was ever taken. Civ.Code, § 172a.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Blanche Hadley Strong against Muriel F. Strong to quiet title to real property wherein the defendant prayed that the title should be quieted in her. From a judgment for defendant, plaintiff appeals.

Reversed and remanded with directions.

Kenneth J. Carey, of Oakland, and Henderson & Henderson, of San Francisco, for appellant.

Snook, Snook & Chase, of Oakland, for respondent.

COMSTOCK, Justice pro tem.

This is an action to quiet title to real property situated in the city of Oakland. The complaint alleges that plaintiff is and for a long time prior to the commencement of the action had been the owner of the real property in question and that the defendant claims and asserts an interest therein adverse to the plaintiff which is without right. The defendant's answer denies plaintiff's allegations of ownership and alleges that defendant is the owner and in possession of the property, and entitled to the possession thereof, and prays that title be quieted in her.

The defendant had judgment in the court below decreeing that she is the owner of the real estate and quieting her title against the plaintiff. Plaintiff has appealed from the judgment.

The respondent Muriel F. Strong was married to Lester H. Strong, the son of appellant Blanche Hadley Strong, on June 11, 1922. On January 14, 1938, in a divorce action brought by Muriel F. Strong against Lester H. Strong, an interlocutory decree of divorce was entered in favor of Muriel F. Strong awarding to her any and all community interests of the parties in the real property involved here.

Said property was deeded to Lester H. Strong on December 16, 1925, by one June L. Wadey. The deed was recorded January 6, 1926. On March 24, 1932, a grant deed to said property was executed and delivered to Blanche Hadley Strong. It was signed and acknowledged by Lester H. Strong and Muriel F. Strong, but only Lester H. Strong was named in the body thereof as party of the first part. This deed was recorded April 14, 1932.

During the time that the property stood of record in the name of Lester H. Strong the following transactions relating to encumbrances thereon were had: Lester H. Strong and Muriel F. Strong executed a deed of trust of the property to Stockholder's Auxiliary Corporation, dated January 22, 1926, recorded January 29, 1926, to secure a loan of $3,500; on December 19, 1929, there was a reconveyance under said deed of trust to Lester H. Strong and Muriel F. Strong, which was recorded the same day; and on that day a new deed of trust to secure $3,500 was placed on record, bearing date the 13th day of December, 1929, executed by Lester H. Strong

and Muriel F. Strong to National Bank of Italy Company.

Appellant bases her claim of title upon the deed dated March 24, 1932; respondent claims under the decree in the divorce action. It is clear that if the whole title passed under the conveyance of March 24, 1932, appellant must prevail, as in that case there was no existing community interest of Lester H. and Muriel F. Strong in the property for the decree to operate upon.

[1] Appellant's contention that the property was the separate property of Lester H. Strong must fail. The evidence on that point was in conflict and this court will not disturb the implied finding of the trial court that the property was acquired with community funds. We must treat it as having been community property.

[2] No point is made that the reconveyance of December 19, 1929, vested any title in the respondent. It did not have that effect. Tyler v. Currier, 147 Cal. 31, 81 P. 319.

Did the said deed of March 24, 1932, pass title to appellant? We think it did.

[3] Prior to 1927, the wife had no vested interest in the community property. Title to the community property was vested in the husband, subject to the statutory restraints upon his power to alienate or encumber the same without her consent, and the power given her to devise a portion thereof. Riley v. Gordon, 137 Cal. App. 311, 30 P.2d 617; McKay v. Lauriston, 204 Cal. 557, 269 P. 519; Maxwell v. Carlon, 30 Cal.App.2d 356, 86 P.2d 666.

[4, 5] The property here was acquired in 1925 and the rights of the husband and wife must be measured by the statutes then in effect. McKay v. Lauriston, supra, and cases cited. Title having been in Lester H. Strong alone it was necessary only that Muriel F. Strong join with him in executing the deed in order to make it completely effective, which she did. She was not required to be named as a party to it, for she was conveying no estate. Riley v. Gordon, supra; 3 Cal.Jur. 10 Yr.Supp. 593, 626; Civil Code, sec. 172a; Cordano v. Wright, 159 Cal. 610, 115 P. 227, Ann.Cas. 1912C, 1044; Ingoldsby v. Juan, 12 Cal. 564; Dentzel v. Waldie, 30 Cal. 138; Douglas v. Fulda, 50 Cal. 77.

[6] Respondent claims that she had no intention when she signed the deed of passing the title or giving away her home or passing any interest to Blanche Hadley Strong and, while she admits signing the deed with knowledge of its contents, she says that she was told by her husband that the transaction was merely for convenience. In their essence these contentions suggest fraud. No fraud was pleaded, which was necessary if it was relied upon as a defense. 12 Cal.Jur. 800; Duncan v. Duncan, 6 Cal.App. 404, 92 P. 310. No effort was made to connect appellant with the alleged deceitful statements. It is not contended that she was present or in any way knew what her son had told his wife or that she knew or suspected what her daughter-in-law intended or had in her mind when she joined in the execution of the deed.

[7] Counsel for respondent do not go so far as to argue that the record shows any fraud upon the part of or imputable to appellant and certainly none appears. We quote from the argument as follows: "We have a case of the husband having attempted to commit a fraud upon his wife, and to have attempted to deed the property to his mother, which deed was, as above pointed out, without consideration other than that the mother should hold the title for convenience, and in the meantime the character of the property, i. e., the community property, had never changed. Thereupon in the interlocutory decree of divorce the court awarded all of the community interest in the property, i. e., the Keith Avenue property, to respondent, which, of course, it had a right to do in a suit for divorce on the ground of cruelty, whereupon the entire property became the property of the respondent." Of course, a mere attempt by respondent's husband to defraud her will avail her nothing against appellant.

[8] As to the suggestion that the deed was without consideration other than that the mother should hold the title for convenience, the record shows no agreement on her part to so hold it, but only that Lester H. Strong had told his wife he was making the deed to his mother for convenience. Nothing was said about the nature of the convenience or whose convenience was being served. On the other hand, the evidence is undisputed that the property was encumbered when deeded to appellant and that as a part of the consideration for the transfer she conveyed to her son by deeds dated, respectively, May 16, 1932, and May 20, 1932, and recorded May 25, 1932, two

other parcels of real property, which were unencumbered and which exceeded in value the property in dispute. It may also be mentioned that there was no pleading of a want of consideration. This was required if the point was to be made available to defendant. Pastene v. Pardini, 135 Cal. 431, 67 P. 681.

[9-11] The argument advanced by respondent assumes that because Lester H. Strong told his wife the deed to his mother was being made merely for convenience, it follows that title remained in him regardless of the name in which it stood and for that reason the interlocutory decree in the divorce action vested the title in respondent. This position is not sound. In the first place, what Lester H. Strong told his wife out of the presence of appellant and without her knowledge is not binding upon her. Secondly, appellant was not a party to nor bound by the decree in the divorce proceeding. Since the nature of the convenience was not proven, nor that appellant ever accepted the transfer except absolutely and in consideration of her conveyance of valuable unencumbered real property in exchange, it does not even appear that any beneficial interest or equity remained in Lester H. Strong as community property or at all. Finally, if some equitable interest had remained in him, or in him and the respondent, that is all that the interlocutory decree would have operated upon; the legal title would still have been vested in appellant, and there would have been no justification for the decree quieting title against her. No issue was tendered as to any equitable title in respondent and if it had been, her title could not have been quieted against the holder of the legal title. It is settled that where a defense in an action to quiet title consists merely of a denial of plaintiff's ownership and the assertion of title in defendant, such defense is not established by proof that the plaintiff is the owner of the legal title subject to an equity in favor of the defendant or of a third person under whom he claims. Milliken v. Valencia, 47 Cal. App. 16, 189 P. 1049; Robinson v. Muir, 151 Cal. 118, 90 P. 521.

[12, 13] It is our opinion that the deed complied with the provisions of section 172a, Civil Code, as it applied in 1932 to community real property acquired in 1925 standing of record in the name of the husband alone. Even though the wife's joinder in his deed had been procured by his fraud, which we have seen has not been and could not in the state of the pleadings be herein established to defeat appellant's record title, the deed would not be treated as a nullity but as his sole deed subject only to being avoided by action commenced within one year from the filing for record of the instrument in the recorder's office of the county in which the land is situate. No action of this sort was ever taken. Maxwell v. Carlon, supra.

Appellant has raised several other points which we deem it unnecessary to notice in detail as the matters already discussed are determinative of the appeal.

We have carefully considered the argument and authorities relied upon by respondent in respect to subjects which we have not specifically touched upon and find no merit in them.

For the reasons stated it is ordered that the judgment be reversed. The cause is remanded with directions to the court below to enter a decree quieting plaintiff's title.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.



49 Cal.App.2d 162

HEBERT et al. v. GRAY.

Civ. 2931.

District Court of Appeal, Fourth District, California.

Jan. 14, 1942.

Hearing Denied March 12, 1942.

1. Courts ⇐24

If superior court, to which action was transferred, did not have original jurisdiction because jurisdiction was by statute placed in justice court, "jurisdiction" could not be conferred on superior court by consent or by motion. Code Civ.Proc. §§ 81, 112, subd. 1, cl. (a, d).

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction".

2. Justices of the peace ⇐36(1)

The word "possession", as used in statute providing that Class A justice's courts shall have original jurisdiction of certain civil actions in cases at law, except cases involving title or possession of realty, means either a possession akin to title, as in ejectment, trespass, or title by adverse possession, or a possession which, for some other good reason, becomes a direct and material fact and issue in case. Code Civ.Proc. § 112, subd. 1, cl. (a).

See Words and Phrases, Permanent Edition, for all other definitions of "Possession".

3. Landlord and tenant ⇐230(3)

Where lessors' complaint sought to recover money due under lease of service station, and alleged title to be in themselves and possession in defendant and that consideration for lease was 1½ cents per gallon for gasoline sold by defendant, and defendant, by cross-pleading, sought accounting for gasoline sold by plaintiffs and delivery of possession of premises, the prayer in the answer was in nature of action of "ejectment" for "possession of real estate", and superior court had "original jurisdiction" under statute giving Class A justice's courts original jurisdiction of certain actions at law, except cases at law involving title or possession of real estate. Code Civ.Proc. §§ 81, 112, subd. 1, cl. (a, d); Const. art. 6, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Ejectment", "Original Jurisdiction" and "Possession of Real Estate".

4. Landlord and tenant ⇐129(1)

A landlord having possession, who refuses to give possession to lessee according to agreement, renders himself liable to an action of "ejectment", which is an action to recover "possession of real estate", within "original jurisdiction" of superior court. Code Civ.Proc. §§ 81, 112, subd. 1, cl. (a); Const. art. 6, § 5.

5. Courts ⇐26

Even if lessors' action for money due under lease, and asking judgment for $500, was not within original jurisdiction of superior court under complaint, but was within original jurisdiction of justice court, defendant, by filing answer setting up cross-action for accounting for gasoline sold by plaintiffs and delivery of possession of premises, gave superior court "jurisdiction" over subject matter of controversy. Code Civ. Proc. §§ 81, 112, subd. 1, cl. (a, d); Const. art. 6, § 5.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Erwin B. Hebert and others against Joe H. Gray and another, for money due plaintiff as landowners and lessors under a lease, in which action named defendant, by cross-pleading, sought an accounting for gasoline sold by plaintiffs and delivery of possession of premises. Judgment for plaintiffs, and named defendant appeals.

Affirmed.

James L. King and Harold King, both of San Bernardino, for appellant.

Brittan & Mack and Roland S. Woodruff, all of Bakersfield, for respondents.

GRIFFIN, Justice.

Plaintiffs obtained judgment against the appellant for $830.83 together with interest and costs. The sole question presented upon this appeal is the jurisdiction of the superior court over the subject matter of the action and is presented upon the judgment roll alone. The action was originally filed in the Superior Court of Kern County against the defendants Joe H. Gray and the General Petroleum Company of California, a corporation. Upon motion of defendant Gray, the action was transferred to the Superior Court of San Bernardino County. Thereafter the defendant General Petroleum Company of California answered. A first amended complaint was then filed. A demurrer was filed to the first amended complaint by appellant Gray on all the statutory grounds including no jurisdiction of the subject matter, and after being duly argued and presented was overruled. Thereafter an answer and pleading denominated a counterclaim was filed by the defendant Gray. In due time the case came on for trial on the first amended complaint and the answers and so-called counterclaim. At the conclusion of plaintiffs' case a nonsuit was granted as to the defendant General Petroleum Company of California, a corporation. At the conclusion of the trial the court permitted the plaintiffs to file an amended and supplemental complaint to conform to the evidence, and thereafter entered its findings and judgment as above mentioned.

The allegations of the first amended complaint, in effect, are that the plaintiffs were the owners of certain premises in the town of Barstow, San Bernardino County, upon which was located an automobile service station; that on August 15, 1938, the plain-

tiff leased the service station to the defendants and that the defendants promised and agreed to pay plaintiffs the sum of 1½ cents per gallon for all gasoline sold through the service station, said sum being payable monthly on the 15th day of each month from and after August 15, 1938, for a period of five years; that the defendants took possession of the premises and thereafter were in possession and operating the service station; that they failed and refused to pay plaintiffs the said sum due for gasoline sold in the service station by the defendants and that as a result thereof there had become due from the defendants to the plaintiffs the sum of $500 by virtue of the terms of the lease. Thereafter follows the usual allegation of demand and the failure to pay the sum. The concluding paragraph prays for judgment against the defendants for the sum of $500, together with interest and costs. The answer of Gray admits the ownership of the property by the plaintiffs, but denies generally and specifically that the premises were ever leased to him or that he ever agreed to pay the sum of 1½ cents per gallon for gasoline sold at the service station for a period of five years or any other period; denies that he, Gray, ever entered into or took possession of the premises or operated the service station; denies that he is indebted to the plaintiffs in the sum of $500 or in any sum at all. The answer also affirmatively alleges that plaintiffs were in possession of the premises and operating the service station; that the defendant Gray was selling gasoline and oil to the plaintiffs and delivering the same to the plaintiffs at the service station and that the plaintiffs had been paying the defendant for the gasoline and oil as the same was delivered to the service station. Included in the answer is what is designated a "third and separate defense and by way of counterclaim." This portion of the answer affirmatively alleges ownership of the premises by the plaintiffs and affirmatively alleges that on August 15, 1938, the plaintiff leased the premises to Gray for a period of five years; that Gray is ready, able and willing to enter upon and take possession of the premises but that the plaintiffs have refused and still refuse to deliver the premises to the defendant; that ever since the date of the lease the plaintiffs have been occupying the premises and have been renting a portion thereof to various and sundry persons unknown to the defendant Gray for amounts of money unknown; and that the plaintiffs have been operating the service station. This is followed by an allegation that the plaintiffs have refused to account for any amounts received by them from the rental of the premises and for moneys received in the operation of the service station, and that the amounts so received by plaintiffs are unknown to defendant; that the amounts so received by plaintiffs, less an amount for rental, are due, owing and unpaid to the defendant Gray. Thereafter follows a prayer that the plaintiffs recover no judgment under their complaint; that an accounting of all moneys received by the plaintiffs through operating the service station and auto court or camp ground since the date of the lease be had in order to determine the amount due the defendant Gray; that he have judgment for such amount; that possession of the premises be delivered to him; and for court costs. The court found in all respects in favor of plaintiffs and respondents and further found that the allegations of defendant and appellant's counterclaim were untrue.

It is conceded that San Bernardino township is one having a Class A justice's court, as defined in section 81 of the Code of Civil Procedure, and its original jurisdiction is defined by section 112 of the Code of Civil Procedure. Subdivision (a) of section 1 thereof provides that such justice's courts shall have original jurisdiction of civil actions in all cases at law in which the demand or the value of the property in controversy amounts to $1,000 or less, except *cases at law which involve the title or possession of real estate.* Subdivision (d) thereof provides that such courts shall have original jurisdiction in cases of equity, when pleaded as defensive matter in any case at law of which they have jurisdiction.

[1] It is immaterial in the present action whether appellant was the party who moved to transfer this action to the Superior Court of San Bernardino County. If that court to which the action was transferred did not have original jurisdiction, jurisdiction could not be conferred on that court by consent or by motion. Van Horn v. Justice's Court, 216 Cal. 235, 242, 13 P.2d 704; Schwartz, Inc., v. Burnett Pharmacy, 112 Cal.App., Supp., 781, 295 P. 508.

The question to be determined is whether or not under the pleadings the Superior Court of San Bernardino County had original jurisdiction, and it is admitted by respondents that if the case appealed from comes within the jurisdiction of the justice's court as set forth in the above-men-

tioned subdivisions of section 112 of the Code of Civil Procedure, the appellant should prevail in this appeal and it should be adjudged that the superior court was without jurisdiction to try this case.

Respondents contend (1) that the complaint sets forth an action at law which involves the possession of real estate; (2) that the cross-action filed by the defendant sets forth an action which involves the title or possession of real estate; (3) that the cross-action of defendant sets forth an action which seeks affirmative equitable relief; and (4) that if any error was committed by the trial court such error is not prejudicial to the appellant within the meaning of section 4½ of article VI of the Constitution.

[2, 3] There have been numerous decisions of the supreme and appellate courts in this state interpreting the language of subdivision (a) of section 112 of the Code of Civil Procedure and the phrase "cases at law which involve * * * possession of real estate." In O'Meara v. Hables, 163 Cal. 240, 124 P. 1003, it was said: "The possession here contemplated is, as we have said, either a possession akin to title, as in ejectment, trespass, or title by adverse possession, where possession is of the essence of the right sought to be established, or it is a possession which, for some other good reason, becomes a direct and material fact and issue in the case, 'upon which the plaintiff relies for a recovery, or the defendant for a defense.' Holman v. Taylor [31 Cal. 338]." See, also, Copertini v. Oppermann, 76 Cal. 181, 18 P. 256; Hart v. Carnall-Hopkins Co., 101 Cal. 160, 35 P. 633; Dungan v. Clark, 159 Cal. 30, 112 P. 718. The next step is whether the present complaint fits within the general concepts of that interpretation. Respondents alleged, in their first amended complaint, not only title to the real property in them, but directly averred possession in appellant. Respondents' right or cause of action depended on possession being established in appellant. The consideration for the lease is 1½ cents per gallon for all gasoline sold by appellants while in possession of the service station. It becomes apparent that it would be necessary for appellant to be in possession for any consideration to accrue under the lease. It would appear, therefore, that possession would be a fact necessary to be determined in order to decide the case.

In Morrissey v. Morrissey, 191 Cal. 782, at page 784, 218 P. 396, at page 396, it was said in discussing the jurisdiction of the justice's court: "The issue of ownership is tendered by the plaintiff, who conceives that his right of action is based wholly or partly upon it. The jurisdiction of the superior court is thus determined, and cannot await upon the contingency that the answer of the defendant may admit the allegation." (Citing cases.) "This is true, even if the issue is incidental. On the other hand, if such a complaint be filed in the justice's court, and an answer be filed which makes no traverse of the allegation of title or possession of the real property, so that no question of such title or possession is involved, the justice's court will have jurisdiction of the action. Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 P. 196. If the issue of title or possession is so involved that it must be decided in order to determine the case, the superior court has original jurisdiction of the action, whether the involution may be said to be merely incidental or not."

On the basis of the complaint alone, it fairly appears that possession of the real estate is a direct and material fact and issue in the case, upon which the plaintiff relies for a recovery or the defendant for a defense and would come within the exception as stated in subdivision (a) of section 112 of the Code of Civil Procedure. Irrespective of the correctness of this reasoning, the appellant put the question of possession directly in issue by his answer and based his defenses mainly on that question. In addition thereto, he injected a prayer *to be put in possession of the real property* under the lease. This prayer was in the nature of an action of *ejectment*.

[4] In Camarillo v. Fenlon, 49 Cal. 202, 206, it was said: "If a landlord, having the possession, refuses to give it to a lessee, according to the agreement, he renders himself liable to an action of ejectment."

An action for ejectment, i. e., to recover the possession of real property, is within the original jurisdiction of the superior court. Article VI, sec. 5, Constitution of the State of California.

[5] Appellant also sought an accounting based upon the theory that he was ejected and deprived of his right of possession. In Brix v. People's Mutual Life Insurance Co., 2 Cal.2d 446, 41 P.2d 537, it was determined

that the superior court had no jurisdiction of plaintiff's cause of action but it was held that where the matters pleaded in the cross-complaint were such as could be litigated only in the Superior Court, the filing of the cross-complaint gave that court jurisdiction over the subject-matter of the controversy. In Cloverdale Union High School District v. Peters, 88 Cal.App. 731, 264 P. 273, 276, the court quotes with approval the following statement of law upon this subject by the Supreme Court of the United States, Merchants' Heat & L. Co. v. James B. Clow & Sons, 204 U.S. 286, 27 S.Ct. 285, 51 L.Ed. 488: "By setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and by invoking submitted to it. * * *"

Regardless of the ruling of the trial court on the demurrer to the first amended complaint on the question of lack of jurisdiction in the superior court, the relief sought by appellant gave the superior court jurisdiction over the subject matter of the controversy between the appellant and the respondents and, having acquired jurisdiction for any purpose, the trial court correctly exercised it for the purpose of settling the rights of the parties to the action. Tennesen v. Prudential Insurance Co., 8 Cal. App.2d 160, 163, 47 P.2d 1066.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.



49 Cal.App.2d 195

CHAPMAN CHINCHILLA SALES CO. v. JOHNSON, State Treasurer.

Civ. 6723.

District Court of Appeal, Third District, California.

Jan. 16, 1942.

Licenses ⇐15(1)

Sales of live chinchillas for breeding purposes only are not "sales for resale", but "retail sales" or "sales at retail" within Retail Sales Tax Act, defining "retail sale" or "sale at retail" as sale for any purpose other than for resale, though pelts of animals sold and of their offspring are sold by purchasers in form of fur coats. Gen.Laws 1937, Act 8493.

See Words and Phrases, Permanent Edition, for all other definitions of "Retail Sale", "Sale at Retail" and "Sale for Resale".

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Chapman Chinchilla Sales Company against Charles G. Johnson, as State Treasurer, to recover a sum paid by plaintiff as a retail sales tax. Judgment for defendant, and plaintiff appeals.

Affirmed.

W. Wellington Farrow, of Inglewood, and Snow & Forster and Richard H. Forster, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and H. H. Linney and Adrian A. Kragen, Deputies Atty. Gen., for respondent.

TUTTLE, Justice.

This action was brought to recover the sum of $768 paid by plaintiff as a retail sales tax. Judgment went for defendant, and plaintiff now appeals therefrom.

The facts are undisputed, and the salient parts thereof appear in the following portion of the findings: "Plaintiff was and is a seller of small fur-bearing animals known as Chinchillas, and is engaged in the business of selling at retail, in California, said Chinchillas; that plaintiff sells, in California, said Chinchillas to purchasers who purchase them for the sole purpose of breeding them and multiplying their progeny."

It was also stipulated that the only use to which said animals could be put was for bearing fur and reproducing their kind, and that during the month of June, 1939, for which period the tax was levied, the sales made by plaintiff were of live Chinchillas to breeders for breeding purposes only.

The question presented arises out of a construction of the Retail Sales Tax Act, section 2c, Stats. 1933, page 2599; Deering's General Laws, Act 8493, which provides in part as follows: "A 'retail sale' or 'sale at retail' means a sale to a consumer or to any person for any purpose

other than for resale in the form of tangible personal property * * *."

It is the contention of appellant that the sale here does not come within the provisions of said act, for the reason that a sale of such animals was for breeding purposes only; hence, there was a sale for the purpose of resale, and such transactions were not subject to the tax. In support of its position, appellant insists that the retail sale occurs when the pelts of the animals and the pelts of the offspring are sold in the form of a fur coat. They urge that "with reference to the sale of animals for breeding purposes only, it is clear that the true value of such animals is contained in the sperm and ova in the animal at the time of sale, and that the purchase of the animal with the sperm and ova in them is therefore a purchase for the purpose of resale." Respondent has the following answer to the foregoing contention: "Appellant's argument that a sale of Chinchillas for breeding purposes is a sale for resale is on the theory that the Chinchillas are not the thing sold by appellant but that the sperm and ova of the animal are sold and this eventually results in the birth of a Chinchilla which is sold. The weakness of appellant's theory is apparent when we consider that without the live animals there cannot be any reproduction. The reproduction organs cannot be separated from the animals and in fact these organs are not resold but their product is resold, not once, but many times. The value of the animals is in part due to their ability to beget offspring frequently. If we follow appellant's theory we would have to find that the reproductive organs entirely left the parents and became part of the offspring."

We think the latter view is the correct one. The animals are purchased for a use, to-wit, the production of Chinchillas, and not for resale. The fact that they have within them the power to create other Chinchillas does not make the sale of the original Chinchillas a sale for resale. The question involved is the purpose of such a sale. It is not contended that the purchaser ever intends to sell the identical animal to others. The rather ingenious argument of appellant that a sale of the offspring is a resale of a part of the parents, conceding that it is based upon a scientific truth, cannot prevail over the admitted fact that a resale of the identical animals was not contemplated by the purchaser.

The case of Kirk v. Johnson, 37 Cal.App. 2d 224, 99 P.2d 279, 281, while not directly in point, tends to bear out the contention of respondent upon the controlling factor of the "purpose" of the sale, as that word is used in the act. We there said:

"We are of the opinion dairy cows which are bought for the primary purpose of first using them in a dairy business to produce milk for the market during the period of their usefulness for that purpose, which continues for an average of over two years' time, may not be said to have been purchased for 'resale in the form of tangible personal property', merely because the owner intends to market them as beef, when their usefulness for the original purpose for which they were acquired has ceased. Under the circumstances of this case the dairy cattle were not bought 'for resale'. It is apparent that the chief purpose for which they were purchased was not for resale, but they were to be used for the benefit of the owners in conducting their dairy businesses as long as they were profitable for that purpose. The purchases of cattle in this case do not come within the exception of the Retail Sales Tax Act found in section 2(c) thereof, and the sales are therefore not exempt from taxes on that account.

"Nor are the sales of cattle exempt from taxation under the provisions of section 5(e) of the act, merely because they produce milk or for the reason that they may finally be converted into beef, which by-products are excepted from taxable sales. It is the sale of milk and not the source from which it is produced that is exempt; just at it is the sale of 'eggs and egg products' and not the hens that lay the eggs which are exempt from taxes. The exemption clause does not mention cattle or chickens. We must assume, from the failure to do so, that the legislature intended to exempt from taxation only the by-products of cattle and poultry, and not the live animals or birds."

The sales come within the definition of the act, and the judgment is therefore affirmed.

THOMPSON, Acting P. J., and STEEL, Justice pro tem., concurred.

HUNTER et al. v. HUNTER et al.

Civ. 6624.

District Court of Appeal, Third District, California.

Jan. 13, 1942.

Hearing Granted March 12, 1942.

1. Mortgages ⇐25(6)

In action by son and his wife to cancel note and trust deed executed to deceased father and his wife, which son and wife claimed they had executed merely to protect the son's parents in case son and wife predeceased the father after father had bought land for son and wife to induce them to live near the son's parents, evidence supported judgment canceling note and trust deed on ground that there was no consideration therefor.

2. Mortgages ⇐25(1)

Where parents, to induce son and wife to live near them, furnished son $7,000 to buy land adjoining parents' land and son and wife moved from another part of the state and son assisted parents in care of their property up to time of demise of father, there was "consideration" for vesting of title in such land in son and wife and for payment of purchase price by parents so that note and trust deed executed by son and wife to the father in order to secure parents in event death of son and wife should predecease the father was without consideration.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

3. Mortgages ⇐25(1)

Where wife participated in transaction whereby husband paid for land taken in name of son and daughter-in-law adjoining parents' land and permitted son and daughter-in-law to believe they were being vested with title to property without having to repay the purchase price, fact that purchase price was community property and that wife did not consent in writing to transaction did not preclude cancellation of note and trust deed executed by son and daughter-in-law to father for lack of consideration.

Appeal from Superior Court, Santa Clara County; Raymond McIntosh, Judge.

Action by C. E. Hunter and another against Lydia Hunter and another to cancel a note and trust deed. From a judgment for plaintiffs, defendants appeal.

Affirmed.

C. E. Luckhardt, of San Jose, for appellants.

Grattan, Kirby & Pasquinelli and Owen D. Richardson, all of San Jose, for respondents.

MONCUR, Justice pro tem.

This is an appeal from a judgment in favor of respondents and against appellants quieting title of respondents in and to certain real property in the County of Santa Clara, State of California, cancelling a note executed by respondents to F. A. Hunter, father of respondent C. E. Hunter, and cancelling a trust deed executed and delivered by respondents to F. A. Hunter and appellant Lydia Hunter to secure the payment of said note.

Respondents C. E. Hunter and Maud M. Hunter are husband and wife. F. A. Hunter was the father and appellant Lydia Hunter is the mother of respondent C. E. Hunter, and appellant Grandin H. Miller was named as trustee in the trust deed ordered cancelled by the judgment. During all of the times of the events out of which this action arises F. A. Hunter was living. He died in August, 1935. At the beginning of the events out of which this action developed respondents were living at Browns Valley, Yuba County, California, and F. A. Hunter and appellant Lydia Hunter lived on a ranch in Santa Clara County. The senior Hunters were well along in years and desired to have their son near them for the purpose of helping to farm and manage the ranch upon which they resided, and to do away with the long trips and traffic dangers in going north to visit the son and daughter-in-law, it being their practice to go to the northern part of the state where respondents resided to visit them about twice each year.

For the purpose of inducing respondents to dispose of the property upon which they were living and to come and reside near where the senior Hunters resided, the latter offered to purchase for respondents a piece of land upon which they could reside and make their home. Respondents did not desire to make the move south, although they were desirous at the time of disposing

of the property which they had so that they could move to San Francisco where respondent C. E. Hunter had the opportunity of securing a good position. Respondent wife particularly objected to making the move requested by the parents of her husband.

The negotiations continued over a period of time. Finally F. A. Hunter succeeded in finding a place, consisting of thirty-five acres, adjoining the property upon which he and his wife resided, which could be purchased for the sum of seven thousand dollars. This property had no suitable home upon it and was planted only with young trees which would not bear for several years. The condition of this place was one of the grounds upon which respondent Maud Hunter based her objections, as she was averse to leaving her comfortable home where they were then living and to moving upon a place where there were no adequate buildings and where the property for a considerable period would not be income-producing. Eventually respondents were persuaded to accept the proposition and consented to move to Santa Clara County. They succeeded in trading their property in Yuba County for property in Glendale.

F. A. Hunter and respondent C. E. Hunter then proceeded to arrange for the purchase of the thirty-five acre tract involved in this action, which was sold at a trustee's sale. F. A. Hunter gave to respondent son a check for seven thousand dollars for the purpose of purchasing the property. Appellant Lydia Hunter assisted in the drawing of this check. The property was purchased and a deed was executed to respondents. Throughout all of these proceedings appellant Lydia Hunter was present at, and participated in, many of the conversations between the parties in connection with the transaction. The deed to the property was executed and delivered to respondents on or about the 11th day of November, 1932. On or about the 11th day of February, 1933, respondents, without previous discussion with F. A. Hunter and appellant Lydia Hunter, or with either of them, visited appellant Grandin H. Miller, an attorney, and requested him to prepare an instrument which would enable the senior Hunters to secure title to the property in the event that anything should happen to respondents, the reason given by respondents for this action being that they desired to protect the F. A. Hunters in the event that they should predecease F. A. Hunter. A note for seven thousand dollars, bearing four per cent interest, and a deed of trust upon the property to secure its payment was prepared by Mr. Miller, in which he was named trustee, and executed by respondents and delivered to F. A. Hunter and appellant Lydia Hunter.

After moving from Browns Valley to Santa Clara County respondents resided a part of the time with the senior Hunters and a part of the time upon the property involved herein, and respondent C. E. Hunter assisted his parents in the management and care of their property, and during a portion of the time had a lease upon the ranch of his parents.

Shortly after F. A. Hunter's death respondents requested Lydia Hunter to execute to them a release of the trust deed so that it would not appear as an incumbrance against the property. At first appellant Lydia Hunter was willing to execute such release but later refused to do so. This action was then commenced.

In view of the conclusion we have reached, the foregoing is deemed a sufficient statement of the facts. The amended complaint sets forth several counts, the first of which is in the usual form in actions to quiet title to real property, and alleges that plaintiffs are the owners, in the possession, and entitled to the possession of the real property involved. Another count alleges that the said note and trust deed were executed without consideration. In its findings the trial court found in accordance with the allegations of the complaint and judgment was entered in conformity with the findings.

[1] There are many sharp conflicts in the evidence. It is the position of the appellants that there was not a gift of the thirty-five acre tract of land involved herein to respondents but that the seven thousand dollar check delivered to respondents for the purchase of the property was a loan or advancement; that the note was given to evidence the loan; and the deed of trust was executed and delivered for the purpose of securing its payment. Appellants contend that there was not sufficient evidence in the record to support the findings and conclusions of the trial court and the judgment made and entered thereon. In connection with this contention, in the brief of appellant it is stated: "The appellant realizes that if there is any evidence in the record that may sustain the respondents'

position upon such a question of fact as is squarely placed before the reviewing court on the position as outlined above, that the appellants cannot hope to prevail in their appeal."

It is urged by appellants that in this particular case a much greater burden of proof is required of plaintiffs than is the case in the ordinary civil action. For the making and execution of the note and trust deed a consideration is presumed, and where a gift is first claimed subsequently by the donee, the burden of proof to be sustained by the donee is far and away greater than the proof ordinarily required. The case of Sullivan v. Shea, 32 Cal.App. 369, 162 P. 925, 926, in support of this contention is cited. Therein it is said: "It is also said to be the rule that where a claim of gift is asserted after the death of the donor, every element necessary to constitute a gift must be sustained by explicit and convincing evidence. In support of this rule, in the case of Whalen v. Milholland, 89 Md. [199], 211, 43 A. [45], 50, 44 L.R.A. 208, the court said: 'Mindful of the facility with which, after the alleged donor is dead, fraudulent claims of ownership may be founded on pretended gifts of his property asserted to have been made whilst he was living, it is but a salutary precaution which demands explicit and convincing evidence of every element needed to constitute a valid donation whether it be a donation inter vivos or mortis causa. Even then, fraudulent claims may prevail, but the rigid requirement of the clearest proof will at least diminish the number.' To the same effect see Davis v. Davis, Sup., 104 N.Y. S. 824; De Puy v. Stevens, 37 App.Div. [289], 293, 55 N.Y.S. 810; Denigan v. Hibernia Sav. & Loan Soc., 127 Cal. [137], 141, 59 P. 389; Lehr v. Jones, supra [74 App.Div. 54, 77 N.Y.S. 213]."

The statement of facts hereinbefore set forth is, in the main, based upon the testimony of respondents. Their testimony was amply corroborated by testimony of other witnesses who were present at some of the conversations of the parties and one of whom actually participated in the consummation of the transaction. The duty devolved upon the trial court, in view of the conflicts and the burden of proof cast upon the respondents in this case, to determine the facts. In its decision the court found that respondents had sustained the burden cast upon them by the explicit and convincing proof required of them. The questions involved were those of fact to be passed upon by the trial court after consideration of all of the evidence and the inferences to be drawn therefrom. Sullivan v. Shea, supra, 32 Cal.App. at page 372, 162 P. 925. We have carefully reviewed all of the evidence adduced at the trial as shown by the transcript on appeal and we cannot say that the facts found are not based upon explicit and convincing evidence sufficient to support the decision of the court and judgment entered thereon.

[2] Further, it appears that, under the facts necessarily found by the trial court, there was consideration for the vesting of title in the thirty-five acre tract in respondents and for the payment by the senior Hunters of the seven thousand dollars as the purchase price. This consideration consisted of the change in the circumstances of respondents at the request and importunities of the senior Hunters and the duties, requirements, and acts resulting therefrom and their conformance therewith up to the time of the demise of F. A. Hunter.

[3] There is also the contention that the seven thousand dollars paid was the community property of F. A. Hunter and appellant Lydia Hunter, and that the latter did not consent, in writing, to the transaction. It is not questioned that the husband may not give away or transfer, without adequate consideration, the community property of the spouses without the written consent of the wife. However, if we assume, for the purpose of this contention only, that the transaction was a gift, nevertheless, appellant Lydia Hunter participated therein. She was at all times familiar with, and participated in what was being done and permitted respondents to believe that they were to be vested with title to the property involved without having to repay the seven thousand dollars or interest thereon. Therefore, we are satisfied that, there being consideration moving between the parties, some of which benefit at least she received, and that she permitted the transaction to be consummated without objection, this contention is untenable. It follows that, as to the note and deed of trust, there was no consideration therefor, the execution and delivery thereof being intended only for the purpose of securing the senior Hunters in the event the death of respondents should precede that of F. A. Hunter. It is not claimed that there were any rul-

ings of the trial court which were prejudicially erroneous.

The facts as found by the trial court being sufficient to support the judgment, it is ordered that the judgment be, and it is hereby affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.



48 Cal.App.2d 685

KNOUSE v. SHUBERT et al.

Civ. 12597.

District Court of Appeal, Second District, Division 1, California.

Dec. 23, 1941.

1. Trusts ⇐72

In absence of showing of fraud or undue influence, a "resulting trust" cannot be predicated on a voluntary and unconditional grant of real estate.

See Words and Phrases, Permanent Edition, for all other definitions of "Resulting Trust".

2. Trusts ⇐86

Where realty was transferred to niece of plaintiff's deceased wife at request of plaintiff who paid purchase price, a presumption of a "resulting trust" in favor of plaintiff arose, but presumption was rebuttable, and oral declarations of plaintiff's intention to make gift to transferee were admissible to show plaintiff intended transferee should have beneficial interest in property, regardless of whether declarations were made before, at time of, or subsequent to transfer, and notwithstanding statute of frauds. Civ.Code, § 853.

3. Trusts ⇐88

As a resulting trust arises from parol evidence, it may be rebutted by parol evidence. Civ.Code, § 853.

4. Appeal and error ⇐1011(1)

Findings of trial court in a nonjury case on irreconcilably conflicting evidence are conclusive on appellate court.

5. Gifts ⇐49(4)
Trusts ⇐89(3)

Evidence was sufficient to sustain trial court's finding that property was deeded to defendant as a gift, and that therefore "resulting trust" did not arise. Civ.Code, § 853.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Q. A. Knouse against Edwin Marion Shubert and another, to establish a trust in real property and for a reconveyance thereof, and for an accounting of rents collected therefrom. From a judgment for defendants, and from orders denying motions for a new trial and to vacate the judgment, plaintiff appeals.

Judgment affirmed and appeal from orders dismissed.

Wm. J. Hanlon, of Los Angeles, for appellant.

Dempster & Dempster and J. H. Creighton, all of Los Angeles, for respondents.

YORK, Presiding Justice.

This is an action to establish a trust in real property and for a reconveyance thereof, as well as for an accounting of rents collected therefrom. At the conclusion of trial before the court sitting without a jury, judgment was rendered in favor of defendants. This appeal is taken from such judgment on the ground that there is an utter lack of evidence to support it.

An examination of the record herein discloses that respondent Bernice Muriel Shubert is a niece of appellant's wife and after the death of the latter on January 4, 1934, Mrs. Shubert went to reside with appellant and his aged mother where she remained until October, 1937, doing the housework, including the laundry, collecting rents from properties owned by appellant and driving him around in his automobile while he transacted his business.

During this period said respondent obtained a divorce from her husband, whose name was Palmer, and took her maiden name of Edwards, later marrying the respondent Edwin Marion Shubert.

Three pieces of real estate, referred to herein as Alta Vista property, the 77th Street and the 107th Street properties, are involved in this appeal, two other parcels having been eliminated by stipulation during the trial, and the defendants Leask dismissed from the action.

The 77th Street and 107th Street properties were conveyed by appellant to respondent under the name of B. Edwards on January 4, 1936. The Alta Vista property was conveyed to her under the name of B. Palmer on May 14, 1935, by one Minnie Jacobs, the record owner of said parcel which theretofore had been given as security for a loan in favor of appellant. This conveyance was made by Mrs. Jacobs at the request of appellant and recited a consideration of $300.

Appellant claims that he frequently deeded real estate to respondent Bernice Shubert with the oral understanding that she should deed it back to him when requested, and it is conceded that such agreement was carried out with respect to properties other than the parcels which form the basis of the instant litigation. It is contended by appellant that these three parcels were conveyed to said respondent without consideration, that she has deeded them to herself and her husband as joint tenants, and that she holds them in trust for the use and benefit of appellant. There is no claim made of a fraudulent intent on the part of said respondent.

Respondents set up in their answer, among other things, the separate defenses: (1) That appellant made the "deeds to said Bernice Muriel Shubert for the purpose and with the intent to hinder, delay and defraud the creditors of said plaintiff"; and (2) that said property "was deeded to her as a gift, plaintiff stating to her on many occasions that he intended that she should have a good part of his property."

In support of the latter defense, respondent Bernice Muriel Shubert testified as follows:

"Oh, he told me he was remembering me in his will, he was going to give me a portion of what he had. About the property, the Alta Vista property, he told me he wanted me to have that for my home, and the other two properties, there was one on 77th Street and one on 107th Street, he told me he wanted me to have those in case anything happened that I would not be able to make my living, that the income from those would take care of me." Also, that she was out of the city when the Alta Vista property transaction took place and when she returned appellant gave her the deed and told her what it was; that he gave her the 77th Street and 107th Street properties a few days before her marriage to respondent Edwin Marion Shubert; that she had not refused to deed back to appellant any property which he told her he expected to take back.

The document which conveyed to respondent the 77th and 107th Street parcels reads as follows:

"In consideration of Ten Dollars Q. A. Knouse does Hereby Grant to B. Edwards all that Real Property situate in the City of and County of Los Angeles, State of California, described as follows:

"Lot 10 in Block 21 of Tract 5107 as per map recorded in Book 54 pages 67–68–69 and 70 of Maps, Records of said County;

"Lot 25 Block 14 of Tract 6110 as per map recorded in Book 78 Pages 59 and 60 of Maps, Records of said County.

"Witness my hand this 4" day of Jan. 1936.

"(Signed) Q. A. Knouse"

Although appellant alleges a lack of consideration therefor and an oral promise to reconvey the real estate conveyed thereby, there is nothing on the face of the document itself indicating it was anything other than an unconditional grant of the fee simple title to the lots therein described.

In Smith v. Butler, 84 Cal.App. 90, at page 94, 257 P. 581, at page 582, the court stated, quoting from Tillaux v. Tillaux, 115 Cal. 663, 668, 47 P. 691: "A deed by the owner of land duly signed and acknowledged by him and delivered to the grantee, conveying the land to the latter in fee simple, is one of the most solemn of civil acts. It is not a thing to be played with, or reclaimed at pleasure, as a hawk in falconry. It is not void on account of either want or failure of consideration; nor does want or failure of consideration raise a resulting trust. Leading authorities declaring this principle are cited in the opinion of the Supreme Court of Michigan in Jackson v. Cleveland, 15 Mich. 94, 90 Am.Dec. 266. The court, among other things, say: 'A voluntary deed, which purports to be for the beneficial use of the grantee, and which was made deliberately and without mistake or contrivance, does not differ from any other deed in binding the grantor, and can only be attacked by those having superior equities which the grantor had no right to cut off—as creditors and the like. * * * This doctrine of resulting trusts has never been applied to mere voluntary conveyances. Mere want of consideration has never raised resulting trusts out of these.' * * * 'A court of chancery has never ventured,

against the express will of the donor appearing on the face of the deed, "to take the use from the donee, and give it back to the donor" ' ". It is also said in the cited case, quoting from Devlin on Deeds, section 834: "But parol declarations cannot be received with this object, for in these cases there exists no resulting or presumptive trust, and the admission of such evidence would be for the purpose of contradicting the written instrument, and establishing a trust in the very teeth of the statute of frauds."

[1] In the absence of a showing of fraud or undue influence, it would appear from the foregoing that a resulting trust cannot be predicated upon a voluntary and unconditional grant of real estate.

[2, 3] Turning to the Alta Vista property which was transferred to respondent Bernice Muriel Shubert by Minnie Jacobs at the request of appellant, who paid the purchase price thereof, this transaction raises the presumption of a resulting trust in favor of appellant under the provisions of section 853 of the Civil Code. However, such presumption is rebuttable and "oral declarations of the payor's intention to make a gift to the transferee are admissible to show that the payor intended that the transferee should have the beneficial interest in the property, even though the property transferred was an interest in land and the Statute of Frauds is in force. Such declarations are admissible, whether made before or at the time of or subsequent to the transfer. As the resulting trust arises from parol evidence so it may be rebutted by parol evidence." Restatement of the Law—Trusts, section 441, Comment b, p. 1348.

[4, 5] A careful examination of the record and a thorough review of the testimony produced on behalf of the parties herein reveal that, while there is evidence in favor of appellant's theory of the case, there is also ample evidence to support the findings of the trial court upholding respondents' contentions. Such testimony, in line with the contradictory statements and inconsistent claims of the parties, is irreconcilably conflicting. That being so, "the findings of the trial court are conclusive. 'The rule adverted to above, that the jury [or the court sitting without a jury] is ordinarily the sole judge of the weight of evidence and credibility of witnesses, applies with great force in a case of conflict. * * *' (10 Cal.Jur. pp. 1171, 1172, sec. 382, 383, citing (authorities) * * *)." McKean v. Alliance Land Co., 200 Cal. 396, 398, 253 P. 134.

The judgment is affirmed. The appeals from the orders denying motions for new trial and to vacate the judgment are dismissed.

DORAN and WHITE, JJ., concurred.



48 Cal.App.2d 696

WIGHT v. ROHLFFS.

Civ. 11704.

District Court of Appeal, First District, Division 1, California.

Dec. 24, 1941.

Hearing Denied Feb. 19, 1942.

1. Fraudulent conveyances ⇐64(1)

Under provision of Civil Code invalidating as to existing creditors any voluntary transfer or encumbrance of property without valuable consideration by a party while insolvent or in contemplation of insolvency, the grantor's intent is immaterial. Civ.Code, § 3442.

2. Fraudulent conveyances ⇐57(1)

In determining whether person alleged to have made fraudulent conveyance was then "insolvent", only such assets as were subject to court process at the time of making the alleged fraudulent conveyance may be considered. Civ.Code, §§ 3442, 3450.

See Words and Phrases, Permanent Edition, for all other definitions of "Insolvent".

3. Fraudulent conveyances ⇐272, 300(1)

In action to set aside alleged fraudulent conveyance under statute invalidating as against creditors voluntary transfers without valuable consideration while insolvent or in contemplation of insolvency, a showing by complaining creditor that there was no consideration makes out a prima facie case, and burden is then shifted to the defendant to show that the grantor had sufficient assets to pay his debts. Civ.Code, § 3442.

4. Executors and administrators ⇐129(3)

In action to set aside alleged fraudulent conveyance by decedent, where establishment

of contention that decedent was solvent at time of conveyance depended upon a showing that there was money owing to him from his brother's estate, testimony of decedent's son that decedent had a third interest in the income of the estate was insufficient to establish that, on date of making of conveyance, there was anything which was subject to court's process due decedent from brother's estate. Civ.Code, §§ 3442, 3450.

5. Appeal and error ⇐891

In action involving question of whether decedent at time of making alleged fraudulent conveyance was entitled to any money from his brother's estate, where defendant had failed to meet burden of showing that anything was due, the plaintiff's application, made after filing of briefs on appeal and prior to oral argument, for leave to take additional evidence on that point was dismissed.

6. Appeal and error ⇐843(1)

Although insufficiency of evidence on one of issues required reversal of judgment for defendant, another of plaintiff's points was considered by reviewing court where it appeared that point would likely arise on retrial and plaintiff would be entitled to a directed judgment on appeal if his contention was correct.

7. Fraudulent conveyances ⇐241(1)

Where resident debtor after contracting debts within state makes voluntary conveyance without valuable consideration of property within state, rendering himself insolvent, his creditors are not compelled to go into distant states to collect their debts from debtor's property there, but are entitled to have the gift conveyance set aside. Civ.Code, § 3442.

8. Executors and administrators ⇐57

In determining whether decedent, who had allegedly made a fraudulent conveyance, was then "insolvent" within statute invalidating as to existing creditors any voluntary transfer without valuable consideration by an insolvent, decedent's alleged interest in his brother's estate in Massachusetts was immune from process of the local jurisdiction and could not be considered as an asset of decedent. Civ.Code, §§ 3442, 3450.

9. Executors and administrators ⇐57

The fact that, according to an account filed in decedent's estate in 1932, assets were then sufficient to pay amount owing to plaintiff as of date on which decedent allegedly made a fraudulent conveyance was immaterial in determining whether decedent was solvent on that date, where order settling the account was subsequently set aside and assets in decedent's estate were insufficient to liquidate plaintiff's claim after establishment thereof in 1937. Civ.Code, §§ 3442, 3450.

10. Appeal and error ⇐1122(2)

Since action to set aside an alleged fraudulent conveyance was one wherein a trial by jury was not a matter of right, the reviewing court was authorized by statute to make findings based upon evidence adduced at the trial contrary to the ultimate finding made by the trial court. Code Civ.Proc. § 956a.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Wilder Wight against Alma Rebecca Rohlffs, as executrix of the estate of Emma Cahill, to set aside a gift deed made by Patrick Cahill. From a judgment for the defendant, the plaintiff appealed, and on the appeal filed an application for leave to take additional evidence.

Application dismissed and judgment reversed with directions.

H. Raymond Hall, of Oakland, for appellant.

Elliott Johnson and John L. Reith, both of Oakland, for respondent.

KNIGHT, Justice.

Plaintiff appeals from a judgment in favor of defendant in an action to set aside a gift deed made by Patrick Cahill about ten months prior to his death and recorded five weeks after he died.

[1] The action was brought under the authority of Civil Code sections 3439 and 3442, which are now merged in the Uniform Fraudulent Conveyance Act. Stats.1939, Chap. 329, p. 1667. Section 3439 declared void as against creditors transfers of property made with intent to delay or defraud any creditor or other person of his demands; and section 3442 provided: "* * that any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors." Plaintiff was admittedly a creditor of Cahill's at the time the latter transferred his property; and defendant concedes that the conveyance under attack

was made and given voluntarily and without any valuable consideration of any kind. But at the trial defendant denied that said conveyance was made with intent to defraud, and claimed that by the making thereof Cahill did not render himself insolvent. The trial court held in defendant's favor on both issues. It is well settled that if the conditions set forth in said section 3442 are present, the intent of the grantor is immaterial and the transfer, regardless of the actual intent, is void as to creditors. Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947, and cases cited therein. On this appeal plaintiff challenges the soundness of the conclusions reached by the trial court on both of the issues above mentioned, but his main attack is directed against the conclusion that by making said transfer Cahill did not render himself insolvent.

The action was instituted following the termination of previous litigation between plaintiff and defendant involving the financial transactions between Cahill and plaintiff, wherein two appeals were taken; and as shown by the decisions rendered on those appeals and by the record herein, the events which led up to the bringing of the present action were these: Prior to 1918 Cahill and plaintiff purchased 82 acres of encumbered land in San Joaquin County, Cahill supplying the larger portion of the purchase price. The land was cultivated to the growing of olives, and was purchased by Cahill and plaintiff for the purpose of subdividing it and selling the parcels at a profit. On account of plaintiff being incapacitated, Cahill was left in charge of the management and sale of the property, and on December 9, 1918, he executed an instrument declaring he held in trust for plaintiff a one-third interest in said property. Thereafter from time to time Cahill sold the various parcels and discharged the encumbrances. The last parcel was sold in 1929, and on May 3, 1930, Cahill made the gift deed in question to his wife, Emma Cahill, whereby he conveyed to her all real property of which he was the owner. The property was situate in Alameda County, and was of the value of over $30,000. The deed was acknowledged before Cahill's son, a notary, and left with his son to be recorded after Cahill's death. He died on February 25, 1931, and the deed was filed for record on April 3, 1931. Cahill's wife died on November 14, 1931; and the defendant, Alma Rebecca Rohlffs, a daughter, was appointed administratrix and executrix, respectively, of the Patrick and Emma Cahill estates.

Plaintiff was unaware that Cahill had sold all of the San Joaquin acreage until after Cahill's death, and thereupon he presented a claim against Cahill's estate. The claim was rejected, and plaintiff sued on the rejected claim and for an accounting. Judgment was given for the defendant, but the trial judge granted a new trial. The defendant appealed, and on plaintiff's motion, after a hearing, the appeal was dismissed. Wight v. Rohlffs, 137 Cal.App. 730, 31 P. 2d 419. A retrial of the action resulted in the rendition of a money judgment in plaintiff's favor, for the sum of $9,682.90, plus costs. The judgment was entered on June 5, 1936; the defendant appealed, and on September 30, 1937, the judgment was affirmed. Wight v. Rohlffs, 9 Cal.2d 620, 72 P.2d 142. The Patrick Cahill estate being without assets to satisfy any part of plaintiff's judgment, plaintiff on December 7, 1937, brought the present action against the defendant as executrix of the Emma Cahill estate to set aside said deed of gift. The trial court found that on May 3, 1930, the date of the making of the gift deed, Cahill owed plaintiff $6926.97, but as already stated held that by making said deed Cahill did not render himself insolvent. Accordingly judgment was entered for the defendant.

[2, 3] Section 3450 of the Civil Code declares: "A debtor is insolvent, within the meaning of this title, when he is unable to pay his debts *from his own means, as they become due.*" (Italics ours.) In determining the issue of a debtor's solvency under said section, in cases of this kind, it is held that only such assets as are subject to court process at the time of the making of the alleged fraudulent conveyance may be considered; and that even though "A man controlling property out of which he may voluntarily pay his debts, if he will, but which for any reason cannot be reached by process of law, and thus without his consent subjected to such payment, is nevertheless insolvent." Adams v. Prather, 176 Cal. 33, 167 P. 534, 538; 12 Cal.Jur., p. 1019. And as to the burden of proof, the defendant in her brief (pp. 11 and 12) concedes the rule to be that "* * * if, in a fraudulent conveyance case under section 3442 of the Civil Code, the complaining creditor shows that the deed was executed without consideration, a prima facie case is made and the burden is then shifted to the grantor or grantee or whoever may be defending the case, to show that the grantor had sufficient assets to pay his debts. This

has been the rule for a long time," says the defendant, "and when a grantor, or his grantee, or whoever is defending the case, meets this burden by showing that the grantor was solvent, the burden ceases."

The evidence introduced and relied upon by defendant to establish that by the making of said gift deed Cahill did not render himself insolvent, involves three items: (1) $1,972.85 deposited in a joint commercial bank account standing in the names of Cahill and his wife; (2) a promissory note signed by John Chinn for the principal sum of $4,500 secured by a trust deed to land near Lodi; (3) an asserted interest in his brother's estate in Massachusetts. With reference to the joint bank account, plaintiff contends that at best only half of the property owned in joint tenancy by two persons may be reached on execution issued against one of the joint owners, citing Bernal v. Hovious, 17 Cal. 541, 79 Am.Dec. 147, (cited approvingly in Veach v. Adams, 51 Cal. 609) and Stanton v. French, 83 Cal. 194, 23 P. 355; whereas defendant claims that the entire deposit should be included. As to the promissory note, plaintiff takes the position that its value is not determined by the face of the note, but by its execution sale value; and that no evidence was offered or received as to such value. Defendant argues that it is the market value of the note which controls, rather than the execution sale value; and in this connection the record shows that evidence was introduced to the effect that the original note secured by the trust deed was given for $5,500; that in 1929 a payment of $1,000 was made thereon, and on February 28, 1930, a renewal note was given for $4,500; that the land covered by the deed of trust was appraised as of May 3, 1930 (the date of the gift deed), at $6,000, and as of February 25, 1931 (the date of Cahill's death), at $4,500; and that subsequent to Cahill's death the administratrix of his estate paid the maker of the note $50 and obtained a grant deed to the property. With regard to the third item, Cahill's asserted interest in his brother's estate in Massachusetts, plaintiff contends that under well established legal principles the same cannot be listed at all as an asset in determining the question of Cahill's solvency as of the date of the making of the gift deed.

[4] In the final analysis, therefore, the decision on appeal turns upon the question of whether Cahill's asserted interest in his brother's estate in Massachusetts may be reckoned as an asset subject to court process as of the date of the making of the gift deed, for if it may not, then the trial court's conclusion as to Cahill's solvency as of that date cannot be sustained, because as will be noted, even though the entire amount of the joint bank account be added to the full face value of the promissory note, the total falls short by several hundred dollars of reaching the amount of Cahill's indebtedness to plaintiff as of the date of the making of the gift deed. One of the reasons assigned by plaintiff for the exclusion of said asserted interest is that defendant utterly failed to prove that at the time Cahill made the gift deed he was the owner of any interest in or that there was any sum of money whatever due him from his brother's estate, which was subject to court process or which Cahill was entitled to use to pay his creditors, even if he had been so disposed. The point is well taken. No documentary proof whatever was introduced by defendant concerning said asserted interest. The evidence relied upon consisted of the testimony given by Cahill's daughter (the defendant) and his son. However, all of the daughter's testimony relating to said asserted interest was stricken out upon the ground it was hearsay; and the only testimony given by the son upon this subject which the trial court permitted to stand after granting certain motions to strike was that his father "had a third interest in the income of the estate of Michael Cahill"; that prior to the making of the gift deed his father received three checks from the estate of his brother which "had the insignia of Michael Cahill"; that "after May 3, 1930" (the date of making the gift deed) his father received three checks for the total sum of $4,803, which he stated were received "over a period of five months," but the dates were not given. As already pointed out, in order to establish Cahill's solvency it was essential for defendant to prove that on May 3, 1930, the date of the making of the gift deed, there was due Cahill from his brother's estate, and subject to court process, either money or property sufficient in amount to overcome the several hundred dollars deficiency above mentioned; and it will be noted that the son's testimony utterly fails to establish that fact. It does not appear therefrom that on that date any money whatever was due Cahill; and if the testimony be construed as showing that on that date Cahill was the owner of a life estate in one-third of the income from his brother's estate, there is still an entire absence of any evi-

dence proving that on said date there was any money due him therefrom; and in that situation, the bare life estate in income may not be considered in determining the question of solvency. Adams v. Prather, supra.

In the case just cited, Mrs. Prather by her will as it was construed by the Supreme Court bequeathed her husband a life estate in all her property with unrestricted power in his lifetime to use, consume and expend all or any part of the property, but giving certain nieces an estate in remainder in the unexpended portion; but the husband could not as of right give the property away in his lifetime nor make it the subject of testamentary disposition after his death. Mrs. Prather died in 1906, and her estate was valued at some $600,000. Prather was stricken with fatal illness on April 2, 1913, and died seventeen days later. On the date he was stricken ill he owned exclusive of any interest in his wife's estate property of the value of about $106,000, and owed debts thereafter proved and allowed against his estate in the sum of approximately $234,000, all of which had been contracted by him after the death of his wife and all of which were due and payable on April 2d. During the latter days of his illness by way of gift conveyances and assignments made without consideration he transferred to his brother real and personal property then owned by him and constituting no part of his wife's estate, the value of which was approximately $96,000, leaving at the time of his death exclusive of his wife's estate then in process of administration property of the value of about $9,737. Being unable to pay Prather's creditors out of his estate, his executor sued to set aside the gift conveyances and assignments, and in defense of the action it was claimed that by reason of Prather's life estate created by his wife's will he was not insolvent. The court held to the contrary, and in so holding went on to say: "Assuming that, under the will of his wife, Thomas Prather obtained a life estate only, coupled with the powers hereinbefore mentioned, appellant [the grantee] insists that at the time of making the gifts he [Thomas Prather] could, in the exercise of such powers, have used the property of the estate and proceeds of the sale thereof for the purpose of paying his debts. Conceding this to be true, it is answered by the fact that he did not exercise such power which he alone could exercise, but during the latter days of his illness, lasting less than three weeks, conscious as he must have been of his early demise, charged with knowledge that the interest in his wife's estate, from which during his lifetime he was empowered voluntarily to pay his debts, would terminate upon his death, and knowing that, in the absence of such voluntary payment, his creditors who, under the circumstance, were powerless to enforce their demands by process of law, must look to his estate for payment, he gave away the sole and only property possessed by him which at his death could be subjected to the payment of his large indebtedness, and which but for such acts would have been appropriated to such purpose. A man controlling property out of which he may voluntarily pay his debts, if he will, but which for any reason cannot be reached by process of law and thus without his consent subjected to such payment, is nevertheless insolvent. Eddy v. Baldwin, 32 Mo. 369; Schwabacher v. Kane, 13 Mo.App. 126. The property of Prather's deceased wife was so situated that, conceding he might voluntarily have used it to pay his debts, the circumstances were such that it could not by legal process be reached after his death by his creditors who, as we have seen, were dependent for payment upon an act, the performance of which he withheld. The effect of his acts, under the circumstances shown, was, as found by the court, to create a condition of insolvency as to his creditors, and ample evidence exists for the finding that the gifts were made in contemplation of the insolvency of his estate and with the intent and purpose of defrauding his creditors."

[5] It follows, therefore, in the present case, that whatever may have been the nature of Cahill's interest in his brother's estate, defendant failed to prove that there was anything due therefrom on the date of the making of the gift deed, which was subject to process, and that being so, said asserted interest cannot be listed as an asset in determining the question of his solvency as of that date. Before leaving this point it should be stated that at the trial plaintiff objected to the oral testimony given by Cahill's son to the effect that his father "had a third interest in the income of the estate of Michael Cahill" upon the ground that it was not the best evidence; and his objections were overruled. And after the filing of the briefs on appeal and prior to oral argument plaintiff made written application to this court for leave to

take additional evidence, consisting of the records in the Michael Cahill estate, the purpose of the application being to show that Cahill's interest in his brother's estate amounted to nothing more than "the right to receive during his lifetime, one-third of the net income, if any, of said estate after the payment of the sum of $20.00 per week to decedent's sister." However, since defendant failed to meet the burden of establishing that said asserted interest may be reckoned as an asset, it becomes unnecessary to consider the merits of plaintiff's application, and the same is hereby dismissed.

[6-8] Plaintiff's other major contention is that regardless of the question of the failure of proof, Cahill's interest in his brother's estate, whatever it may have been, being admittedly situate outside of this state, and hence immune from process of the local jurisdiction, cannot in any event, under well settled legal principles, in an action of this kind, be considered in determining the question of his solvency as of the date of the making of the gift deed. At first thought it would seem that since the conclusion reached on the issue of insufficiency of evidence calls for a reversal, a determination of plaintiff's alternative point is unnecessary to a disposal of the appeal. But the record shows that the point was urged before the trial court, and received an adverse ruling; and it is apparent that if on retrial the defendant seeks to supply additional evidence to overcome the factual defect above pointed out, the question of the admissibility of all such evidence will again arise, and that the propriety of the ruling thereon, whether favorable or unfavorable to plaintiff, will serve as ground for another appeal. Obviously, if plaintiff's point is good he is entitled on this appeal not only to a reversal, but to a directed judgment, and thus be relieved of the expense of a retrial and bring to a final termination litigation which has already extended over a period of ten years. To repeat what has often been said, there should be an end to litigation; and after having examined the authorities submitted by the respective parties we are convinced that plaintiff's alternative point should be sustained. Corpus Juris, vol. 27, at page 552, gives the rule as follows: "If the property retained is such that it cannot be sold under execution or attachment, or is located in another state * * * it will not avail." In Bump on Fraudulent Conveyances, 4th Ed., p. 298, the rule is stated thus: "Whether the property reserved is what will be deemed ample does not depend entirely on the amount and value, as the real end to be accomplished is that the conveyance shall not deprive creditors of the means of collecting their debts. Hence the nature and situation of the property are to be regarded as well as the amount and value. * * * The property must also be in the state where the donor resides. If it is in some other country, where the creditors cannot reach it, the gift may be set aside." In Bigelow on Fraudulent Conveyances, Rev.Ed., p. 225, the author says: "* * * it follows that a creditor would make a case against a voluntary alienation by his debtor by showing that even if he had means left with which to pay his debts, they were effectually concealed or placed where they could not be taken, or were in some distant state and not easily obtainable." Such doctrine was invoked and applied in this state in Schwartz v. Brandon, 97 Cal.App. 30, 275 P. 448, 450, wherein the question of a grantor's solvency arose in an action to set aside a gift deed which was made one day prior to the rendition against the grantor of an award by the Industrial Accident Commission; and in holding that assets situate outside the state could not be considered in determining the question of the grantor's solvency, the court said: "There is some evidence that he owns some property in the Azores Islands. This may be dismissed from consideration, as no court would be heard to say that a workmen's compensation for industrial injury shall go to a foreign country for liquidation while the debtor gives away his California property for the reasons of love and affection, thus putting it presumptively beyond his power to respond in damages." Numerous cases from other jurisdictions may be cited, which adhere to the same doctrine. Among them is James v. Stokes, 203 Ky. 127, 261 S.W. 868, 877, wherein the court said: "Lastly, it is contended that since the proof shows the defendant Stokes to be solvent because of the property he owns in New York, the remedy resorted to by plaintiff cannot be maintained although the conveyed property was all that Stokes owned in this jurisdiction. * * * we are convinced that, because a defendant may possess property in some other jurisdiction or country upon the globe, he is not thereby entitled to fraudulently convey all of his locally situated property and which a local creditor is liable to subject, so as to

compel that creditor to go to a foreign jurisdiction to collect his debt." Again in Rohrer v. Snyder, 29 Wash. 199, 69 P. 748, 749, the following language was used: "A creditor, before he is permitted to attack a conveyance which he conceives to be fraudulent, is not obliged to search the entire world for unincumbered property out of which to make his debt. It is sufficient if he finds none within the jurisdiction of the court in which he seeks to set aside the fraudulent conveyance." Other cases holding to the same effect are Baker v. Lyman, 53 Ga. 339; Drake v. Ward-Truitt Co., 149 Ga. 54, 99 S.E. 125; and Price v. Mazange & Co., 31 Ala. 701. In Baker v. Lyman the court said: "The attack upon that deed is, that it was made with the intention to delay or defraud creditors, and the jury so found. It is not a sufficient reply to say that the debtor had sufficient property in another and distant state to discharge his indebtedness." The basic theory of the doctrine seems to be that if a resident debtor contracts debts in the state wherein he resides, and then makes voluntary conveyance without valuable consideration of his property situate within that state, whereby he renders himself insolvent, he thus deprives his creditors of that which is rightfully theirs; and in those circumstances they are not compelled to go into distant states to collect their debts, but are entitled to have the gift conveyance set aside.

Defendant does not question the fairness or soundness of the doctrine, but contends that it is not the law of this state. A careful analysis of the cases relied on by defendant demonstrates, however, that factually each of them is essentially different from this one and that the precise point here involved was not there decided. In Sacry v. Lobree, 84 Cal. 41, 23 P. 1088; Everts v. Sunset Farms, Inc., 9 Cal.2d 691, 72 P.2d 543, and McKee v. Title Ins. & Tr. Co., 159 Cal. 206, 113 P. 140, the question of outside property was not involved at all. In Cook v. Cockins, 117 Cal. 140, 48 P. 1025, 1030, the question was raised but not decided, the court having there expressly stated: "The question is too important a one to decide in a case where it is not necessarily involved." It is evident, therefore, that any discussion appearing in the decision of that case on that question must be regarded as dictum. Furthermore, that case and those cited therein were all decided prior to the 1895 amendment to section 3442, which amendment completely changed the rule, so that a voluntary conveyance without valuable consideration made by an insolvent or by one in contemplation of insolvency is now conclusively presumed to be fraudulent as to existing creditors. 12 Cal.Jur. p. 1019. Then again in that case the grantor was a resident of the outside state in which the property was situate. Consequently both the grantor and his property were subject to the process of the courts of that jurisdiction; whereas here the grantor was a resident of this state, and the assets in question were situate in another state. Therefore the process of neither jurisdiction could have been invoked against both the grantor and his assets. In the case of First Nat. Bank v. Ranger, 49 Cal.App. 447, 193 P. 788, the plaintiff was an Oklahoma bank to which the grantor became indebted as an endorser on a promissory note. The bank brought the action in California to set aside voluntary transfers made by the grantor to his wife conveying real property in this state. Judgment was given for the grantee, and on appeal the judgment was affirmed. While in that case the trial court in dealing with the question of the grantor's solvency took into account certain leases of oil lands in Oklahoma, the question of whether it committed error in so doing was not discussed, nor, so far as the decision shows, ever raised as an issue in the case. In Turner v. Tjensvold, 214 Cal. 105, 3 P.2d 1018, 1019, the trustee in bankruptcy brought suit for the purpose, among others, of setting aside a quitclaim deed made by the bankrupt to his son. The major portion of the indebtedness owed by the bankrupt was to creditors in Canada, wherein he resided before coming to California; and the undisputed testimony showed that at the time of the making of the deed in question his property in Canada exceeded in value the amount of these debts, and at that time his business was prospering and he had adequate means to meet all of his indebtedness. In affirming the trial court's judgment in favor of the grantee the court said: "In this state of the evidence we cannot say that it is insufficient to support the finding as to the solvency of said Gabriel Tjensvold [the bankrupt]." Therefore, all that was held in that case, so far as we are here concerned, was that since the major portion of the grantor's indebtedness was incurred in Canada with creditors there residing, and at the time of the making of the deed in question the grantor was the owner of property

in Canada of the value of more than sufficient to pay them, it could not be said that the finding of the trial court as to his solvency was without evidentiary support. Hasenjeager v. Voth, 91 Cal.App. 394, 267 P. 146, 147, is not in point for the reason that it was brought, not under section 3442, but section 3439. As said in the opinion: "At the outstart it may be noted that the complaint, since it failed to charge that the conveyance was without consideration, does not attempt by its allegations to charge fraud in law as designated in section 3442 of the Civil Code. Franck v. Moran, 36 Cal. App. 32, 171 P. 841. The complaint attempts simply to charge fraud in fact, without any further specifications of fact than to allege that the conveyance was made with intent to defraud and that the grantor was insolvent." It will be seen, therefore, that the solvency of the grantor was not the controlling issue. Moreover, the testimony relating to outside property was received without objection. The decision in Thompson v. Paige, 16 Cal. 77, is too indefinite to be considered as an authority on any question here involved. The action was for damages against the sheriff for an alleged illegal levy on certain fruit trees, and the appeal was decided in 1860. It appears from the head-notes that the court refused to give an instruction reading: "That a man who is insolvent for the want of means to pay his debts in this State, is in law insolvent, without reference to any property in another State"; and in commenting on the refusal to give the instruction it was merely said: "We see no evidence in respect to the insolvency of Webster, and the proposition is too broadly asserted, if there was any proof upon which it could rest." Just how the question of insolvency could have arisen in that case does not appear from the decision. As above indicated, we find nothing in any of the foregoing cases which may be construed as holding that the doctrine here contended for by plaintiff is not the law of this state.

[9] The final point made by defendant is that according to an account filed in Cahill's estate in 1932 there were sufficient assets out of which to pay the amount due plaintiff as of May 3, 1930. With respect thereto it will suffice to say that the order settling said account was subsequently set aside. No part of plaintiff's claim against Cahill's estate was definitely established until the affirmance of the judgment thereon in his favor on September 30, 1937; and admittedly neither at that time nor thereafter have there been sufficient assets in Cahill's estate to liquidate plaintiff's claim.

[10] The judgment is therefore reversed; and since the action is one wherein a trial by a jury is not a matter of right, and in our opinion calls for the exercise of the powers conferred by section 956a of the Code of Civil Procedure, this court finds from the evidence adduced at the trial, and contrary to the ultimate finding made by the trial court, that by the making of said gift deed Cahill, the grantor, was rendered insolvent, and that the gift deed, as to creditors, was and is therefore null and void. The trial court is directed to enter judgment accordingly, and to grant such other and further relief necessary and appropriate to protect the rights of plaintiff as a creditor, and to carry out the views herein expressed.

PETERS, P. J., and WARD, J., concurred.



49 Cal.App.2d 101

MOUL v. McVEY.

Civ. 11739.

District Court of Appeal, First District, Division 1, California.

Jan. 13, 1942.

1. Witnesses ⇐125

The object of statute disqualifying witnesses to transactions with decedents is to so balance rights as between survivor and decedent that no advantage may be taken of a decedent because of his inability to testify and that personal representative may not take advantage of the survivor. Code Civ. Proc. § 1880, subd. 3.

2. Witnesses ⇐178(1)

The limitations of statute disqualifying witnesses to transactions with decedents may be waived by personal representative by calling the survivor as a witness and going into the transaction had by him with decedent, and in so doing he "waives" benefit of the statute and opens the door to witness to tes-

tify in his own behalf fully as to transaction gone into. Code Civ.Proc. § 1880, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

3. Witnesses ⇐178(4)

The limitations of statute disqualifying witnesses to transactions with decedents are "waived" and survivor may testify when his deposition is taken in the action by executor or admininistrator whether it is read in evidence upon trial or not.

4. Witnesses ⇐178(4)

In physician's action against executor to recover for professional services rendered decedent, executor, who offered portions of physician's previous testimony in judicial proceedings in support of executor's contentions, indirectly made the physician executor's own witness and could not invoke the statute disqualifying witnesses to transactions with decedents, and physician could testify fully in explanation of admissions charged against him. Code Civ.Proc. § 1880, subd. 3.

5. Witnesses ⇐178(4)

It is not the dignity with which a judicial admission is clothed nor its competency nor the weight to be accorded it as evidence that lifts the bar of statute disqualifying witnesses to transactions with decedents, but it is the advantage accruing to executor or administrator by its use that unseals the lips of survivor. Code Civ.Proc. § 1880, subd. 3.

6. Appeal and error ⇐1056(1)

In physician's action against executor to recover for professional services rendered decedent, wherein executor had introduced in evidence portions of testimony which physician had given in previous judicial proceedings, the ruling of trial court in not permitting physician to testify in his own behalf in explanation of such prior testimony was a denial of a substantial right and warranted reversal of the judgment. Code Civ.Proc. § 1880, subd. 3.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Charles T. Moul against John L. McVey, as executor, etc., to recover on a claim rejected by the executor for services rendered to decedent. From a judgment for defendant, plaintiff appeals.

Reversed.

William A. Lahanier, of San Francisco, for appellant.

Harry C. Morrison and John L. McVey in pro. per., both of Oakland, for respondent.

B. C. JONES, Justice pro tem.

This appeal is from a judgment entered in the trial court against the plaintiff and in favor of the defendant. The plaintiff, a physician and surgeon, filed a creditor's claim against the estate of the decedent claiming as due him for professional services rendered the decedent during her lifetime the sum of nine thousand dollars. This claim was rejected by the executor. The plaintiff thereupon instituted this action to recover on the claim and judgment went against him.

The appellant's specifications of error are directed to various adverse rulings of the trial court upon the admission of evidence. The most important of his contentions goes to his right to take the stand and testify in his own behalf after his adversary had introduced in evidence portions of testimony which he had given in previous judicial proceedings. During the progress of the trial the defendant executor produced a transcript which, as stipulated, contained the testimony of the plaintiff given in a proceeding to have a guardian appointed for the decedent in her lifetime. According to the transcript of this case, the following proceedings then ensued:

"Mr. McVey: Yes. Now, if the Court please, I am reading from the testimony of Doctor Moul.

"Mr. Lahanier: Q. What page?

"Mr. McVey: 138 given on the 27th day of August, 1935, reading first from page 137, line 16: 'A. I mean that I have given Mrs. Wells a great portion of my time. Q. As her physician? A. As a physician mainly. Q. Do you think that the major part of your time is necessary to be given to Mrs. Wells, to take care of her? A. Mrs. Wells has—yes, I do. Mr. Gillis: Then he can explain. A. It is my opinion that Mrs. Wells should have every possible attention and should have a physician constantly by her or with-

in close reach. Mrs. Wells suffers from periodic attacks of angina pectoris, some of which may be fatal to her. She has prodromes of these attacks. I can conscientiously say that when she complains of any of the prodromes—by that I mean warnings—that they are dangerous. Mr. McVey: Q. And you think it is necessary that she have a physician with her at night? A. Not all the time but a great deal of the time. Q. A great part of your time is devoted to taking care of her, isn't it? A. It is. Q. What do you think is the reasonable value of your services that you have given to her already? A. I have not thought about it. I don't know what her income was. I gave it voluntarily and considered my services in relation to people's means. Q. What about figuring that her income is $1500.00 a month, what do you figure you would charge her estate for work you have done already, per month? A. I have recently heard that figure mentioned. I think that $4500 is a reasonable fee. Q. Well, you have been paid that, haven't you? A. No, I have not been paid. Q. You heard her testimony in the Hotel Oakland, didn't you? A. Yes, sir. Q. You heard her say she paid you $400 a month, didn't you? A. No, she has not paid me. She may have given me $400.00 on some months but the total was not paid me like that. Q. Is there any month she has not paid you money? A. Yes, lots of them, lots of months she has not. Q. Do you keep a book with her account in it? A. I have a record of it. Q. In the event that Mrs. Wells should die to-morrow, you have not—your bill has not paid been paid, has it? A. No, my bill has not been paid. Q. You figure right now she owes you about $4500.00? A. I have not figured it up, Mr. McVey, but I think that for the past two years I have spent the greatest part of my time with her and I should say for those two years, the greater part of my time; I have been giving up my social activities and I have spent a great deal of time outside of my office, some of it spent at her request and some taking care of her in sickness. I have lost money from it. I have had to borrow money from the Morris Plan this year. My finances have dropped considerably this year. Q. You don't know anything about putting in a bill for $250.00 a month in this matter, do you? A. Not until it had been spoken of. Q. If that was in there it would not be satisfactory to you at all? A. Not for what I have been doing for her. Q. If it is in there you don't figure that is pay for your services, do you? A. I should consider that in relation to her income and other obligations. Q. Have you ever given Mrs. Wells a bill for the work that you have done for her? A. No. Q. Have you given her a receipt for moneys paid to you? A. No. Q. So if you would put in a claim tomorrow against her estate there would not be a single paper to show what she paid you? A. I am very positive there would not.'"

Another transcript was produced by the executor containing other testimony given by the plaintiff in still another proceeding, and from the transcript on file herein the following occurrences appear:

"Mr. McVey: Now, I will offer in evidence, if the Court please, testimony taken on April 8, 1940 in the Probate Department in this court in the matter of the Estate of Mary F. Wells, deceased, No. 73213, the proceeding to ascertain, concerning the property of Mary F. Wells.

"Mr. Lahanier: May I see it?

"Mr. McVey: Yes. (Handing transcript to counsel.)

"Mr. McVey: Doctor Charles Moul is a witness sworn and testified as follows:— (Handing papers to counsel to examine them.)

"Mr. McVey: It better be stipulated, Mr. Lahanier, it will be stipulated those were the purported change of beneficiaries.

"Mr. Lahanier: Yes.

"Mr. McVey: (Reading) 'Have you ever seen these papers before? They are requests to change the beneficiaries named in Mrs. Wells' insurance policies. (Handing to the witness who examines.) A. I never saw these papers before, Mr. McVey. Q. Did you ever have any conversation with Mrs. Wells about these papers? A. The only conversation I had regarding any of her annuities, Mr. McVey, was that Mrs. Wells promised to allot me an annuity in return or when my services were brought up to the amount that the annuity called for, that she would provide for me by the annuity. But that was never done, I never saw any annuity.'"

[1-3] The appellant did not object to the introduction of these statements in evidence, but he took the position in the trial

court, and he takes the same position here, that the introduction of his testimony, although given in another proceeding, lifted the bar of the statute prohibiting him from testifying in support of his claim against the estate. The incompetency of one suing to establish a claim against the estate of a deceased person to testify against an executor or administrator as to any matter or fact occurring before the death of the decedent is declared by sub. 3 of sec. 1880 of the Code of Civil Procedure. The soundness of the rule is not open to question. Pearson v. Parsons, 173 Cal. 331, 159 P. 1171; Estate of Emerson, 175 Cal. 724, 167 P. 149. The object of the statute is to so balance rights as between the survivor and the deceased that no advantage may be taken of a deceased person because of the fact that his lips are sealed by death, and that the personal representative may not take advantage of the survivor. Cole v. Sweet, 187 N.Y. 488, 80 N.E. 355. The limitations of the statute may be waived by the personal representative by calling the survivor as a witness and going into the transaction had by him with the decedent. In so doing he waives the benefit of the statute and opens the door to the witness to testify in his own behalf fully as to the transaction gone into. Kinley v. Largent, 187 Cal. 71, 200 P. 937. Likewise the door is opened to the survivor when his deposition is taken in the action by the executor or administrator whether it is read in evidence upon the trial or not. McClenahan v. Keyes, 188 Cal. 574, 206 P. 454; Borgess Inv. Co. v. Vette, 142 Mo. 560, 44 S.W. 754, 64 Am.St.Rep. 567.

If the testimony given in evidence had been taken from a deposition given by the plaintiff in the case, or had been given by him from the witness stand herein, there would be no room for discussion as to his right to testify in explanation of the subject matter of his examination. No substantially different situation exists when the testimony of the survivor given in a previous proceeding is put in evidence. In either case the answers given are under compulsion of the law in response to questions propounded by counsel, and with no alternative but to answer.

[4] The plaintiff here finds himself in that situation where a portion only of his answers were introduced in evidence. The respondent presumably selected only those portions of the previous testimony most favorable to his side of the case and presented them into evidence claiming at the same time a right to seal the lips of the survivor against any explanation of the selected statements with the bar of the statute. By offering those portions of plaintiff's previous testimony tending to support his contentions, the executor indirectly made the plaintiff his own witness and he could not at the same time invoke the cloak of the statute to shield him in his advantage. Section 1880 was not enacted for such a purpose. By thus indirectly making the plaintiff his witness, the executor opened the door for the plaintiff to testify fully in explanation of the admissions which are charged against him.

[5] It is not the dignity with which a judicial admission is clothed, nor its competency, nor the weight to be accorded it as evidence, that lifts the bar of sec. 1880, but it is the advantage accruing to the executor or administrator by its use that unseals the lips of the survivor. By virtue of the circumstances under which it is given, an answer to a question propounded in a judicial proceeding is limited to the scope of the question. It is not voluntary in the sense that all upon the subject may be said. On the other hand, if a survivor makes a voluntary statement upon the street concerning a transaction had by him with a decedent he has an untrammeled opportunity to add all else that he may see fit by way of explanation. He is under no compulsion to make such a statement in the first place, and, in the second place, there is nothing in the world to hinder him from explaining it to all who may hear. Of his own volition, as is held in Stuart v. Lord, 138 Cal. 672, 72 P. 142, he assumes the risk of having such a statement proved against him, and, if it is proved, his time for explanation has passed. It would be as manifestly unfair to permit a survivor to open the door against the limitation of his right to testify as it would be to keep it closed in the face of an advantage grasped at by an executor.

[6] No case from this state involving the precise point raised here has been cited by counsel for either party. In other states the courts have uniformly held that the introduction in evidence of testimony previously given lifts the bar of the statute. Cole v. Sweet, supra; Cline v. Dexter, 72 Neb. 619, 101 N.W. 246;

Fox v. Barrett's Estate, 117 Mich. 162, 75 N.W. 440; Lilley v. Mutual Benefit L. Ins. Co., 92 Mich. 153, 52 N.W. 631; Levy v. Simon, 119 Wash. 179, 205 P. 426. The ruling of the trial court in not permitting the plaintiff to testify in his own behalf is a denial of a substantial right and warrants a reversal of the judgment.

The appellant specifies other rulings of the court as grounds of reversible error. These rulings in each instance involved a determination of fact by the trial judge upon the state of the record as it then stood. As the case is to go back for a new trial, and as a different state of facts may be presented upon the next trial, it is not necessary to pass upon these questioned rulings at this time.

The judgment is reversed.

PETERS, P. J., and WARD, J., concurred.



49 Cal.App.2d 148

SIEM v. HJELM et al.

Civ. 6431.

District Court of Appeal, Third District, California.

Jan. 14, 1942.

Hearing Denied March 12, 1942.

1. Limitation of actions ⇐60(3)

Action by executrix of deceased partner's estate against strangers to partnership to establish an alleged trust in fund deposited in bank pursuant to court order pending determination of an appeal was barred by three or four year limitation statutes, where determination of appeal terminated trust six years before action was brought, and more than four years elapsed after trust fund was exhausted before action was commenced, though action was commenced two months after judgment in partnership accounting suit, as against contention that statute of limitations does not run between partners until accounts are settled and balance is agreed on, since the action was not between partners. Code Civ.Proc. § 338, subd. 3; § 343; Probate Code, § 571; Civ.Code, §§ 2437, 2424, 2425(4).

2. Limitation of actions ⇐102(11)

When a trust relation is terminated by settlement between the parties thereto, a suit founded thereon must be commenced within four years therefrom, and the same rule prevails when the trust relation, with knowledge of the plaintiff, is terminated by any other means. Code Civ.Proc. § 343.

3. Limitation of actions ⇐102(8)

Ordinarily, in a suit to establish a constructive trust, the statute of limitations begins to run from the date when the trust is created.

4. Limitation of actions ⇐103(4)

If an action be deemed to be one for wrongful conversion of a trust fund, the statute of limitations will begin to run from the actual conversion of the money, or when the claimant thereof has actual or constructive knowledge of the conversion.

5. Limitation of actions ⇐20

An action to recover specific personalty is barred by three-year limitation statute. Code Civ.Proc. § 338, subd. 3.

6. Limitation of actions ⇐39(11)

An action to establish a trust in personalty and to secure an accounting therefor, is barred by four-year limitation statute. Code Civ.Proc. § 343.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Suit by Jessica M. Siem, as executrix of the estate of E. W. Siem, deceased, against G. B. Hjelm and others, to establish an alleged trust in a certain fund. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment affirmed.

Wm. N. Graybiel, of Turlock, for appellant.

Hawkins & Hawkins & Cardozo and E. H. Zion, all of Modesto, for respondents.

THOMPSON, Acting Presiding Justice.

The plaintiff has appealed from a judgment which was rendered against her in a suit to establish an alleged trust in a fund which had been deposited in a bank pursuant to an order of court in a former action, and to require payment thereof to the estate of a deceased partner. The surviving partner, to whom the money was paid by order of court, is not a party to this suit,

The court held that the present action is barred by laches and by the statute of limitations.

The appellant, Jessica M. Siem, is the widow of E. W. Siem, deceased, who died January 11, 1930. She was duly appointed as executrix of his estate. Prior to his death, Mr. Siem was engaged as a partner with Elmer Swanson in the business of buying and selling livestock. Swanson asserted his right, as a surviving partner, pursuant to section 571 of the Probate Code, to possession of the assets and property of the partnership pending the final settlement of the business. The executrix denied the existence of the partnership and refused to deliver the assets of that business to Mr. Swanson. He then brought suit against her to establish the partnership and to recover possession of the assets of the business pending its final settlement. During the trial of that case hogs and cattle belonging to the partnership business were sold for amounts aggregating the sum of $4,000. By order of court and by stipulation of the parties, the proceeds of said sales were first deposited with the clerk of court, subject to control of the court. Subsequently, the court made an order for the clerk to pay Swanson from that fund the sum of $1,500, which was done. The court further ordered that the balance of that fund, which was determined by the court to be the sum of $2,055.78, should be withdrawn from custody of the clerk and deposited in a suitable bank to be selected "by agreement of the parties" upon plaintiff's furnishing a surety bond therefor. It was provided this fund was to be held in the bank "pending determination of the appeal in this action." The minute order of the court provided in that regard:

"It is ordered that plaintiff be permitted to withdraw $1500.00 from the money deposited with the clerk of the court in trust in this action, said $1500.00 to become the property of plaintiff, and it is further ordered that the balance of the trust fund in this action may be withdrawn upon plaintiff's giving a surety bond in the amount of said balance, with the understanding that the said balance is to be held in some suitable bank, agreeable to the parties *pending determination of the appeal in this action.*"

Pursuant to that order the sum of $1,500 was paid to Swanson, and the balance of the fund was deposited in the Security State Bank of Turlock, in the name of G. B. Hjelm, as agent. He was one of the attorneys for the plaintiff.

In that suit, the court adopted findings favorable to the plaintiff, Elmer Swanson, holding that the partnership existed and that he, as the surviving partner, was entitled to the assets of the business pending the settlement of the affairs of the enterprise. On appeal from the judgment which was accordingly rendered in that suit, the decree was affirmed by this court June 27, 1932. Swanson v. Siem, 124 Cal. App. 519, 12 P.2d 1053. Assuming that the affirmance of that judgment constituted a release of the impounded funds and Swanson's right, as surviving partner, to possession thereof, pursuant to the order of court and the judgment which was pronounced, the balance of that fund was subsequently paid by G. B. Hjelm to Swanson or to others upon his request. The fund was entirely exhausted.

It appears that Swanson did not promptly settle the affairs of the partnership business or account to the executrix for the proceeds of sales received by him. Upon application of the executrix to the probate court in the matter of the estate of E. W. Siem, deceased, under section 571 of the Probate Code, a citation was directed to Elmer Swanson to show cause why he should not account to the estate for the assets and property of the partnership business in his possession. From time to time that citation proceeding was continued without hearing. It appears that the proceeds of some sales of hogs and cattle were paid by the purchasers thereof to the executrix. July 8, 1933, Swanson brought another action against her, demanding an accounting and payment to him of all partnership assets in her possession. The executrix answered that complaint, joining in a demand for an accounting of the partnership property. The citation proceeding was consolidated for hearing with the last-mentioned suit for accounting. The consolidated cases were not finally determined until February, 1938. The accounting was held. It considered all receipts and disbursements of both parties to the controversy, including the funds which were impounded in the bank by order of court pending the determination of the first action on appeal. In that accounting suit the court found that partnership funds, aggregating the sum of $3,555.78, were deposited in the Security State Bank

of Turlock, pursuant to order of court, and that:

"No accounting whatever has been made by said Elmer Swanson as to the disposition of said moneys deposited in said bank except as hereinbefore shown."

In the account this sum was charged to Swanson. After stating the specific debits and credits of the respective parties, the court finally held "that said Elmer Swanson is indebted to the estate of said E. W. Siem in the sum of $6960.91."

On April 25, 1938, two months after judgment was rendered in the accounting suit, this action was commenced by the executrix against G. B. Hjelm, Harold Hjelm, Hjelm & Hjelm, as attorneys at law, and Security State Bank of Turlock, to establish an alleged trust in the balance of the funds which were deposited in the bank as aforesaid and subsequently converted, and to require the defendants to pay that sum to the estate of E. W. Siem, deceased. To that complaint the defendants separately demurred on the grounds that it failed to state a cause of action and that the suit was barred by laches and by the statute of limitations. The demurrers were overruled and the defendants separately answered the complaint denying the material allegations thereof and pleading laches and the bar of the statute of limitations. In this suit the court adopted findings against the plaintiff, determining that she had actual or constructive knowledge of the withdrawal of the funds from the bank, and that this action is barred by laches and by the statute of limitations. From the judgment which was accordingly rendered against the plaintiff to the effect that she take nothing by this suit, she has appealed.

[1] We are of the opinion this suit is barred by the provisions of the statute of limitations. The surviving partner, Elmer Swanson, is not a party to this action. Neither is G. B. Hjelm, in whose name the money was deposited in the bank, a party *in his capacity as agent or representative of Mr. Swanson.* He and the other named defendants are made parties to this suit in their individual capacities only.

The partnership was dissolved by the death of E. W. Siem. § 2425, subd. 4, Civil Code. The livestock business, however, was not terminated, since the affairs of the enterprise were not settled. § 2424, Civil Code. The surviving partner, Elmer Swanson, having been placed in possession of the partnership business and assets by decree of the court in the first-mentioned action, pursuant to section 571 of the Probate Code, it became his duty to settle the affairs of the partnership "without delay" and to account to the executrix and pay to her the share of the proceeds to which the estate was entitled. For failure on the part of Swanson to comply with the last-mentioned section of the Probate Code, the executrix was authorized to and she did procure an order of the probate court in the estate of E. W. Siem, deceased, for him to show cause why he had not done so. The executrix was authorized to maintain an action against the surviving partner for an accounting of the partnership business which was continued by him after the death of E. W. Siem. § 2437, Civil Code. That is precisely what she did by means of her cross-complaint filed in the accounting suit which was brought by Swanson against her July 8, 1933. This last-mentioned action and the citation to show cause, which was previously issued in the matter of the estate were consolidated and tried together. In that consolidated action the court held an accounting which included all transactions of the partnership business which occurred since the death of E. W. Siem, including the funds which were impounded with the clerk and the balance thereof which was deposited in the bank, and determined that Swanson was possessed of partnership assets in the sum of $6,960.91, which he was required to account for to the estate. That judgment was rendered February 1, 1938. Section 571 of the Probate Code authorizes the issuance of an attachment to compel a surviving partner to account for and pay to the estate of his deceased partner the balance found to be due. The executrix is afforded a complete remedy to enforce payment and delivery from the surviving partner of all money and assets belonging to the estate.

The present action against strangers to the partnership, to establish an alleged trust and to enforce payment of the funds affected thereby to the executrix, is entirely distinct from the proceedings for an accounting between the representative of a deceased partner and a surviving one. The rule relied upon by the appellant that the statute of limitations does not commence to run until the accounts between partners are completely settled, has no application to the present case for the reason that this is not an action *between partners* and the status

of their partnership accounts is in no way involved. In the case of Freeman v. Donohoe, 65 Cal.App. 65, 223 P. 431, which is cited by the appellant in support of her contention that the statute of limitations was tolled because the accounts of the partners had not been settled, quoting with approval from Hendy v. March, 75 Cal. 566, 17 P. 702, the court says at page 85 of 65 Cal. App., at page 439 of 223 P. in the Freeman case, "The statute of limitations does not run *between partners* until the accounts are settled and the balance agreed on." (Italics added.) This is not an action "between partners." That rule does not apply to strangers to the partnership.

[2] In this case the alleged trust created by depositing the money in a bank pursuant to the court order was fulfilled and terminated by the express declaration of the court that it was to last only "pending the determination of the appeal" in that action. That appeal was affirmed six years before this action was commenced. The entire fund was thereafter promptly paid to or upon order of the surviving partner according to the provisions of that judgment which awarded him custody of the assets of the partnership business. It has been held that when a trust relation is terminated by settlement between the parties thereto, a suit founded thereon must be commenced within four years therefrom. Marston v. Kuhland, 151 Cal. 102, 90 P. 188; Knapp v. Knapp, 15 Cal.2d 237, 241, 100 P. 2d 759; 25 Cal.Jur. 270, § 131. On principle, the same rule prevails when the trust relation, with knowledge of the plaintiff, is terminated by any other means. The statute then begins to run from that date.

[3-6] More than four years elapsed after the fund was exhausted before this suit was commenced. There is adequate evidence of the knowledge of plaintiff regarding the nature of that transaction of impounding the fund in the bank and of its subsequent withdrawal by or under directions of Elmer Swanson. Her attorney in the present action represented her in a similar capacity in all of the suits and proceedings with respect to the partnership business and the probating of the estate of E. W. Siem, deceased. In authorizing the withdrawal of that fund from the custody of the county clerk, and directing it to be deposited in the bank *pending the determination of the appeal*, the court specifically provided that it should be deposited in a suitable bank "agreeable to the parties," and then, only, upon Swanson furnishing a surety bond to secure its payment to the party entitled thereto. It was to remain in that bank until the appeal in that case was disposed of. We must assume appellant's attorney was fully informed of the details of that entire transaction, and that the fund was deposited and expended only in compliance with that order. He knew that the court determined, in that first action, that the impounded funds belonged to the partnership and that, as surviving partner, Swanson was entitled to possession of the assets of that partnership, including that fund, upon the affirmance of that judgment. That very fund was first deposited with the clerk by consent of the respective parties. Appellant's attorney represented her on the appeal of that case. He knew when that judgment was affirmed. No facts are alleged in the pleadings of this case which will toll the running of the statute of limitations. Ordinarily, in a suit to establish a constructive trust, the statute of limitations begins to run from the date when the trust is created. Wrightson v. Dougherty, 5 Cal.2d 257, 54 P.2d 13; Benoist v. Benoist, 178 Cal. 234, 172 P. 1109; Earhart v. Churchill Co., 169 Cal. 728, 147 P. 942. If the action be deemed to be one for wrongful conversion of a trust fund, the statute will begin to run from the actual conversion of the money, or when the claimant thereof had actual or constructive knowledge of that conversion. In the present case, practically six years elapsed after the affirmance of the judgment which gave Swanson possession of the funds in question before this action was commenced. No sufficient excuse for that delay is shown. It follows that if, under any circumstances, the appellant might have had a valid cause of action to establish a trust against these defendants, that suit is barred by the statute of limitations. If this suit be deemed to be an action to recover specific personal property it is barred in three years by the provisions of subdivision 3 of section 338 of the Code of Civil Procedure. If it is an action to establish a trust in personal property and to secure an accounting therefor it is barred in four years under the provisions of section 343 of the same code. Easton v. Geller, 116 Cal.App. 577, 3 P.2d 74; 25 Cal.Jur. 269, § 131. In either event the statute of limitations expired long before this action was commenced.

The judgment is affirmed

TUTTLE, J., concurred.

49 Cal.App.2d 137

EUCLID CANDY CO. OF CALIFORNIA, Inc., v. INTERNATIONAL LONGSHOREMEN & WAREHOUSEMEN'S UNION, LOCAL 1-6 et al.

Civ. 11869.

District Court of Appeal, First District, Division 2, California.

Jan. 14, 1942.

Rehearing Denied Feb. 13, 1942.

1. Trial ⇐393(1)

Recitals of fact divided into numbered paragraphs, contained in order for temporary injunction, are not "findings" within statute relating to findings of fact and conclusions of law, and appellate court is not bound thereby, but may consider them. Code Civ.Proc. § 632.

See Words and Phrases, Permanent Edition, for all other definitions of "Finding".

2. Appeal and error ⇐533(1), 717

The opinion of the lower court is not a part of the "record on appeal", though appellate court may consider it as an aid in discovering processes by which judgment below was reached.

See Words and Phrases, Permanent Edition, for all other definitions of "Record on Appeal".

3. Appeal and error ⇐842(1)

In employer's action for injunction against labor union growing out of dispute between two rival unions, whether acts of violence on picket line were isolated acts of violence was "question of fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

4. Appeal and error ⇐920(3)

In support of temporary injunction order, appellate court must assume that trial court found facts to be in favor of the order, where evidence introduced justified such a finding.

5. Appeal and error ⇐901

The District Court of Appeal, on appeal from a temporary injunction order, is not bound to search terms of order and find, if possible, some passages to criticize, but that function rests on one claiming that error has occurred.

6. Injunction ⇐128

In employer's action for injunction against labor union and its members, evidence that sole controversy was between defendant union and rival union, that defendant sought to raid membership of rival union with which employer had closed shop agreement, and that defendant threatened to blacklist and fine employees who did not join defendant, and engaged in violence against employees and was boycotting employer, authorized finding that defendants were engaged in unlawful conspiracy by violent, illegal, and malicious acts.

7. Injunction ⇐136(1)

Where trial court, in employer's action for injunction against labor union and its members, was justified in finding that defendants were carrying into effect an unlawful conspiracy against employer, its employees, customers and associates, by violent, unlawful and malicious acts, a temporary injunction order restraining picketing, peaceful or violent, secondary boycott, distribution of false and misleading literature, and carrying false and misleading standards, was justified.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by the Euclid Candy Company of California, Inc., against the International Longshoremen and Warehousmen's Union, Local 1-6, an unincorporated association, and others, for injunction and other relief in a labor controversy. From an order granting a temporary injunction, defendants appeal.

Affirmed.

Gladstein, Grossman, Margolis & Sawyer, of San Francisco, for appellants.

Philip S. Ehrlich, Albert A. Axelrod, Julien R. Bauer, Bartley C. Crum, and George O. Bahrs, all of San Francisco, for respondent.

STURTEVANT, Justice.

The defendants have appealed from "a so-called preliminary injunction pendente lite, and the order granting said injunction." As the order only was appealable (Code Civ.Proc., § 963), it alone will be considered.

On May 8, 1940, the plaintiff filed a verified complaint asking for a restraining order, an order to show cause, a temporary injunction, and for other relief. On that date an order to show cause was made, returnable on May 17, 1940. At the same time and as part of the same instrument a restraining order was made. Later the defendants filed a demurrer to the complaint. An order was entered on May 23, 1940, overruling the demurrer. On May 23, 1940, the order to show cause why a temporary injunction should not issue came on for hearing. Each party produced oral and written evidence. The transcript covers nearly 1,600 typewritten pages. In deciding the case the trial court presented a memorandum of decision. It thereafter signed a temporary injunction which covers forty-two typewritten pages. It commenced with a recital of facts divided into paragraphs I-LI inclusive, and some of those paragraphs are subdivided into two or more divisions. Then follows an order divided into twelve paragraphs restraining certain acts.

The record presents a labor controversy. But no controversy between master and servant was involved. The dispute was between the American Federation of Labor and the Congress of Industrial Organizations, and the alleged injury inflicted on the employer who was no party to the dispute. The matter, among others, involved the following facts:

The plaintiff is a California corporation normally employing two hundred persons, and doing a business in this and other states in excess of $1,000,000 annually. Its employees include two groups, the manufacturers and wrappers of candy, and second, the warehousemen. At the time of the controversy the plaintiff was a party to a collective bargaining agreement with the AFL, the bargaining agency of its employees in its production and wrapping department. That was a closed shop agreement. The plaintiff also had a collective bargaining agreement with the defendant, the CIO, as the bargaining agency of its seven warehousemen. The plaintiff's relations with the CIO had always been friendly and on March 4, 1940, that union forwarded a new contract to plaintiff concerning its warehousemen. Notwithstanding the existing agreement between the AFL and plaintiff, the CIO, early in 1940, began a raid on the AFL membership, and on March 15, 1940, it requested that the CIO be recognized as the sole bargaining agency for all of the employees of the plaintiff. On April 1, 1940, the CIO commenced an effort to bring about a breach of the collective bargaining agreement between plaintiff and the AFL; that effort at first was by persuasion and later was followed by force. The first step in said effort was to present a new set of demands for plaintiff's warehousemen to create the appearance of a dispute between plaintiff and the CIO. The trial court found those demands were not made by plaintiff's warehousemen and were not made in good faith. The second step of the CIO was to address meetings advocating a slow down of work and threatening to "black list" and "fine" any of the AFL members who did not join the CIO. The slow down reduced the output thirty to forty per cent. The plaintiff hired additional employees who were threatened with physical violence if they did not quit their employment and thereupon they did quit. During all these times the AFL was insisting that the plaintiff abide by its contract with that union and threatened if plaintiff did not do so the AFL would impose economic pressure. On May 2, 1940, plaintiff advised all its employees that it would abide by its valid contract with the AFL. An oral agreement was reached between the CIO and plaintiff concerning the warehousemen of the latter, but plaintiff's attempt to bring about peace between the AFL and the CIO resulted in failure. Thereafter the representative of the CIO threatened to make plaintiff's plant a "battle field." On May 6, 1940, the defendant CIO stationed two hundred or three hundred of its members in front of the plaintiff's plant. The CIO called a strike of plaintiff's warehousemen after said union had refused to sign the aforementioned oral agreement. Thereafter, through the use of "goon squads," physical assaults, and other terroristic devices, the CIO tried to force plaintiff's employees to quit work. Such acts were done and such threats were made that commencing May 6, 1940, and continuing many days thereafter, the AFL in the morning transported its members from the San Francisco Labor Temple to plaintiff's factory and returned them in the evening. On many occasions those busses were followed by other vehicles operated by the CIO and carrying its "goon squads." Such conduct caused to be brought in a protective force of from five to seventy-

five police officers during the week May 6 to May 13, 1940. On May 7, Dominic Gallo, a member of the CIO, assaulted William Price, one of plaintiff's factory employees. The assault was so violent that Price's nose was broken and he suffered concussion of the brain which required hospitalization for three weeks. On May 8, members of the CIO rioted, injuring police officers and causing a state of hysteria among plaintiff's women employees. Late in the afternoon on May 8, plaintiff commenced this action, took out a restraining order, and caused the defendants to be served. When the process server attempted to serve the defendants other disturbances arose and he in turn was assaulted. Those disturbances continued until the attorney acting for defendants advised the latter to desist. Thereafter the defendants commenced to distribute leaflets in front of plaintiff's factory and so continued until the 19th day of May, 1940. There was evidence that such leaflets were false and libelous. For the purpose of said distribution from six to eight members of the CIO continued to march in front of plaintiff's place of business until the trial court made the order from which the defendants have taken this appeal. During the period above mentioned Donald F. Maguire acted as the representative of the CIO. The plaintiff quotes him as saying the CIO would raid every AFL in San Francisco in entire disregard of the Constitution of the United States and other laws. Continuing, the plaintiff also calls to our attention that on May 10, 1940, Myrtle Price, one of the plaintiff's employees and a member of the AFL, at midnight was aroused by the continuous ringing of her doorbell. On making a discreet examination she saw two members of the CIO outside the door. One rang the bell and tried to open the door. The other stood as guard on the sidewalk. On May 13, Myron Fitch, another employee, was waited upon in his own room by five members of the CIO and assaulted and beaten into insensibility. On May 17, 1940, the defendant Maguire called at the office of B. T. Rocca. The latter, a contractor, was acting as deliveryman delivering syrup to the plaintiff. Maguire asked him to stop. Rocca replied that his contract with plaintiff must be complied with. Thereupon Maguire replied, "Oh, to hell with the contract * * * we are just about to the point where we are going to tear up every other contract in San Francisco and throw them into the bay. * * * If your men deliver we can't be responsible for what happens by ten thousand union men * * * we can't be responsible for goon squads." The plaintiff further quotes statements made May 31, 1940, by the distributors above mentioned which vilified the plaintiff's employees and threatened them.

The plaintiff also calls attention to facts showing that the CIO instituted, and at the time of the trial was carrying out a boycott, local, statewide, and interstate, against this plaintiff. There was evidence that the literature used for such purpose was false, untrue, and misleading. Moreover the CIO threatened openly to blacklist all of plaintiff's employees wherever it could possibly do so.

As stated above, the foregoing facts are recited in plaintiff's brief. The record discloses that many other facts could have been recited. However, they would be but cumulative and it is not necessary to add them.

At this time the defendants contend because of isolated acts of violence on a picket line the trial court had no power to enjoin (1) peaceful picketing; (2) a secondary boycott; (3) the distribution of literature; and (4) the carrying of banners. However no passages of the order appealed from are specified as being erroneously stated.

[1, 2] Apparently treating as findings the recitals of facts I-LI, the defendants attack numbers VIII, XX, and XXXIII, as not being supported by the evidence. However, under well settled rules those passages are not findings within the meaning of section 632 of the Code of Civil Procedure. Hunt v. Steese, 75 Cal. 620, 17 P. 920; Waller v. Weston, 125 Cal. 201, 57 P. 892; Waymire v. California Trona Co., 176 Cal. 395, 168 P. 563; 2 Hayne New Trial and Appeal, § 242; 64 C.J. 1228; 24 Cal.Jur. 932. As recited above the opinion of the trial court is included in the transcript. It is also "well established in California that the opinion of the lower court is not a part of the record on appeal, although the appellate court is always glad to find it in the transcript, because it is as a rule an aid in discovering the processes by which the judgment below

was reached." 2 Cal.Jur. 488 "Appeal and Error," § 235. It follows that this court is not bound by what is found in the opinion of the trial court nor by the purported findings, but that it may consider the same.

[3-5] We return to a consideration of the contention of the defendants that because of isolated acts of violence on a picket line the trial court had no authority to make the order appealed from. That contention assumes the acts of violence were isolated. As to whether they were isolated or otherwise was a question of fact. The defendants earnestly contend they were isolated. The plaintiff earnestly contends they were planned, continuous acts which defendants threatened to continue. It alleged facts showing that such acts were continuous and it introduced proof of such allegations. In support of the order appealed from it must be assumed the trial court so found the facts to be. The record shows nothing to the contrary. After hearing the parties the trial court made the order appealed from. Omitting the purported findings hereinabove mentioned, the order contains nearly seven pages, that is, over fifteen folios. The defendants do not, except as herein mentioned, specifically object to any portion of the order. This court is not bound to search the terms of the order and find, if possible, some passages to criticize. That function, under our practice, rests on him who claims that error has occurred.

[6, 7] From the facts hereinabove set forth it is patent the trial court was authorized in concluding that the defendants had formed and were carrying into effect an unlawful conspiracy against the plaintiff, its employees, customers, and associates; and that the defendants were carrying said conspiracy into effect by violent, illegal, unlawful, and malicious acts. In support of the order appealed from we assume the learned chancellor so concluded. If he did, he was authorized in making an order for a temporary injunction restraining picketing, peaceful or violent, secondary boycotts, distribution of false and misleading literature, and carrying false and misleading banners. Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200; Meadowmoor Dairies v. Milk Wagon Drivers' Union, 371 Ill. 377, 21 N.E.2d 308; Southern California I. & S. Co. v. Amalgamated Ass'n, 186 Cal. 604, 620-622, 200 P. 1; Lisse v. Local Union No. 31, 2 Cal.2d 312, 322, 323, 41 P.2d 314.

We find no error in the record. The judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



49 Cal.App.2d 115

JONES v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 12744.

District Court of Appeal, Second District, Division 1, California.

Jan. 13, 1942.

Hearing Denied March 12, 1942.

1. Banks and banking ⇐174

In determining whether assignee of payees of checks cashed by collecting bank on presentation by drawer's office manager who forged payees' signatures could recover amount of checks from collecting bank on theory that payees could ratify collection of checks from drawee bank by collecting bank and hold it as for money had and received, if there was no delivery of the checks to payees then checks remained the property of drawer making inapplicable the theory of ratification. Civ.Code, § 3097.

2. Principal and agent ⇐164(1)

A "ratification" can only be effectual between the parties, when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent himself, or of some third person and ratification is effectually implied only in respect of an act done by a person professedly acting as the agent of party sought to be charged as principal.

See Words and Phrases, Permanent Edition, for all other definitions of "Ratification".

3. Principal and agent ⇐164(1)

Brokers' office manager who stole, forged, and cashed checks payable to brokers' customers to whom checks were to be delivered by such manager was not an "agent" of the payees, and hence payees' assignee could not recover from collecting bank

which cashed the checks, on theory that payees could ratify collection of checks from drawee bank by collecting bank and hold it as for "money had and received", since there was nothing that payees could ratify so as to effectually make delivery of the checks to the manager by brokers a delivery to the payees. Civ.Code, § 3097.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent" and "Money Had And Received".

4. Principal and agent ⇐163(1)

An assignee of payees of checks cashed by collecting bank on presentation by drawer's office manager who forged payees' signatures could not recover amount of checks from collecting bank on theory that payees ratified collection of checks from drawee bank by collecting bank and could hold such bank as for "money had and received", where assignment was not made until after payees who were drawer's customers had been paid in full by drawer's surety, at which time it was too late for them to effect a ratification of delivery of the checks. Civ. Code, § 3097.

5. Subrogation ⇐7(1)

The doctrine of "subrogation" does not apply in favor of a surety company on a fidelity bond against persons who did not participate in the wrongful act of the wrongdoer.

See Words and Phrases, Permanent Edition, for all other definitions of "Subrogation".

6. Subrogation ⇐7(1)

A brokers' surety which paid brokers' customers for loss sustained when brokers' office manager cashed checks payable to customers by forging their signatures, could not under doctrine of "subrogation" recover from collecting bank which cashed the checks the loss sustained, since neither such bank nor the surety were wrongdoers, and equity would not compel the bank, admittedly an innocent party, to bear the loss.

7. Assignments ⇐90

A brokers' surety which paid brokers' customers for loss sustained when brokers' office manager cashed checks payable to customers by forging their signatures could not under an assignment from payees of their claims to surety's agent collect loss sustained from collecting bank which cashed the checks, since payees never had a cause of action against collecting bank, and hence had nothing to assign. Civ.Code, § 3097.

8. Banks and banking ⇐140(2)

A drawee bank is not liable to payee of a check whose indorsement thereon has been forged where payment thereon has been made by drawee bank upon such unauthorized indorsement, since there is no "privity" between drawee bank and payee, bank's contract being only with drawer. Civ.Code, § 3097.

See Words and Phrases, Permanent Edition, for all other definitions of "Privity".

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by T. Lloyd Jones against Bank of America National Trust & Savings Association, a national banking association, to recover the amount of checks paid by defendant on forged indorsements of signatures of payees who assigned their claims to plaintiff. From an adverse judgment, defendant appeals.

Reversed and remanded, with directions.

Hearing denied; HOUSER, J., dissenting.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for appellant.

George H. Moore and Hugh B. Rotchford, both of Los Angeles, F. B. Griffith, of San Francisco, and Robert E. Ford, of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal by defendant bank from an adverse judgment arising out of the cashing of a number of checks by such bank upon which the signatures of the persons named therein as payees had been forged by one Davies, who was an office manager of the brokerage firm which drew the checks. At the time of the misconduct of Davies there was in effect an agreement between the brokerage firm and Ocean Accident and Guarantee Corporation, Ltd. (hereinafter referred to for convenience as the surety company), under the terms of which the latter agreed to reimburse and indenmnify the brokerage firm, employer of Davies, for any loss occasioned the employer through embezzlement, etc., on the part of its employee, Davies.

The facts germane to a determination of this controversy are that the brokerage firm, Bennett, Richards & Hill, had its main office in Los Angeles and maintained a branch office in the city of Long Beach.

We shall hereafter refer to the brokerage firm as the brokers. Davies was manager of the brokers' Long Beach office. Customers in that office placed securities there for sale, and Davies forwarded them to the Los Angeles office. The securities were sold by the last-named office and the proper officers at Los Angeles drew checks payable to the order of the respective customers for the net proceeds of the sales and sent the checks to Davies at the Long Beach office for delivery to such customers. Instead of delivering the checks to the customers, Davies stole them, forged the indorsement of the payees in blank, added his indorsement, and deposited the checks in his bank account in a branch of defendant bank in Long Beach, which bank received the checks in good faith and without notice of any infirmity in Davies' title. Thereupon defendant bank forwarded such checks to the drawee bank, Citizens National Trust and Savings Bank of Los Angeles, and collected the proceeds thereof, which it paid to Davies in due course.

There was one check, which forms the basis of the fourth cause of action, which differed from all the others in this: The customer had deposited the stock certificate of a corporation called Buffums' with Davies to be sold by the issuing corporation, which, as a service to its stockholders, handled such transactions. Buffums' sold the stock and sent to Davies a check for $1,950, payable to the customer, one Minnie Butler. That check was drawn on the account of Buffums' in the same branch of defendant bank where Davies maintained his account. The last-named bank cashed that check in good faith on Davies' forgery of the payee's name and paid the amount thereof to Davies.

When Davies' thefts were discovered, the brokers immediately notified the surety company. Thereupon the brokers and the surety company entered into a written agreement which provided that "instead of following the usual procedure covering the payment of claims arising under such bonds," the officers of the brokers and the surety company would confer together with a view to arriving at a settlement direct with the customers, and that "such settlement shall be considered the payment of a direct loss sustained by Bennett, Richards & Hill under said bonds and in diminution of said bonds." The customers were thereafter interviewed by an adjuster of the surety company and an agent of the brokers, and claims were prepared for filing by the customers against the brokers. In each case the claim was for money alleged to be due from the brokers to the customer. The surety company thereupon paid to each customer the amount of his or her claim against the brokers and took from each of such customers an assignment of his or her claim against defendant bank. Simultaneously therewith the customer executed a release to the brokers.

The plaintiff herein is the claims manager of the surety company which executed the agreement under which the losses were indemnified. It was stipulated at the trial that the surety company paid the consideration for the assignments which it took from the customers and will receive any net recovery that is had.

The complaint proceeds upon the theory that the checks were issued to the several payees and when their respective checks were collected by the bank as the same were deposited by the faithless office manager of the brokers, who had no authority to receive or indorse the same, such payees could ratify the collection of the checks from the drawee bank by the collecting bank and hold the latter as for money had and received. All causes of action except the fourth are identical, and are based upon checks drawn by the brokers. The fourth cause of action is based upon the check drawn by Buffums' upon defendant bank and delivered to the brokers for the payee thereof.

The answer denied that the checks were ever issued, such denial being based upon the theory that with the exception of the Buffums' check, by reason of claimed nondelivery to the payees, such payees never had any interest in the checks, were not therefore damaged by what defendant bank did, and consequently never had a cause of action to assign. The answer also pleaded that the settlement made by the surety company was in fact payment of a loss sustained by the brokers covered by the bond. The answer also pleaded a release, on the theory that if the bank was a wrongdoer in converting the checks, assuming such checks did become the property of plaintiff's assignors (the payees thereof), the brokers, by and through the wrongful act of their agent, Davies, became joint converters and were also released.

As to all causes of action of the complaint other than the fourth the trial court found that on the dates alleged the defendant bank received to and for the use of

each payee named the amounts of the respective checks. As to the fourth cause of action it was found that without any authority from the payee of the check therein mentioned defendant bank cashed the same and paid the proceeds thereof to Davies, who had forged the payee's name thereto; that defendant bank had therefore received the amount named in said check from the drawee bank to and for the use and benefit of the payee named in the check. Judgment went for plaintiff against the defendant for the total amount of the checks in question.

Appellant's first ground of appeal is that all of the checks except the one issued by Buffums' were never in fact issued, but were stolen by the drawer's manager while still undelivered in the hands of the drawer, by reason of which, it is asserted, the intended payees of such checks never actually became the payees or owners thereof and never had any interest in them; that as there was no agency between Davies and the payees, the latter could not ratify the receipt of the checks by Davies as a delivery to them.

Because the two classes of checks here involved are governed by different legal considerations, we shall first discuss the group of checks involved in all causes of action except the fourth. The brokers had sold securities belonging to their customers. Whether such sales were authorized by the customers does not appear, but the record does disclose that in some of the cases the thefts by Davies of the proceeds of such sales were concealed for years, which fact would seem to warrant the inference that in some instances at least the customers were without knowledge that the securities had been sold or that any checks were drawn by the brokers to their order. Section 3097 of the Civil Code provides: "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

[1] In the case at bar, if there was no delivery of the checks to the customers, then they remained the property of the brokers. Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 P. 326. In People v. Cassou, 27 Cal.App. 23, 148 P. 810, the defendant was charged with the felonious taking of personal property in violation of section 532 of the Penal Code. The information filed charged him with having induced the indorser on a note, by means of false pretenses, to make and deliver a certain promissory note to him. From the allegations of the information it appeared that the defendant charged therein was himself the maker of the note and there was no averment that the instrument had ever been delivered to the payee. A demurrer to the information on the ground that it did not state facts sufficient to constitute a public offense was sustained by the trial court, and such ruling was upheld on appeal, where the court said: "Neither the note nor the indorsement thereon had any legal existence until delivered to and accepted by the payee." It was accordingly held that because of non-delivery to the payee, the indorser had no interest in the note and the pleading charged the defendant with nothing more than procuring the indorser's signature to the note by false pretenses.

In support of his claim that his assignors as payees on the check had a right of action against the collecting bank, respondent strongly relies upon the case of George v. Security Trust & Savings Bank, 91 Cal. App. 708, 267 P. 560, wherein the facts were substantially that one Lynch drew his check to the order of one Vanderbilt and gave it to Allen, who had no authority to receive or indorse the same. The drawee bank accepted and certified the check. Allen thereupon forged the payee's name and passed the check to one Cohen; the latter collected the amount thereof from the defendant bank, which in turn collected such amount from the drawee bank. It is true, as contended by respondent, that the court there held that a cause of action was stated against the bank upon the theory of ratification by the payee of the collection of the check from the drawee and that the collecting bank could be held as for moneys had

and received; that the payment by the drawee bank to the collecting bank with the forged indorsement thereon is evidence that the check was accepted and paid by the drawee bank, which acts the payee ratified. It is noteworthy, however, that in all the cases relied upon by the court in the cited case the facts were that delivery of the negotiable instrument had been made to the payee thereon. Such also was the fact in the cases of Palo Alto, etc., Ass'n v. First National Bank, 33 Cal.App. 214, 164 P. 1124; Buena Vista Oil Co. v. Park Bank, 39 Cal.App. 710, 711, 180 P. 12, and Walsh v. American Trust Co., 7 Cal.App. 2d 654, 47 P.2d 323. True, the court in the George case stated that the maker of the check did not deliver it to the payee thereof, but to Allen, "who had no authority to receive or indorse the same." However, in that case there had been a delivery of the check by the drawer, presumptively made, as is stated in section 3097 of the Civil Code, "for the purpose of giving effect thereto." Where there has been such a release or delivery of the check by the maker, we can readily understand how equitably and legally the defrauded payee might elect to sue the bank, thereby ratifying the receipt of the check by the bank from the forger. This for the reason that after delivery of the check has been made with the intent and purpose of giving effect thereto and it falls into the hands of an unauthorized person, the rightful payee may charge the bank with having received it as an agent for the use and benefit of the payee and as having dealt with the check as the property of the true payee and therefore bound to pay the proceeds only to him or his order. In other words, under such circumstances the collecting bank holds the funds obtained upon the check for and on behalf of the true owner thereof, and the bank's payment of such funds to the party who committed the forgery or to any person other than the true owner does not discharge its obligation. But in the case with which we are here concerned the checks never left the custody, possession or control of the makers. The brokers' manager, Davies, was their agent and employee. He stole the checks while they were yet within the custody and control of the employers. He was neither ostensibly nor in fact the agent of the payees. Had the checks been transmitted by the brokers to the payees and delivery miscarried, thereby resulting in the checks falling into the hands of one unauthorized to receive them, but who fraudulently indorsed and collected them from the bank, the situation might be different.

[2, 3] So far as ratification is concerned, it is the rule in California that a "ratification can only be effectual between the parties, when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent himself, or of some third person." Watkins v. Clemmer, 129 Cal.App. 567, 19 P.2d 303, 305. Furthermore, in Schomaker v. Petersen, 103 Cal. App. 558, 570, 285 P. 342, 347, it is said: "And ratification is effectually implied only in respect of an act done by a person professedly acting as the agent of the party sought to be charged as principal." By no stretch of the imagination can it be made to appear that Davies, the branch manager of the brokers, who stole, forged and cashed the checks, was even pretending to act as agent of the payees of the checks. Consequently there was nothing that the payees could ratify so as to effectually make the delivery to Davies a delivery to them.

[4] In the instant case the assignment was not made until the payees on the checks as customers of the brokers had been paid in full for their claims against such brokers. In other words, the customers stood upon their claims against the brokers until they were paid. Therefore, whatever cause of action the customers might conceivably have against the bank reverted to the brokers, who caused the claims against them to be satisfied. When the customers had been paid their respective claims it was too late for them to effect a ratification of the delivery of the checks; and after payment of their claims the customers were left without a claim against any one.

[5, 6] We shall not discuss the question of subrogation, for the reason that respondent disclaims the existence of the doctrine in the instant litigation; and, as we have heretofore indicated, the customers under the facts of this case had no cause of action against the bank because of non-delivery of the checks to them or anyone in their behalf. Their sole claim was against the brokers. As heretofore stated, they stood upon that claim and obtained payment of the same against the brokers in full. The equitable doctrine of subrogation would not aid the surety company under the facts of this case. Meyers v. Bank of America Nat. Trust & Savings Ass'n, 11 Cal.2d 92, 77 P.2d 1084. Almost universally it has been held that the doctrine of subrogation does not apply in favor of a surety company on a fidelity

bond against persons who did not participate in the wrongful act of the wrongdoer. Here neither the bank nor the surety company were wrongdoers, but the surety company was required to make good the losses suffered by the brokers under a contractual liability for the assumption of which the surety company was paid a premium. Under such conditions equity will not permit the application of the doctrine of subrogation to compel the bank, admittedly an innocent party, to bear the loss.

[7] So far as the causes of action other than the fourth are concerned, we therefore hold that while the payees on the checks, as customers of the brokers, had a cause of action against the latter which they settled, there never existed under the facts here presented a cause of action against the defendant collecting bank. Consequently such payees had nothing to assign to the surety company or its agent.

[8] We come now to a consideration of the check involved in the fourth cause of action of the amended complaint. As heretofore in this opinion narrated, this check was drawn by Buffums' upon the defendant bank and was paid to Davies by a branch of such bank on the forged indorsement of the name of Minnie Butler, the payee. The question of delivery of the check is not involved. As found by the trial court, Minnie Butler had left her Buffums' stock with Davies, the manager of the brokers' Long Beach office. Buffums', as a service to its stockholders, handled the sale and purchase of its securities. After the receipt by him of Minnie Butler's stock, Davies sent the same to Buffums', who sold it as directed and forwarded the brokers their check for $1,950 payable to Minnie Butler. Forging her name to the check, Davies presented it to defendant bank's branch, upon which it was drawn, received payment thereon, and the bank charged the amount thereof to the account of Buffums'. In this case the check was delivered to the brokers as agent for Minnie Butler, and she therefore became the payee thereof. In connection with the checks heretofore considered, defendant bank was the collecting bank and admittedly received the money upon the checks it cashed, but in the case of the Minnie Butler check the drawee bank did not receive any money. It paid the check, and upon its books erroneously charged the amount thereof against the account of its depositor, Buffums'. That such depositor had a cause of action against the bank for erroneously paying out its funds on deposit cannot be denied; but the question presented to us is whether a drawee bank is liable to the payee of a check whose indorsement thereon has been forged and when payment thereon has been made by the drawee bank upon such unauthorized indorsement. We are convinced that it is firmly established as the law that the payee of a check unaccepted, as was the case here, cannot maintain an action upon it against the bank on which it is drawn. Such holding is based on the principle that there is no privity between the drawee bank and the payee of the check. In the instant case the bank's contract was only with the drawer of the check, Buffums'. The bank never received any money from Minnie Butler; it had no money belonging to her, and never promised to pay her anything. It received money on deposit from Buffums', and its agreement with the latter was that it would return the same to Buffums' when called for or would pay it out upon Buffums' checks. For its failure of duty in this regard by not paying the money to Minnie Butler, the payee, the bank was responsible to its depositor, by reason of its contract with such depositor, but was not responsible to Minnie Butler or anyone else. When the check was not paid to Minnie Butler, the obligation of Buffums' to her was not impaired by the issuance of the check, and she was still entitled to demand her money from her debtor. Therefore Minnie Butler, as the payee of a check unaccepted by her, cannot maintain an action for it against the bank on which it was drawn. This was the conclusion reached by the Supreme Court of the United States in First National Bank of Washington v. Whitman, 94 U.S. 343, 24 L.Ed. 229. The case of George v. Security, etc., Bank, supra, relied upon by respondent, is not controlling here, for the reason that the action there was against a collecting bank, and not, as here, a drawee bank.

From the foregoing it follows that defendant bank being without fault, and plaintiff's assignors having nothing to assign, plaintiff cannot prevail in his action against the appellant bank.

For the reasons herein stated, the judgment is reversed and the cause remanded with directions to the court below to enter judgment for the defendant.

YORK, P. J., and DORAN, J., concurred.

49 Cal.App.2d 160

Ex parte WHITE.

Cr. 1781.

District Court of Appeal, Third District, California.

Jan. 14, 1942.

1. Habeas corpus ⇐117(1)

A decision in prior habeas corpus proceeding before Superior Court cannot be "res judicata" in subsequent habeas corpus proceeding in appellate court if the decision of the Superior Court is based on questions of law alone.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Habeas corpus ⇐120

In habeas corpus proceeding in appellate court by divorced mother, who had been awarded custody of minor child, against paternal grandparents who were alleged to be illegally detaining the minor, decision of the Superior Court denying prior petition for writ of habeas corpus was not "res judicata" where at hearing before Superior Court no evidence was introduced relating to the fitness of any of the parties to have the custody of the minor or of environment and the Superior Court made no finding since the question decided by the Superior Court was one of law alone.

Habeas corpus proceeding by Grace White to obtain custody of Robert LaVoy White. On motion to dismiss the proceeding.

Motion denied.

Pugh & Pugh, of Red Bluff, for petitioner.

Ware & Ware, of Chico, for respondents Wm. D. White and Letha Beryl White.

TUTTLE, Justice.

Petitioner asks, by her application for a writ of habeas corpus, to have the custody of Robert LaVoy White restored to her. A similar application was made to the Superior Court, in and for the County of Tehama, and denied. It is alleged in the petition that William D. White and Letha Beryl White, paternal grandparents of the minor, are illegally detaining his person and restraining him of his liberty. The grandparents now move this court to dismiss the proceedings upon the ground that the matter has been once adjudicated.

Petitioner was the wife of LaVoy White, from whom she was divorced by final decree on May 15, 1940. The minor is the son of said parties, his age being six years. By the terms of the final decree, the custody of said minor was awarded to the parents equally, each to have his custody for one-half of every year. The father was ordered to pay $15 per month for the support of the child during the time that he was with the mother.

Subsequent to the filing of the petition, this court made an order appointing a referee to hear all the issues involved, and report his findings thereon.

It further appears from the allegations of the petition that the father of the minor is on Midway Island, and has failed to provide any money whatever for his support, and does not intend to return to the United States for several years; that the mother is able and competent to provide a proper home for the child. Facts are set forth with the intent to show that the grandparents are not furnishing the child with a proper or suitable home, and that the latter will not permit petitioner to approach the child. It is also alleged that respondents have had the custody of said minor since March, 1940, and refused to permit petitioner to have his custody.

Respondents rely upon In re Holt, 34 Cal. App. 290, 167 P. 184, where it was held that a prior hearing upon habeas corpus, under identical facts, in the superior court, is res adjudicata, where the custody of children is involved.

[1, 2] Petitioner relies upon In re Livingston, 108 Cal.App. 716, 292 P. 285, where it is held that a prior hearing, in such a case, cannot be res adjudicata in an appellate court, if the decision of the superior court is based upon questions of law alone. We believe that the latter view must prevail here. Under no circumstances could it be said that respondents have any legal right to the custody of the minor. In the eyes of the law, they are mere interlopers who have no standing before this court. On the other hand, petitioner is the mother, and, under the terms of the decree, has a right to the custody at certain times. Her rights cannot be ignored, or lightly brushed aside. Furthermore, the petition

recites that at the former hearing no evidence was introduced relating to the fitness of any of the parties to have the custody of the minor, or of environment. The court made no findings, but merely denied the writ. The question decided by the superior court was therefore one of law alone. Petitioner is therefore entitled to a full hearing in this court upon the issues, set forth in her petition.

The motion is denied, and the referee directed to proceed with the hearing.

THOMPSON, Acting P. J., concurred.



49 Cal.App.2d 58

MURPHY v. RETIREMENT BOARD OF SAN FRANCISCO CITY EMPLOYEES' RETIREMENT SYSTEM et al.

Civ. 11522.

District Court of Appeal, First District. Division 2, California.

Jan. 9, 1942.

Hearing Denied March 9, 1942.

1. Mandamus ⇐187(9)

On appeal from judgment for respondents in mandamus proceeding to compel retirement board to grant widow of policeman a pension, District Court of Appeal must assume in support of judgment that respondent board found that petitioner failed to prove that death of officer resulted from injury received while in performance of duty.

2. Appeal and error ⇐901

District Court of Appeal will assume fairness and integrity of trial court and will indulge in all presumptions and inferences in support of its findings and judgment until error is affirmatively shown, since burden is always on appellant to show that error complained of is result of miscarriage of justice. Const. art. 6, § 4½.

3. Mandamus ⇐172

In mandamus proceeding to "review" the trial and judgment of an administrative or quasi judicial board, function of trial court is not that of a court sitting in trial de novo, since when law gives to fact-finding body power to hear and determine questions of fact, judgment of such body will not be controlled by mandamus in absence of showing that it acted arbitrarily, capriciously or fraudulently or without due regard for applicant's rights.

4. Mandamus ⇐187(9)

Where trial court found in mandamus proceeding that in denying application to widow of policeman for pension, and in denying application for rehearing, retirement board did not act arbitrarily or in abuse of discretion, burden was upon petitioner to affirmatively show on appeal that such finding was error.

5. Municipal corporations ⇐187

In mandamus proceeding to compel retirement board to grant widow of former police officer a pension, trial court correctly found under evidence that evidence before board was in conflict as to whether deceased suffered a heart condition while climbing stairs of police station in February, 1936, which caused or excited death in 1938, and that board did not act arbitrarily or in abuse of discretion in denying pension.

6. Municipal corporations ⇐187

Where it was a fair inference to be drawn from evidence in proceeding by widow for pension that a pre-existing injury or chronic alcoholism caused deceased policeman to fall while ascending stairs in police station, triers of fact were not concluded by opinions of physicians, who had made no physical examination of deceased and who formed their opinions without regard to evidence from those who had personally examined and treated deceased in his lifetime, as to cause of death.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Jr., Judge.

On rehearing. Former disposition affirmed.

Prior opinion, 119 P.2d 739.

Affirmed.

Hearing denied; CARTER, J., dissenting.

James C. Purcell and William E. Ferriter, both of San Francisco, for appellant.

John J. O'Toole, City Atty., and Reynald J. Bianchi, Deputy City Atty., both of San Francisco, for respondents.

NOURSE, Presiding Judge.

The petitioner sued for a writ of mandate requiring respondents to grant her a pension as the widow of a former member of the municipal police department. Trial was had upon the record of the proceedings of the respondent board which resulted in a denial of petitioner's application for a pension.

The case is based upon the claim that the deceased suffered a heart occlusion, or thrombosis, while he was ascending the stairs of the central police station on February 10, 1936, and that this injury caused, or aggravated, his death two years later. The evidence was that the deceased fell upon the stairs at that time, was unconscious for about five minutes, and later suffered headaches and pains in his ribs. In April, 1936, he was relieved from active service because of a pre-existing knee injury. The petitioner and the deceased were separated in 1934. She had obtained an interlocutory decree of divorce, and had not seen deceased since February, 1936.

[1] On the trial before the respondent board, and before the trial court, the petitioner endeavored to show that the deceased suffered a heart occlusion, or thrombosis, while ascending the stairs, and that this was "an acute stage of his coronary disease and the exciting cause of his death therefrom." The trial court found that the evidence adduced before the board failed to show that "the exertion of walking up said stairs was a cause of said heart thrombosis and/or heart occlusion which resulted in an infarct and caused the death * * *." The trial court thereupon sustained the action of the respondent board, and the appeal is taken from that judgment. On this appeal we must assume in support of the judgment that the respondent board found that petitioner had failed to prove that the death of the officer resulted from an injury received while in the performance of his duties.

[2] It is difficult to understand the theory upon which this appeal is based. It seems to be that if an appellant merely states that there is no conflict in the evidence, or no evidence to support the material findings of the trial court, the burden is forthwith cast upon the respondent, or upon the appellate court, to sustain the judgment. The accepted rules of appellate procedure are that this court will assume the fairness and integrity of the trial court and will indulge in all presumptions and inferences in support of its findings and judgment until error is affirmatively shown. The burden is always upon the appellant to show "that the error complained of has resulted in a miscarriage of justice." Constitution art. VI, section 4½.

[3] When the case is one in mandamus to "review" the trial and judgment of an administrative or quasi judicial board, the function of the trial court is not that of a court sitting in a trial de novo. We endeavored to make this clear in Hogan v. Retirement Board, 13 Cal.App.2d 676, 677, 57 P.2d 520, 521, where we said: "When the law gives to a fact-finding body the power to hear and determine a question of fact, the judgment of that body will not be controlled by *mandamus* in the absence of a showing that it acted arbitrarily, capriciously, or fraudulently, or without due regard for the rights of the applicant. Mogan v. Board of Police Com'rs, 100 Cal.App. 270, 279 P. 1080; Sevina v. Hickock, 113 Cal.App. 301, 298 P. 116; McColgan v. Board of Police Com'rs, 130 Cal.App. 66, 19 P.2d 815."

[4] Now the trial court herein found that "in denying the application for pension and in denying the application for rehearing of said application for pension, said defendants sitting as said Retirement Board did not act arbitrarily or in abuse of the discretion in them residing and did not act capriciously therein." The burden was thus cast upon the appellant to affirmatively show that this finding was error. But the appellant assumes that it is sufficient to show that a heart occlusion *might* have occurred at the time of the fall and that the respondent board was therefore bound to find that death resulted from that particular event. But the weakness of the theory is that the petitioner's evidence discloses nothing more than that the occlusion might have occurred at that time, but that other evidence was just as persuasive that the fall was the result of other causes, that it did not produce the occlusion, and that the heart infarct might have resulted from any one of many causes, either before or after the fall. Thus the conjectures which the appellant makes as to the cause of death are no more convincing than those to the contrary. But, in any event, the entire evidence was such that reasonable

minds might have fairly drawn the inferences and conclusions which are the subject of this attack—and that should settle the controversy.

[5] But here the appellant contends that because of her statement that there was no conflict in the evidence as to when the heart occlusion occurred and that this was the exciting cause of death, the judgment must be reversed unless we prove the contrary. In matters of this kind we never assume that counsel will intentionally make a statement that is in direct conflict with the facts. Rather we assume that they have inadvertently overlooked essential facts and given a partisan examination of the record. Though we have never conceived it to be the function of an appellate court to burden an opinion with a full recital of the evidence to disprove counsel's declaration that there is no evidence to support a finding, there are cases where that is made necessary because of indifference to the accepted rules of legal procedure. Here the cause was heard by an able and experienced trial judge who was fully aware of the difficulties confronting the respondent board upon the original trial. He entered the findings after an examination of all the evidence taken at the hearing. The appellant contends that there was no evidence to support the finding that the evidence before the respondent board was conflicting. We recite some of it.

On May 16, 1934, the deceased was examined by Dr. Twitchell because of his complaint of a serious mental condition which the deceased ascribed to a knee injury which he suffered in 1923. The deceased admitted that he had been disarmed while about to commit suicide and that his wife and daughter had left his home. The physician reported from his examination that the knee injury had nothing to do with "bringing about a disturbed mental state" and recommended harmony in the household.

On February 21, 1936, the deceased was examined by Dr. Shumate to whom he stated that, on February 10th he "fell down the stairs at the police station and struck his head and right leg." The deceased also stated that "about one month ago" he fell or was knocked down and "struck his head on the pavement" and also suffered a broken rib. The physician then gave this diagnosis: "Chronic alcoholism; possible mild head injury. X-ray of skull negative."

On March 6, 1936, the deceased was examined by Dr. Oliver. The chief complaints were "headache, dizziness." The examination disclosed that on January 4, 1936, the deceased was knocked down "probably hitting his head on the sidewalk," and was kicked in the ribs. "At this time he began having a steady constant frontal and occipital headache" and occasional dizzy feelings. On February 10, 1936, "*he slipped and fell* down the stairs," and for the rest of the day suffered with headache and pains in the lower ribs. As a result of this examination the physician concluded that: "The mental changes consisting of garrulousness, unstable emotions, and defective memory could be due either to alcohol, or to an early cerebral arteriosclerosis. In favor of the latter is the appearance of the retinal arteries." He submitted his diagnosis as "1. Chronic Alcoholism, based upon the history as received from the patient and from Dr. Shumate, and also upon nerve tenderness.

"2. Early Cerebral Degenerative Changes, based upon (1) or upon cerebral arteriosclerosis."

On October 26, 1936, Dr. Oliver reported that he had examined the deceased again and found that he was still suffering from defective memory and head pains and that his diagnosis "is as before cerebral arteriosclerosis."

At the time of the death of deceased on March 23, 1938, an autopsy was performed which disclosed the following: "Lungs: Bilateral dependent broncho pneumonia. Heart: Shows an aneurysmal dilatation of left ventricle, the result of an old infarct which has been repaired by calcification." Cause of death: "Coronary sclerosis, myocardial infarction. Broncho pneumonia (Terminal)." No examination of the head was made.

All this evidence which was before the respondent board was offered at the hearing before the trial court by the petitioner without objection to its competency or relevancy. It is significant that throughout the many years of illness of the deceased, and in the numerous physical examinations and medical treatments which the deceased was subjected to, no mention was made of any heart condition, or of any symptoms of heart disease or weakness; that though several physicians

separately examined him, took his history for a period of over ten years, and listened to all his complaints, no one records any evidence of a heart condition, or of any complaint of that nature. One piece of evidence which was before the respondent board, but which does not appear in the exhibits on file herein, is the report of Dr. Horbaugh made March 23, 1936, within six weeks of the fall. It appears from the transcript of the testimony that, in answer to the question relating to the condition of "heart and blood vessels" the doctor answered "normal."

The foregoing is a part of the evidence upon which the trial court based its findings "That the whole of said evidence adduced before said defendants sitting as said Retirement Board failed to show that the heart occlusion and/or heart thrombosis from which said John J. Murphy died or any other thrombosis and/or heart occlusion occurred while said John J. Murphy was climbing said Central Police Station stairs on said February 10, 1936, or that the exertion of walking up said stairs was a cause of said heart thrombosis and/or heart occlusion which resulted in an infarct and caused the death of said John J. Murphy or of any heart occlusion or of any heart thrombosis." Also "that the evidence adduced before said defendants sitting as said Retirement Board showed that said John J. Murphy died on the 23rd day of March, 1938, from a disease which had no connection with any injury suffered by the said John J. Murphy while performing his duties as a member of the said Police Department of said City and County of San Francisco."

It is true that after the death of deceased the petitioner produced medical witnesses who gave favorable opinions of the cause of death based upon questions favorable to petitioner's theory, but the respondent board, with many years of experience as to the ease with which such witnesses may be produced, was not compelled to accept those opinions in the face of the positive evidence of those physicians who had examined and treated the deceased in his lifetime. With this state of the record the trial court correctly found that the evidence before the board was in conflict as to whether the deceased suffered a heart occlusion or heart thrombosis while climbing the stairs in February, 1936, which caused or excited the death in 1938. In support of the finding it should be added that the petitioner's witnesses concurred in the opinion that the heart occlusion might have occurred from many other causes either before or after the fall.

[6] It was a fair inference to be drawn from this evidence that either the pre-existing knee injury, or the pre-existing head injury, or the chronic alcoholism, caused the deceased to slip and fall while ascending the stairs and the triers of the fact were not concluded by the opinions of those physicians who had made no physical examination of the deceased and who formed their opinions without regard to the evidence of those who had personally examined and treated the deceased in his lifetime.

From our examination of the entire record we are forced to the same conclusion made by the trial court—that the respondent board did not act arbitrarily or capriciously, but that the petitioner was given a full and fair hearing, and that the judgment of the board was based upon conflicting evidence and upon fair and reasonable inferences which might properly have been drawn therefrom.

The judgment is affirmed.

STURTEVANT, and SPENCE, JJ., concurred.



49 Cal.App.2d 86

In re SCHMIDT'S ESTATE.

PEOPLE v. DILL et al.

Civ. 11857.

District Court of Appeal, First District, Division 2, California.

Jan. 12, 1942.

1. Taxation ⇐879(2)

Where corporate stock, which four years prior to death was transferred by husband to his wife in fulfillment of prenuptial agreement, having been indorsed by both husband and wife and enclosed in envelope bearing wife's initials, was placed in joint safe deposit box to which both spouses had access, and husband turned over to wife money equal

to or in excess of her share of dividend checks and advised others that stock belonged to her, even though stock was not transferred on books of corporation, there was a sufficient "delivery" thereof to establish an immediate transfer of ownership, possession and enjoyment and negative any intention to postpone possession or enjoyment until husband's death, and hence such transfer was not subject to inheritance tax. Gen.Laws 1931, Act 8443, § 2(3).

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

2. Taxation ⇐879(2)

The fact that corporate stock, which decedent four years prior to death transferred to wife in fulfillment of prenuptial agreement, was not transferred on books of corporation during lifetime of the decedent, was a circumstance which jury could consider in determining whether parties intended transfer not to take effect in possession or enjoyment until death of decedent, thereby rendering transfer subject to inheritance tax, but such circumstance was not of controlling significance. Gen.Laws 1931, Act 8443, § 2(3); Civ. Code, § 324.

3. Taxation ⇐879(2)

Where evidence warranted finding that inter vivos transfer of corporate stock to transferor's wife was made without any reservation or intention that it was to take effect in possession or enjoyment only at or after the death of transferor, such transfer was not subject to inheritance tax regardless of whether it was made without a valuable and adequate consideration. Gen.Laws 1931, Act 8443, § 2(3).

4. Taxation ⇐900(2)

The Inheritance Tax Act of 1929, providing for the filing of inheritance tax appraiser's report and permitting the filing of objections thereto by any person interested in the proceeding, including the state controller, did not give to the people, acting through the state controller, or to any interested person the right to amend the report of the inheritance tax appraiser. Gen.Laws 1931, Act 8443, § 16(2).

5. Appeal and error ⇐1067

Where trial of issues raised by objections to inheritance tax appraiser's report, involving taxability of a transfer of corporate stock, had proceeded on the assumption that a valid inter vivos transfer had been made, but it appeared that a decree of partial distribution had been entered in order that stock which had not been transferred on books of corporation might be immediately placed in transferee's name, court's refusal to instruct that if stock was transferred by any decree of distribution by probate court, the transfer was subject to inheritance tax did not warrant reversal of judgment holding the transfer not subject to such tax, since requested instruction, if not erroneous, was at least misleading. Gen.Laws 1931, Act 8443, §§ 2(1), (3), 13.

6. Costs ⇐58

In proceeding under the Inheritance Tax Act of 1929 to hear objections to a report of the inheritance tax appraiser, objectors were not entitled to recover costs as against the state controller. Gen.Laws 1931, Act 8443, § 17(5).

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Proceeding in the matter of the estate of Herbert A. Schmidt, deceased, to hear objections filed by Marian S. Dill, individually and as executrix, and others to the report of the inheritance tax appraiser, including the value of certain corporate stock, transferred by decedent to the named objector prior to death, in the sum upon which inheritance tax was computed. From judgment and order entered pursuant thereto modifying the report and fixing the inheritance tax at a sum less than that fixed by inheritance tax appraiser, and from an order denying the motion to disallow costs claimed by the objectors, the People appeal.

Judgment affirmed in part and reversed in part, order modifying report of inheritance tax appraiser affirmed, and order as to costs reversed.

James W. Hickey, Inheritance Tax Atty., of Sacramento, and A. W. Brouillet, Deputy Inheritance Tax Atty., and W. Urie Walsh and Richard C. O'Connor, Asst. Deputy Inheritance Tax Attys., all of San Francisco, for appellants.

Hugo D. Newhouse and Russell P. Tyler, both of San Francisco, for respondents.

SPENCE, Justice.

This is an appeal from a judgment entered after a trial by jury of the issues presented by objections to the report of the

inheritance tax appraiser and from the order entered pursuant to said judgment modifying said report and fixing the inheritance tax at a sum less than that fixed by the inheritance tax appraiser. There is also an appeal from the order denying the motion to disallow the costs claimed by the objectors.

The controversy involved the question of the taxability of a certain transfer made during his lifetime by Herbert A. Schmidt, deceased, to his wife, Marian S. Schmidt, now Marian S. Dill. Said transfer was made in 1927 and it involved 2,025 shares of the stock of the Pacific Lighting Corporation. The report of the inheritance tax appraiser found that said transfer "was a gift made in contemplation of death and intended to take effect in possession and enjoyment as to said Marian S. Schmidt at or after the death of said Herbert A. Schmidt, and that said gift was made without valuable and adequate consideration." Pursuant to said finding, the inheritance tax appraiser included the value of said stock in the sum upon which inheritance tax was computed. The objectors filed written objections denying the material facts found by the inheritance tax appraiser and affirmatively alleging certain facts and circumstances relating to said transfer. The objectors claimed that said transfer was made for a valuable and adequate consideration; that it was not made in contemplation of death; and that it was not intended to take effect in possession or enjoyment at or after the death of the deceased.

Upon the trial, appellants abandoned the claim that said transfer was made in contemplation of death and relied upon the other grounds set forth in the findings made by the inheritance tax appraiser. The jury returned a special verdict answering the two questions submitted to it. By its first answer, it found that said transfer was made for a valuable and adequate consideration within the meaning of the inheritance tax act. By its second answer, it found that said transfer was made without any reservation or intention that it was to take effect in possession or enjoyment at or after the death of the deceased. The above mentioned judgment and order were entered in conformity with the special verdict of the jury. The effect thereof was to eliminate any tax upon said transfer to Mrs. Schmidt of the 2,025 shares of stock of Pacific Lighting Corporation.

The main contentions of appellants on this appeal are that the evidence was insufficient to show that said transfer was made for a valuable and adequate consideration or to show that said transfer was made without any reservation or intention that it take effect in possession or enjoyment at or after the death of the deceased. In this connection, it is conceded that if the evidence was sufficient to sustain the answer of the jury to either the first or second question submitted to it, then the evidence was sufficient to sustain the judgment and order. In other words, under what is referred to by appellants as the "Inheritance Tax Act of 1929," St. 1929, p. 1834, said transfer was admittedly not taxable if it was made for a "valuable and adequate consideration (i. e., a consideration equal in money or in money's worth to the full value of the property transferred)" and further said transfer was admittedly not taxable, even if it constituted a gift without any consideration, unless it was made either "(a) In contemplation of the death of the * * * donor, or, (b) Intended to take effect in possession or enjoyment at or after such death." See 1931 Deering's General Laws, Act 8443, section 2, subdivision 3. As above stated appellants' claim that the transfer was made in contemplation of death was abandoned on the trial and said claim is not argued on this appeal.

[1] Our review of the record convinces us that there was ample evidence to show that said transfer was made without any reservation and without any intention that it should take effect in possession or enjoyment at or after the death of the deceased. This conclusion renders is unnecessary to determine the question of whether the evidence was sufficient to show that said transfer was made for a valuable and adequate consideration within the meaning of the inheritance tax act. We will nevertheless briefly summarize the evidence introduced on both issues as some of the evidence relating to the issue of consideration had some bearing upon the issue of when the parties intended the transfer to take effect.

Herbert A. Schmidt, deceased, was a young architect at the time of his marriage to Marian S. Schmidt in 1915. He was the son of wealthy and elderly parents who had assured him that he would inherit their entire estate. He had been given an exten-

sive education but was discouraged concerning his progress in his chosen profession. He was anxious to marry Mrs. Schmidt and, prior to the marriage, he freely discussed with her his inability to support the two of them on his earnings. He also discussed these matters with his parents. His parents were anxious that he should marry and therefore promised to give him a monthly allowance in the event of his marriage and again assured him that he would inherit all of their property. In proposing marriage to Mrs. Schmidt, the deceased promised that if she would marry him, he would transfer to her as her separate property, when he received his promised inheritance, an amount equivalent to one-third of said inheritance. In reliance upon said promise, Mrs. Schmidt consented to the marriage and the marriage took place in 1915.

About one year after said marriage, the parties had another conversation regarding their affairs. Mr. Schmidt was not succeeding in his profession as well as he had hoped and he suggested a plan which involved the deferring of any prospect of accumulating community property at least for some time to come. He reminded Mrs. Schmidt of his antenuptial promise concerning his inheritance and the result of the conversation was that Mrs. Schmidt consented to the plan proposed.

The mother of Mr. Schmidt died in 1921 and the father of Mr. Schmidt died in 1925. After the estate of the father went through probate, all of the property of his parents was distributed to him in the latter part of 1926. Mr. Schmidt had thereby inherited among other property certain shares of Pacific Lighting Corporation and a stock dividend was to be declared in 1927 by that corporation whereby Mr. Schmidt would receive an additional 2,025 shares of its stock. Mr. Schmidt advised Mrs. Schmidt that the time had come when he should fulfill the promises previously made and that he had decided to transfer to her said 2,025 shares of the stock of said corporation. Shortly thereafter, Mr. Schmidt phoned his wife that he had received the certificate for said 2,025 shares and he requested that she come to his office in order that he might complete the details of the transfer. She went to his office and he told her that he had been advised that in order to effect the transfer of said stock to her as her separate property, it would be necessary for him to endorse the certificate and that it would also be necessary for her to endorse it as evidence of the fact that she had actually received possession of said certificate. Mr. Schmidt therefore endorsed the certificate and handed it to Mrs. Schmidt who also endorsed the same. He then advised her that said stock was hers as her separate property and that she could have the stock transferred on the books of the corporation at any time. The stock certificate was then placed in a joint safe deposit box of the spouses to which both had access and it was enclosed in an envelope bearing the initials "M. M. S.," signifying Mrs. Schmidt, which initials were written by Mr. Schmidt.

At the time of the above mentioned transfer in 1927 and at all times until his death, Mr. Schmidt was apparently in excellent health. He nevertheless died very unexpectedly in 1930 at the age of 44 years, his death resulting from a coronary occlusion which occurred while he was attending a dinner party. When said safe deposit box was opened following his death, said certificate was found in the above mentioned envelope bearing Mrs. Schmidt's initials. There were many other stock certificates in said box but none, other than the above mentioned certificate, was so endorsed or was so contained in an envelope bearing Mrs. Schmidt's initials.

Said stock had not been transferred to Mrs. Schmidt on the books of the corporation during Mr. Schmidt's lifetime. Mr. Schmidt also owned stock in said corporation and all dividend checks on all of the stock standing in his name had been sent to him. It nevertheless appears that Mr. Schmidt turned over to Mrs. Schmidt sums of money equal to or in excess of her share of such dividend checks. It also appears that he advised others that said 2,025 shares of stock belonged to Mrs. Schmidt and that he consulted with Mrs. Schmidt in 1929 regarding the advisability of selling a portion of her said stock. An order was given by Mrs. Schmidt in 1929 for the sale of 1,000 shares thereof but said order was not executed because the stock did not regain the price set in the order.

[2] There was no material conflict in the evidence introduced on the trial. Mrs. Schmidt testified at length and her testimony regarding the affairs of the spouses appears to have been clear and convincing. It was corroborated in many important details by the testimony of others. We are satisfied that the facts and circumstances in evidence were ample to show that there was

a sufficient delivery with the intent to make an immediate transfer of ownership, possession and enjoyment (Shaver v. Canfield, 21 Cal.App.2d 734, 70 P.2d 507) and that it was ample to show there was no intention that the transfer should take effect in possession or enjoyment only at or after the death of Mr. Schmidt. The mere fact that said stock was not transferred on the books of the corporation during the lifetime of Mr. Schmidt is not of controlling significance. Civil Code, § 324, as said section read in 1927 [see Stat. 1907, chap. 470, p. 854]; Crane v. Reardon, 217 Cal. 531, 20 P.2d 49; Crocker v. Crocker, 84 Cal.App. 114, 257 P. 611. Mrs. Schmidt testified to the effect that she had intended to have said stock transferred on the books of the corporation but she had overlooked having it done. She further testified that she attached no importance to having the transfer made on said books as the certificate was in the safe deposit box to which she had access and that she had implicit confidence in Mr. Schmidt. While the failure to have said stocks so transferred on the books of the corporation was a circumstance which the jury could consider in arriving at the intention of the parties, our only present inquiry is whether there was substantial evidence to show the intention as found by the jury. The positive testimony given by Mrs. Schmidt regarding the actual intention as expressed by the parties at the time of the transfer constituted substantial evidence to sustain the finding of the jury with respect to such intention. While appellants claim in their reply brief that the evidence introduced by respondents on the question of intention was inherently improbable, we find nothing in the record to justify this claim.

[3] Appellants further contend that the trial court erred in "submitting to the jury an issue of law" and that it erred in "giving and refusing instructions on the subject of valuable and adequate consideration." Both of these contentions relate to the issue of consideration. As above stated, we believe that the affirmative answer of the jury on the second issue submitted to it found ample support in the evidence and the finding on said second issue was sufficient in itself to sustain the judgment and order. It therefore follows that the question of whether the trial court committed error in dealing with the issue of consideration is immaterial under the circumstances. It also follows from what has been heretofore said with respect to the evidence relating to said second issue, that the trial court did not err, as contended by appellants, in denying the motions for nonsuit, directed verdict and judgment notwithstanding the verdict.

[4] Appellants also contend that the trial court erred in refusing to permit them to "amend the report of the inheritance tax appraiser." We find no merit in this contention. Subdivision 2 of section 16 of the Inheritance Tax Act (1931 Deering's General Laws, Act 8443) provided for the filing of the report of the inheritance tax appraiser and the filing of objections. It provided that "any person interested in said proceeding (including the state controller) may file objections in writing to said report." The procedure prescribed provided for a hearing of any objections to the report and further provided that "Upon the hearing of said objections, said court may make such order as to it may seem meet and proper in the premises." It therefore appears that appellants, acting through the state controller, could have filed objections to said report but there is nothing in the act which gave to appellants or to any interested person the right to amend said report.

A further contention made by appellants is that the trial court erred in refusing another requested instruction. The discussion of this contention requires the statement of certain additional facts which were developed upon the trial. Admittedly, the deceased owned certain shares of the stock of the Pacific Lighting Corporation at the time of his death and admittedly the 2,025 shares of said stock in question here also stood in his name on the books of the corporation. The shares owned by deceased were listed in the inventory but the 2,025 shares in question here were not so listed. After the death of the deceased, said corporation refused to transfer said 2,025 shares to Mrs. Schmidt on the books of the corporation without some form of judgment or order of court. Mrs. Schmidt was the sole beneficiary under the will of the deceased. The price of said stock was declining on the market during the depression period and it was the desire of Mrs. Schmidt to have said stock placed immediately in her name in order that she might deal with it to best advantage without unnecessary delay. Under advice of her counsel, she filed a petition for partial distribution in 1931, seeking a decree of partial

distribution covering all said stock including both the stock admittedly owned by the deceased and the 2,025 shares in question. The petition was granted, a decree was entered and written consent was given for the transfer of all said shares on the books of the Pacific Lighting Corporation. § 13 of said act.

[5] On the trial, appellants requested an instruction that "* * * if the Pacific Lighting Company stock here involved was transferred to Marian S. Dill, formerly Marian S. Schmidt, by any decree of distribution made by a probate court, then such transfer is subject to the payment of inheritance tax." This instruction was refused and we find no error in such refusal. The trial had proceeded upon the assumption that a valid inter vivos transfer had been made. The only question presented for determination was whether such valid inter vivos transfer was subject to inheritance tax by reason of the provisions of subdivision 3 of section 2 of said inheritance tax act. When the above mentioned evidence was produced, appellants apparently believed that the transfer might be taxable under subdivision 1 of section 2 of said act under the theory that it was a transfer "by will." As we view the situation, the uncontradicted evidence showed an inter vivos transfer and not a transfer by will. The reason for the petition for partial distribution was fully explained by the testimony of counsel for Mrs. Schmidt and the fact the petition was filed and a decree of partial distribution was granted could not change the inter vivos transfer into a transfer by will. In any event, the instruction requested was misleading, if not erroneous, under the circumstances. It did not purport to submit to the jury in proper form and under proper advice the question of whether the transfer was an inter vivos transfer or a transfer by will. It ignored the explanation of the reason for the petition and decree and apparently made the existence of the decree the sole determining factor. Assuming, without deciding, that appellants were entitled under the evidence to appropriate instructions on the question of whether the transfer was an inter vivos transfer or a transfer by will, they are not entitled to a reversal because of the refusal of the trial court to give the above mentioned requested instruction.

[6] Lastly, appellants contend that the court erred in denying the motion to disallow the costs claimed by the objectors. This contention must be sustained. Subd. 5 of § 17 of said act; In re Steehler's Estate, 197 Cal. 67, 239 P. 718.

The order denying the motion to disallow costs and the portion of the judgment awarding costs to the objectors are reversed. In all other respects said judgment and the order modifying the report of the inheritance tax appraiser are affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.



ROY v. SALISBURY.

Civ. 11750.

District Court of Appeal, First District, Division 1, California.

Jan. 20, 1942.

Rehearing Denied Feb. 19, 1942.

Hearing Granted March 19, 1942.

1. Executors and administrators ⇐221(4)

In action by kennel keeper to recover from deceased's executor for housing, feeding and caring for deceased's dog at kennels under alleged oral contract with deceased, finding that kennel keeper and deceased entered into the alleged oral contract was sustained by testimony.

2. Appeal and error ⇐1010(1)

Where there is some substantial evidence to support a finding, the finding will not be disturbed on appeal.

3. Appeal and error ⇐1010(1)

Only where there is no evidence to sustain a finding, or where, as a matter of law, a court can say that there is neither sufficient evidence nor a reasonable inference from evidence to support a finding, is an appellate court warranted in reversing a judgment on ground that it is not supported by the evidence.

4. Appeal and error ⇐1010(1)

In passing on the sufficiency of the evidence, the District Court of Appeal need inquire only whether there is evidence of a substantial nature to support the judgment, and where reasonable minds might differ

from the inferences to be drawn from a particular set of facts, the appellate court will not substitute its own conclusions for those of the trial court.

5. Frauds, statute of ⇐130(1)

A contract, a portion of which is invalid, and unenforceable because not in writing, is unenforceable as a whole or in any part, if the contract is entire and indivisible. Code Civ.Proc. § 1973, subd. 6.

6. Frauds, statute of ⇐130(1)

Where a contract which is entire contains a stipulation or agreement which is illegal under the statute of frauds, and which therefore is not severable from the balance of the contract, such illegal stipulation or agreement cannot be ignored and other provisions of the contract enforced, and the illegal stipulation or agreement corrupts the whole contract and vitiates it as an entirety. Code Civ.Proc. § 1973, subd. 6.

7. Frauds, statute of ⇐130(1)

A contract which is divisible, and a part of which is within and a part of which is without the statute of frauds, may be enforced as to the part which is good, without regard being paid to that which is bad. Code Civ.Proc. § 1973, subd. 6.

8. Frauds, statute of ⇐130(1)

Where a transaction involves the making of different contracts at the same time and as part of the transaction, and those contracts are of such nature that they cannot be reasonably considered as separate, those contracts which are not banned by the statute of frauds will be enforced, and the others will be avoided. Code Civ.Proc. § 1973, subd. 6.

9. Frauds, statute of ⇐130(1)

If a portion of a transaction or a promise is capable of being executed or closed, separately from the remaining portions, it is ordinarily held to be "separable" and enforceable if not within the ban of the statute of frauds, independently of the balance of the transaction, since the independent portions of the transaction are in effect separate contracts. Code Civ.Proc. § 1973, subd. 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Separable".

10. Frauds, statute of ⇐130(1)

Where owner of dog promised kennel keeper that dog would be turned over to the kennel keeper to be cared for if the owner became unable to care for the dog, and the owner also promised the kennel keeper that the dog would be turned over to him for care, in case the owner died, the two portions of the contract were severable, and the fact that the second part of the contract was invalid under the statute of frauds did not militate against the enforcement of the first part of the contract. Code Civ. Proc. § 1973, subd. 6.

11. Contracts ⇐137(1)

The rule that if a party would not have entered into valid portion of contract without the invalid portion being included, the whole contract is unenforceable, applies only where there is an interdependence between the several portions of the contract to the extent that one portion cannot be extricated from the whole without an interference with the execution and closing of the other portions. Code Civ.Proc. § 1973, subd. 6.

12. Frauds, statute of ⇐54½

If performance of a contract is possible within the lifetime of the promisor, the prohibition of the statute of frauds does not apply, notwithstanding that complete discharge of the obligation does not occur within the promisor's lifetime. Code Civ.Proc. § 1973, subd. 6.

13. Frauds, statute of ⇐49

If a contract is performable within one year, the statute of frauds does not apply, notwithstanding that it is not actually performed. Code Civ.Proc. § 1973.

14. Frauds, statute of ⇐54½

Where parol agreement for care of dog was made by the parties in contemplation of the possible contingency of the owner's death or the death of the dog within the time limited by the statute of frauds, the agreement was not within the statute of frauds. Code Civ.Proc. § 1973, subd. 6.

15. Contracts ⇐9(3)

Agreement by owner of dog to pay kennel keeper for care of dog if anything should happen to owner of dog, was not too uncertain as to time of performance to be enforceable.

16. Contracts ⇐9(3)

Where the time of performance of a contract is made to depend on when one is financially able, the contract is not so indefinite or uncertain as to be unenforceable.

17. Contracts ⇐153

The law does not favor but leans against the destruction of contracts because of uncertainty, and it will, if feasible, so construe agreement as to carry into effect the reasonable intentions of the parties if that can be ascertained.

18. Contracts ⇐170(1)

Where there is any doubt as to the meaning of the terms of a contract, the acts of the parties afford one of the most reliable means of arriving at the intention of the parties.

19. Contracts ⇐170(1)

Though the practical construction placed on the terms of a contract by the parties is not conclusive, such construction is entitled to great or controlling weight, where the questioned provision is of some uncertainty.

20. Contracts ⇐175(3)

Where a contract is oral, any acts, conduct, or declarations of the parties, indicating mutual intent and understanding, are of added significance in determining the meaning of the contract.

21. Contracts ⇐9(3)

If there was any uncertainty as to when an agreement between owner of dog and kennel keeper for care of the dog was to become effective, it was dispelled and certainty was established by delivery of the dog to the kennel keeper and the rendering by kennel keeper of the care and keep which the contract called for, since the parties by their own acts determined the time of performance.

22. Contracts ⇐9(3)
Specific performance ⇐41

Where owner of dog delivered the dog into the keeping of a kennel keeper, and up to date of owner's death the kennel keeper did everything that he was required to do by terms of contract with owner for care of the dog, and there only remained for the kennel keeper to collect for the care already given, and to continue to give the care as agreed, there was such a "partial performance" of the contract as to cure any uncertainty and to warrant specific performance in case it would lie.

See Words and Phrases, Permanent Edition, for all other definitions of "Partial Performance".

23. Witnesses ⇐126

The statute providing that parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator on a claim or demand against deceased's estate cannot testify as to any matter or fact occurring before deceased's death, being a limitation on a fundamental right, is to be strictly construed. Code Civ.Proc. § 1880.

24. Assignments ⇐1

To "assign" means to transfer or to set over, while to "relinquish" is to surrender or to abandon.

See Words and Phrases, Permanent Edition, for all other definitions of "Assign" and "Relinquish".

25. Husband and wife ⇐266

Community property is held by both husband and wife in a community estate in which both have a present community interest, and that interest is of such a character that either may step out of the community entirely, with reference to property only, and relinquish all rights in the community estate to the other, and agreement only is necessary to effect such relinquishment. Civ.Code, §§ 158, 159.

26. Property ⇐12

As between persons who do not occupy the marital status and who do not enjoy the privilege of holding property in community estate, there can be no transmutation of rights by agreement to relinquish, and transfer is the only method by which a change in property status between them may be effected. Civ.Code, §§ 158, 159.

27. Witnesses ⇐143(3)

Where subsequent to presentation of claim against decedent's estate and prior to filing of action, wife of claimant executed an instrument in which she agreed that the claim and the proceeds thereof were the separate property of her husband, she was not the "assignor" of her husband within the statute so as to be precluded from testifying in the husband's action on the claim over the objection of deceased's executor. Code Civ.Proc. § 1880, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Assignor".

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by C. A. Roy against Raymond Salisbury, as executor under the will of

one Drucks, deceased, to recover on a claim against the deceased's estate for care of deceased's dog. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Raymond Salisbury, of Oakland, in pro. per., and Joseph C. Prior, of Oakland, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

B. C. JONES, Justice pro tem.

The respondent here obtained judgment against the appellant, the executor of the decedent's will, in the trial court upon a rejected probate claim.

The complaint in the action alleges that Dr. Drucks, the decedent, owned a Doberman Pinscher dog named Mike which he had purchased as a pup from the plaintiff and thereafter procured plaintiff to train for obedience and protection. It is also alleged that in the year 1938 the plaintiff and Dr. Drucks agreed orally, "That if said Drucks ever became unable to care for said dog, or if he should die, he had arranged that said Mike would be delivered to plaintiff to be housed, fed and cared for by plaintiff for the remainder of said dog's life at plaintiff's usual rate for housing, feeding and caring for such dogs, viz., at the rate of $20.00 per month, which said sum said Drucks promised and agreed to pay, payable at the end of each month, and that said dog was neither to be sold nor exhibited by plaintiff."

The trial court found the existence of the contract as pleaded in the complaint, gave judgment to the plaintiff in the sum of $480 for caring for the dog for twenty-four months at the rate of $20 per month, and directed the defendant executor to pay an additional $20 per month to the plaintiff each month during the life expectancy of the dog, or a total sum of $1,440, with the alternative of paying this sum into court under the provisions of section 953 of the Probate Code. It is from this judgment that the plaintiff appeals.

In December, 1938, Drucks, whose health had been none too good for some considerable time, became bedridden. On the 30th of the month he was taken to a hospital for an emergency operation, returning to his home on January 5, 1939. He died on January 9, 1939, leaving a net estate upwards of $20,000.

On December 30, 1938, the date on which Dr. Drucks was taken to the hospital, the dog was delivered to the plaintiff at his kennels at San Pablo. Ever since that date the plaintiff has kept the dog at the kennels where he has fed, housed, and cared for him.

Appellant urges as one of the grounds for a reversal of the judgment that there is not sufficient evidence to warrant a finding that any part of the alleged contract was performable in the lifetime of Dr. Drucks. He also takes the position that, although one portion of the contract may be within the statute of frauds, the other portion is without, and the agreement being entire and indivisible, it is wholly unenforceable under the statute. In this connection it is urged that the evidence conclusively shows that Dr. Drucks would not have entered into one portion of the contract without the other, thereby rendering the whole unenforceable.

[1] The contention that there is not sufficient evidence to warrant a finding that the parties entered into the agreement alleged in the complaint finds no support in the record.

The plaintiff called as a witness a Mr. Frank Perry who was employed at the kennels. This witness testified that in June or July of 1938 Dr. Drucks called at the kennels and at that time stated to Mr. Roy, the plaintiff, that his health was failing and that, "In the event anything should happen to me, or I should die, Mike will be brought to the kennel and I want him to stay here and be taken care of and be fed, not to show him and not to work or not to sell him." This witness testified further that Mr. Roy in response to this statement replied, "Yes, I will do that." This same witness testified that Dr. Drucks called at the kennels on the Sunday following Thanksgiving of the same year and, after some discussion concerning his health, said to Roy, "So the agreement about Mike still stands," and they shook hands on it.

Another witness, Melvin Bollinger, testified to a conversation with Dr. Drucks about his arrangements for the keep of the dog, the witness stating: "Doctor Drucks said, 'Now, Mel, I have a wonderful dog. I get a lot of enjoyment out of him,' and then he had the dog do different things that Mike did, then he said, 'you know, I am not a well man and I am making arrangements with Mr. Roy about Mike. I

guess if I am unable to take care of Mike I know he will be in good hands and get proper care.'"

[2-4] There appears no contradiction of this testimony which in itself is sufficient to sustain the finding complained of. It has been held over and over again that where there is some substantial evidence to support a finding it will not be disturbed on appeal. It is only when there is no evidence to sustain the finding, or when, as a matter of law, the court can say that there is neither sufficient evidence nor a reasonable inference from evidence to support a finding that an appellate court is warranted in reversing a judgment on this ground. Olivero v. Rosano, 42 Cal.App.2d 740, 109 P.2d 976. This court need inquire only whether there is evidence of a substantial nature to support the judgment, and where reasonable minds might differ on the inferences to be drawn from a particular set of facts, the appellate court will not substitute its own conclusions for those of the trial court. Webster v. Board of Dental Examiners, 17 Cal.2d 534, 110 P.2d 992.

A more serious question is presented with reference to the divisibility of the contract and the enforceability of one portion thereof when the other obviously falls under the ban of the statute. Unless the agreement is separable recovery cannot be had under it. The appellant most seriously contends that the contract alleged and found is entire and indivisible. As to the unenforceability of the agreement as a whole, he relies upon subdivision 6 of section 1973 of the Code of Civil Procedure (see, also, sec. 1624, subd. 6 of the Civil Code) which deals with contracts not to be performed during the lifetime of the promissor. It is urged that the taint cast by the provisions of subdivision 6 of said sections upon that part of the agreement providing that the plaintiff should keep, care for, and house the dog in case Dr. Drucks should die, spreads to, and permeates the whole of the agreement and renders it unenforceable.

[5, 6] A contract, a portion of which is invalid and unenforceable because that part is not in writing, is unenforceable as a whole or in any other part if the contract is entire and indivisible. Fuller v. Reed, 38 Cal. 99; Traiman v. Rappaport, 3 Cir., 41 F.2d 336, 71 A.L.R. 475. As is said in American & English Encyclopedia of Law, 2d Ed., vol. 15, p. 988: "Where a contract which is entire contains a stipulation or agreement which is illegal, and which therefore is not severable from the balance of the contract, such illegal stipulation or agreement cannot be ignored and the other provisions of the contract enforced; the illegal stipulation or agreement in such a case penetrates and corrupts the whole contract and vitiates it as an entirety."

[7, 8] On the other hand, a contract which is divisible, and a part within and a part without the statute of frauds, may be enforced as to the part which is good without regard being paid to that which is bad. In such cases it is not of such great importance to ascertain whether the one portion would not have been entered into without the other as to ascertain whether they are in their nature separate and distinct. In a transaction which involves the making of different contracts at the same time and as a part of the transaction, and they are of such nature that they can be reasonably considered as separate, those which are not banned by the statute will be enforced, and the others avoided. Adams v. Weaver, 117 Cal. 42, 48 P. 972; Ryan v. Walker, 35 Cal.App. 116, 169 P. 417; Lowman v. Sheets, 124 Ind. 416, 24 N. E. 351, 7 L.R.A. 784. Thus, in Haynes v. Nice, 100 Mass. 327, 1 Am.Rep. 109, a parent promised to pay for the past and future board of a child at a certain weekly rate and the court there held that the promise was clearly severable, one part being within the statute of frauds and the other without. Recovery was allowed for the future board but none for the past as being a promise to pay the debt of another.

[9] If a portion of a transaction, or a promise is capable of being executed or closed, separately from the remaining portions, it is under ordinary circumstances held to be separable and enforceable independently of the balance of the transaction. This is because the independent portions of the transaction are in effect separate contracts.

[10] In the contract before us Dr. Drucks made two distinct promises. He promised that if he ever became unable to care for the dog, Mike, he would turn him over to the plaintiff who promised to give him the specified care as long as he lived, and, for which care, the doctor promised to pay a reasonable charge. The second promise was that if he should die, he would turn the dog over to the plaintiff to be by him cared for as specified for which he would

pay a reasonable sum. Neither of these promises is made to depend upon the existence of the other. The first part of the agreement could well have been fully performed by both parties without the second part ever having been made. Similarly the second part, if it had been otherwise valid, could have been completely executed and closed without the existence of the first. The lack of interdependence between the two promises makes the contract severable. Sterling v. Gregory, 149 Cal. 117, 85 P. 305; Ward v. Ward, 94 Colo. 275, 30 P.2d 853; Straus v. Yeager, 48 Ind.App. 448, 93 N.E. 877. The fact that the second part is invalid does not militate against the enforcement of the independent portion which is good.

[11] The contention that Dr. Drucks would not have entered into the one portion of the contract without the other portion being included finds no support either in the contract itself or in the circumstances connected with its making. As pointed out, the two portions of the agreement are distinct and separate. There is nothing to indicate that one would not have been made but for the existence of the other. The rule invoked can only apply when there is an interdependence between the several portions of the agreement to the extent that one portion cannot be extricated from the whole without an interference with the execution and closing of the other portions. The contract presented here lacks that interdependence between its two parts which is necessary to sustain this contention.

[12, 13] The appellant makes the added point that the first portion is not clear of the statute for the reason that it was not fully performed during the lifetime of Dr. Drucks. The rule is that if performance is possible within the lifetime the prohibition of the statute does not apply. The fact that complete discharge of the obligation does not occur within the lifetime is of no consequence. The same situation prevails with reference to contracts not to be performed within a year. If the contract is performable within a year the statute does not apply. In Gaskins v. Security-First National Bank, 30 Cal.App.2d 409, 86 P.2d 681, 685, the court had before it a contract for the support of minor children of an incompetent during their minority. In disposing of a contention that the contract was not to be performed within a year, the court said: "In the case at bar the contract was to care for the minor children of the incompetent during their minority with payment to be made when the youngest attained majority. Obviously such a contract might be fully performed in one year from the date of its execution, as, for instance, would be the case should all the minor children have died within the first year. In 27 Corpus Juris 184 it is said with reference to the statute of frauds: 'A parol agreement to board, or to support * * * a person during his life or other indefinite period, is regarded as having been made by the parties thereto in contemplation of the possible contingency of the person's death within the year, and, being capable of complete performance within a year, is not within the statute. The same is so of an oral contract to support a person until he reaches his majority or attains a certain age, the contingency being implied that he may die within the year. The same contingency of death being implied, an oral agreement to pay for the maintenance or education of a child is not within the statute. It has even been held that an agreement to support another for a fixed period greater than one year is not within the statute'."

[14] In this case the care of the dog was undertaken during the lifetime of Dr. Drucks. At the time the dog was turned over to the plaintiff no one was able to foresee when the doctor would recover or when he would die. Nor was anyone able to foresee when the dog would die. As stated in the Gaskins case, a parol agreement for care, such as we have here, is regarded as having been made by the parties thereto in contemplation of the possible contingency of the death of the person or animal to be cared for within the time limited by the statute. Clearly, the first portion of the contract is not within the statute.

[15, 16] The further point is made that the provision of the contract which is clear of the statute of frauds is too uncertain to be enforceable. The appellant appropriately points out that the time when the plaintiff should take over and care for the dog depends on when the doctor might be unable to render this care. This point of time, he argues, is not fixed by the contract and is not ascertainable. If this time is reasonably ascertainable, there is of course no merit in the point. In this connection we are unable to make a perceptible distinction in principle between those cases in which a promisor promises to perform when he is able, and this case in which the promisor promises to perform when he is unable to perform cer-

tain other acts. The rule has been consistently adhered to by the courts of this country and of Canada that when the time of performance is made to depend on when one is financially able, the contract is not so indefinite or uncertain as to be unenforceable. Van Buskirk v. Kuhns, 164 Cal. 472, 129 P. 587, Ann.Cas.1914B, 932, 44 L.R.A., N.S., 710; Mock v. Trustees, 252 Ky. 243, 67 S. W.2d 9, 94 A.L.R. 716 and note 721.

[17] In cases such as this, as stated by our Supreme Court in McIllmoil v. Frawley Motor Co., 190 Cal. 546, 213 P. 971, 972: "The law does not favor, but leans against, the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained." In support of this policy of the law may also be cited, Sutliff v. Seidenberg, Stiefel & Co., 132 Cal. 63, 64 P. 131, 469; Pease v. Lindsey, 129 Cal.App. 408, 18 P.2d 717; Meyers v. Nolan, 18 Cal. App.2d 319, 63 P.2d 1216.

The attendant circumstances indicate very clearly that Dr. Drucks intended that his dog should be taken care of and not abused if for any reason he should not be able to care for him, and that the plaintiff was cognizant of these intentions. The two men had been associated in training the dog from the time he was a pup. Both recognized his superior qualities and breeding. The dog undoubtedly had formed attachments for his trainer in addition to the affection bestowed upon his master. Dr. Drucks was alone in the world. He paid frequent visits to the cemetery in which his mother lay buried. Apparently no relative came near to offer cheer or encouragement in his illness. He had to depend upon friends and neighbors to help him to the hospital. His dog was his close friend and companion, and his consolation in his darkening days. Nothing is more natural than that the doctor visualizing a protracted illness and days and nights within hospital walls, should intend the plaintiff to render that care which he could not give.

Our courts in many cases have paid glowing tribute to the fidelity of the dog and have praised his many virtues, but we, in ascertaining the intention of the parties, are to be controlled by the circumstances of the case alone. As is said in Mayor, etc., of City of Washington v. Meigs, reported in 8 D.C. 53, 1 McArthur 53, 29 Am.Rep. 578, "History informs us of noble acts of fidelity and affection performed by some sentinel of the class under consideration. Our attention has been called by our brother, Olin, to the event of so much interest to the world, and to the cause of freedom of opinion, and to the exercise of a conscientious faith, the rescue from the grasp of the enemies of toleration of William of Orange, on the morning of the 12th September, 1572, by the action of a little dog. The Spanish army, under the command of Alva, invading the Netherlands, and the army of patriots under the command of the prince, were encamped near the city of Mons. The plan was formed for the surprise of the camp of the patriots and the capture or assassination of William, and for this purpose a band of six hundred disguised men were placed under the command of Julian Romero. The historian of the Rise of the Dutch Republic narrates that, near the hour of two o'clock in the morning, 'the boldest, led by Julian in person, made at once for the prince's tent. His guards and himself were in profound sleep, but a small spaniel, who always passed the night upon his bed, was a more faithful sentinel. The creature sprang forward, barking furiously at the sound of hostile footsteps, and scratching his masters' face with his paws. There was but just time for the prince to mount a horse which was ready saddled and to effect his escape through the darkness before his enemies sprang into the tent. His servants were cut down, his master of the horse and two of his secretaries who gained their saddles a moment later, all lost their lives, and but for the little dog's watchfulness, William of Orange, upon whose shoulders the whole weight of his country's fortunes depended, would have been led within a week to an ignominious death. To his dying day, the prince ever afterward kept a spaniel of the same race in his bed-chamber.'" The Supreme Court of the United States has paid its tribute to this friend and protector of man. Said the learned Justice who delivered the opinion in Sentell v. New Orleans, etc., R. Co., 166 U.S. 698, 17 S.Ct. 693, 694, 41 L.Ed. 1169: "The higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection, and, above all, for their natural companionship with man."

During the course of his illness Dr. Drucks requested of Joe Repose, a friend, that if anything happened, to take Mike

out to the kennels. It was pursuant to this request, on the day Dr. Drucks was taken to the hospital for an emergency operation, that he gave the dog into the keeping of the plaintiff. After he came back from the hospital the doctor did not send for the dog, but left him in the plaintiff's care where he had been placed and made no effort to remove him.

[18-21] The acts of the parties done under it where there is any doubt as to the meaning of the terms of a contract, afford one of the most reliable means of arriving at their intention. This rule is clearly stated by the Supreme Court of this state, speaking through Mr. Justice Lorigan, in Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 150, 6 L.R.A.,N.S., 275, where it is said: "Parties to a contract have a right to place such an interpretation upon its terms as they see fit, even when such an interpretation is apparently contrary to the ordinary meaning of its provisions. And in all cases where the terms of their contract, or the language they employ, raises a question of doubtful construction, and it appears that the parties themselves have practically interpreted their contract, the courts will follow that practical construction. It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it. The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions. In its execution, every executory contract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty. Mayberry v. Alhambra, etc., Co., 125 Cal. [444] 446, 54 P. 530, 58 P. 68; Keith v. Electrical Engineering Co., 136 Cal. [178] 181, 68 P. 598." The cases of Herrlein v. Tocchini, 128 Cal.App. 612, 18 P.2d 73, Kales v. Houghton, 190 Cal. 294, 212 P. 21, are to the same effect. While the practical construction placed upon the terms of the contract is not conclusive, such construction is entitled to great or controlling weight where the questioned provision is of some uncertainty. Laiblin v. San Joaquin Agr. Corp., 60 Cal.App. 516, 213 P. 529. Where the contract is oral, any acts, conduct, or declarations of the parties indicating mutual intent and understanding are of added significance. If there was any uncertainty as to when the agreement between the parties was to become effective it was dispelled and certainty established by the delivery of the dog to the plaintiff and his rendering the care and keep which the contract called for. By their own acts the parties determined the time of performance. 12 Am.Jur. 558, secs. 67, 68.

[22] Argument is made by counsel for the appellant that because of the claimed uncertainty equity would not compel the specific performance of the contract. After the dog was delivered to the plaintiff there remained nothing to compel. The dog was delivered into his keeping and up to the date of the death of the doctor he had done everything that by the terms of the contract he was required to do. There only remained for him to collect for the care already given, and to continue to give the care as he had agreed. In any event, there was such a partial performance of the terms of the contract as to cure any uncertainty and to warrant specific performance in case it would lie. Pearsall v. Henry, 153 Cal. 314, 95 P. 154, 159.

Subsequent to the presentation of the claim against the estate, and prior to the filing of this action, the wife of the plaintiff executed the following document:

"July 8, 1932.

"In consideration of the sum of $1.00 to me in hand paid by my husband C. A. Roy, I hereby agree that the claim against the estate of Edward S. Drucks (No. 71031 Alameda County) on account of the Doberman dog "Mike" and all proceeds thereof is the separate property of my husband C. A. Roy.

"Elizabeth Roy
"Wife of C. A. Roy."

[23-27] Mrs. Roy was sworn as a witness and testified in the case over the objection of counsel for the defendant. At the close of the proceedings a motion to strike from the the record all of her testimony was made and denied. The basis for the objection and motion is that the instrument evidences an assignment by her of her community interest in the contract to her husband, and as such an assignor she is incompetent to testify under the provisions of subd. 3, sec. 1880 of the Code of Civil Procedure. The disqualification claimed by the appellant is purely statutory. All persons who are not under the statutory ban are deemed competent witnesses. Sec. 1879, Code Civ.Proc. Since section 1880 is a limitation upon a fundamental right it is to be strictly construed. Unless the document set forth constitutes an assignment of her community interest making her an assignor of the claimant the objection to the testimony of the witness was properly overruled and the motion to strike properly denied. To assign means to transfer or set over. To relinquish is to surrender or abandon. Community property in this state is now held by both husband and wife in a community estate in which both have a present community interest. This interest is of such a character that either may step out of the community entirely, with reference to property only, and relinquish all right in the community estate to the other. Likewise, a portion only of the community estate may be relinquished or abandoned by one spouse to the other. Agreement only is necessary to effect such relinquishment. Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 103 P. 190; Wren v. Wren, 100 Cal. 276, 34 P. 775, 38 Am.St.Rep. 287; Young v. Young, 126 Cal.App. 306, 14 P.2d 580; Gray v. Perlis, 76 Cal.App. 511, 245 P. 221; Smith v. Smith, 47 Cal.App. 650, 191 P. 60; Schipper v. Penkalski, 46 Cal.App.2d 28, 115 P.2d 231. As between persons who do not occupy the marital status and who do not enjoy the privilege of holding property in a community estate there can be no transmutation of rights in property in this manner. Transfer is the only method by which a change in property status between them may be effected, they not being endowed with any of the plenary powers granted to husband and wife by sections 158 and 159 of the Civil Code. At the time the wife gave her testimony she held no interest in the contract, and was not an assignor of her husband. The rulings complained of were properly made.

There are no other points which appear necessary to be considered.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.



LEUPE v. LEUPE

Civ. 6621.

District Court of Appeal, Third District, California.

Jan. 13, 1942.

Hearing Granted March 12, 1942.

1. Divorce ⇐249(3)

In action for divorce the trial court was not authorized to award to husband personalty which was the wife's separate property, on husband's payment to wife of fixed amount to be secured by lien on the personalty.

2. Divorce ⇐249(3)

In divorce action only community property and the homestead may be awarded, and the court is not authorized to assign the separate property of one of the spouses to the other nor to require one to pay to the other any amount in lieu of an assignment or division of it.

3. Divorce ⇐255

Where interlocutory divorce decree awarded wife's separate personalty to husband in consideration of husband's payment of $1,500 secured by lien in favor of wife who was authorized to obtain order of sale in event of husband's nonpayment, the husband in accepting the personalty became bound by the conditions imposed by the decree, and would not be permitted to accept the benefits received from the transfer without sharing the burdens attached thereto.

4. Divorce ⇐286

Where evidence presented to trial court at divorce hearing was not before the reviewing court, such court was required to

presume that the trial court acted on sufficient evidence as to husband's ability to pay and as to the wife's necessities, in providing for her care, maintenance and support in interlocutory decree.

5. Divorce ⇐254, 255

Although the court is not authorized to dispose finally of property rights of parties to divorce action until entry of final divorce decree, if the court does by its order make such a disposal, its act in doing so constitutes an "error of law" which can be remedied only on motion for new trial or other appropriate motion or on direct appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Error of Law".

6. Divorce ⇐254

Where interlocutory divorce decree purported to settle property rights of the parties, husband's motion to modify the decree which was made more than six months after the entry thereof was not timely made under circumstances of case, and trial court was without authority to order modification.

7. Attorney and client ⇐77

Generally, an attorney is not vested with authority to bind his client in matters affecting property rights.

8. Divorce ⇐245(1)

The trial court has discretion in determining whether to modify terms of interlocutory divorce decree relating to alimony, but there is a limit to the exercise of the discretion and it cannot be arbitrary or capricious.

9. Divorce ⇐245(2)

Where trial court exercised its discretion at time of making of interlocutory decree of divorce providing for payments of maintenance and support, and financial circumstances of the husband were substantially the same at time of hearing on husband's motion to modify as they were at date of granting of interlocutory decree, the action of the trial court in modifying the decree was an abuse of discretion.

10. Divorce ⇐245(2)

Trial court's authority to modify provisions of divorce decree relating to maintenance and support can only be exercised on showing of material, permanent and substantial change in circumstances and conditions of the parties.

11. Divorce ⇐182

Where order modifying interlocutory divorce decree was erroneous, and as to amounts allowed for maintenance and support of wife was not a proper exercise of trial court's discretion, and wife's motion seeking allowance for alimony, costs and counsel fees on appeal was submitted to trial court on evidence previously introduced, denial of the wife's motion was an abuse of discretion.

Appeal from Superior Court, San Mateo County; Maxwell McNutt and A. R. Cotton, Judges.

Action by Louis Leupe against Marie Leupe for divorce. From an order and judgment modifying terms of an interlocutory decree of divorce and from that portion of final decree of divorce incorporating terms of the order, and from order denying alimony, costs and counsel fees on appeal, the defendant appeals.

Order modified, interlocutory decree reversed, and portion of final decree incorporating modification in the interlocutory decree stricken, and an amended final decree ordered to be entered, and order denying motion for alimony, costs and counsel fees reversed, with directions.

Carl W. Anderson, of Burlingame, for appellant.

J. E. McCurdy, of San Mateo, and J. W. Coleberd, of So. San Francisco, for respondent.

MONCUR, Justice pro tem.

The above action is before the court upon an appeal from an order and judgment modifying the terms of an interlocutory decree of divorce granted in an action between the parties hereto and from that portion of the final decree of divorce incorporating the terms of the order modifying the terms of the interlocutory decree and an appeal from the order denying alimony, costs, and counsel fees on appeal.

The matter of the alleged abuse of discretion upon the part of the trial court is involved and, therefore, a more complete statement of the facts is deemed necessary than would otherwise be required.

It appears that prior to the 23rd day of March, 1937, an action was commenced by Louis Leupe, as plaintiff, against his wife, Marie Leupe, as defendant, for a divorce. The defendant answered and filed a cross-

complaint. The case came on for trial on the 23rd day of March, 1937, and was regularly continued from time to time to April 21, 1937, at which time it was tried. The plaintiff, respondent herein, did not appear in person but appeared by his attorney, Francis W. Murphy. Defendant, appellant herein, appeared personally and by her attorney, Carl W. Anderson. Upon the trial no evidence was offered on behalf of plaintiff. Evidence was offered on behalf of defendant in support of the allegations contained in her cross-complaint. On written stipulation, findings of fact and conclusions of law were waived and an interlocutory decree of divorce in favor of defendant and cross-complainant was granted upon the ground of extreme cruelty.

The interlocutory decree provided that plaintiff should pay to defendant the sum of $100 for additional counsel fees, payable in installments; that plaintiff pay to defendant the sum of $1,500 as and for her interest in the personal property and business conducted by the plaintiff in Burlingame, San Mateo County, California, said personal property being particularly described; that said sum of $1,500 should be paid in sums of $25 per month commencing May 1, 1937, until paid in full, and that said payment of $1,500 should be secured by a lien upon the personal property mentioned, said personal property being awarded to said plaintiff subject to a lien in favor of defendant in the sum of $1,500, said personal property to be charged with said lien for said sum, and that in the event plaintiff should fail to pay said installments, then and in that event, upon five days' notice in writing to plaintiff, defendant might apply for an order of sale to be issued to sell said personal property to satisfy said lien.

It was further ordered that plaintiff be required to pay to defendant the sum of $50 per month, commencing May 1, 1937, for the maintenance and support of said defendant, and, further, that upon the completion of the payment of said $1,500 by plaintiff to defendant, that said plaintiff should pay to defendant the sum of $75 per month for her maintenance and support.

This interlocutory decree was approved by Francis W. Murphy, plaintiff's attorney, before signing and filing. Thereafter J. E. McCurdy was substituted in place of Francis W. Murphy as attorney for plaintiff. Following this substitution, notice was served upon defendant and her attorney stating that on Monday, May 23, 1938, plaintiff would move the court for an order modifying the interlocutory decree of divorce entered on May 17, 1937, by striking therefrom the provision requiring the payment to defendant of any further moneys under or pursuant to said interlocutory decree. Accompanying the motion was an affidavit by plaintiff stating that theretofore and on May 17, 1937, an interlocutory decree of divorce was entered in said action in favor of defendant and against plaintiff, said interlocutory decree being referred to; that affiant did not know that a hearing in said matter was to be had on April 21, 1937, and was not present in court and did not consent to the terms of the interlocutory decree and the payments therein ordered to be made by said court, and had no knowledge of the terms and conditions thereof until after the entry of said decree; that in compliance with the terms of said interlocutory decree, plaintiff has paid to defendant and deposited with the Bank of America, Burlingame Branch, the sum of $75 per month each and every month since the entry of said decree; that the total sum of $900 has been paid by said plaintiff and cross-defendant since the entry of said decree, and that the total sum of $900, so affiant is informed and believes and therefore alleges, is on deposit with said Bank of America, Burlingame Branch. That none of said money has been necessary for the care, maintenance, and support of said defendant, and said defendant is amply provided for and does not need any care, maintenance, or support from the said plaintiff; that because of business depression and labor troubles, the business of said affiant has practically disappeared and since the 1st day of January, 1938, said affiant has been unable to do sufficient business and collect the money therefor to make any profit; that affiant has a machine shop in Burlingame, California, and some of the machinery and equipment therein contained is being purchased under contract of sale and there is still due and to be paid on said machinery and equipment approximately the sum of $800 in twelve installments of $68.30 a month; that affiant is not able to earn sufficient money to pay said monthly installments as they become due and that affiant will lose said machinery and equipment and will be obliged to discontinue business; that the net value of the personal property owned by plaintiff was never the sum of $1,500 and the machinery and equipment of affiant as set forth in said interlocutory decree should be discharged

of any lien for the payment of said sum from said plaintiff to said defendant.

This motion was partially heard on May 23, 1938. When the action was called on the calendar defendant's attorney moved the court for an order for counsel fees and costs in defense of the motion about to be heard upon the ground that defendant had no funds with which to compensate her counsel or pay costs of a defense of said motion.

At said hearing plaintiff was called as a witness and testified that he was the plaintiff and operated a machine shop on Highland Avenue known as Louie's Machine Shop; that he had had considerable difficulty with the unions; that his business was very bad; that he was unable to make the payments as required under the terms of the interlocutory decree; that he had made all of the payments to date as required under the terms of said decree; that he paid out the sum of $61.03 on account of contracts of sale on equipment he was purchasing; that he owed approximately $700; that if he had not won $1,000 in a lottery he could not have made the payments as required in the decree. He also won a Chevrolet car in a theatre drawing; he made $1,852.42 in 1937 from his machine shop; he paid Mrs. Leupe $900 since the entry of the decree and she still has said money on deposit in the bank; his wife is a business woman and managed an apartment house in Seattle; that he had a bookkeeper and his books showed he actually lost $40 from January 1, 1938, to May 1, 1938.

On cross-examination he testified that Mrs. Leupe borrowed $800 from Margee Pansky and A. H. Barlin, and her brother, K. F. Pauliet, signed the note with her; he had no money at that time; he was out of work at that time; his wife gave him the $800 and he bought the shop. The note referred to was exhibited to plaintiff and he said that was the note. The note was then offered in evidence.

Plaintiff further testified on cross-examination that he executed a bill of sale of the machine shop to Mrs. Leupe on July 9, 1932. The bill of sale was identified and admitted in evidence. This bill of sale assigns, sells, conveys, and sets over to Mrs. Leupe as her separate property and not a part of the community property, all of his right, title, and interest in and to all machinery, equipment, and fixtures of every kind whatsoever in Louie's Machine Shop at 235 Highland Avenue, Burlingame, California, together with the good will and name and the leasehold interest thereof, and warrants to the buyer the title to said property.

Plaintiff testified further that his wife borrowed additional money to pay their living expenses for awhile because he had not been working; he paid the $800 note to Mrs. Leupe through earnings from the shop; that he did not bring his books for the shop with him; that he had paid Mrs. Leupe $300 on account of the property settlement agreement and $600 on alimony.

The matter was then continued for further hearing to June 27, 1938, at which time R. E. Benson, plaintiff's bookkeeper, was called as a witness for plaintiff and testified that he was the bookkeeper for Louie's Machine Shop and had been such bookkeeper for over a period of two years; that the books showed, in 1937, that Mr. Leupe's net earnings were $1,852.45; that the books show the earnings for the said business this year are less than last year; that the books showed that Leupe is indebted in the sum of more than $700 on conditional sales contracts and that the monthly payments are $61.03.

On cross-examination the witness testified that the total sales for the five months' period, 1937, was $3,104.27; that the total sales for the five months' period, 1938, was $2,569.95; that the labor costs during the five month period of 1937 was $933.96 and the labor costs for the five month period of 1938 was $461.94, and the difference between the total sales for the years 1937 and 1938 is $534.32; that the labor costs for the year 1938 was $472.02 less than 1937; that the difference between the periods for the years 1937–38 is that the actual income for 1938 is the sum of $62.30; that the total sales made for the five month period of 1938 is $2,569.95; that the total costs and outlay for the period is $1,843.84; that $305.15 of this amount was paid for equipment on contract; that the net income for the period from January 1 to May 30, 1938, is $1,032.-26.

On re-direct examination he testified that the property in the machine shop had been appraised by machinery men and one appraisal, for purposes of sale, was $2,200, and the other appraisal was for $2,000; and on re-cross examination he testified that for income tax purposes the property was valued at $8,000, and the depreciation for the year 1937 was taken in the amount of $833.97.

In opposition to the motion a counter affidavit by defendant Marie Leupe was presented in which it is alleged that it was not true that Louis Leupe did not know that a hearing on said matter was to be had on April 21, 1937; that on the 19th day of April, 1937, affiant was present in court with all of her witnesses who were to testify at the trial of said divorce action; that said plaintiff was present with two of his witnesses; that at said time the court made its order continuing the trial of said action to ten o'clock a. m. on April 21, 1937, and ordered that all witnesses return at said time; that on the 21st day of April, 1937, plaintiff was not present in court but was represented by his attorney, Francis W. Murphy; that on the 19th day of April, 1937, plaintiff had agreed with his attorney and the attorney for affiant as to the proposed settlement of the property rights of the parties and the amount of alimony to be paid in the event that an interlocutory decree of divorce was granted to affiant; that plaintiff consented to the terms of the interlocutory decree of divorce and the payments therein ordered to be made and did have knowledge of the terms and conditions prior to the entry of said decree; that on June 2, 1937, plaintiff was served with a certified copy of the interlocutory decree of divorce; that since the entry of said interlocutory decree plaintiff had paid to affiant the sum of $75 a month by depositing the same in the Bank of America, Burlingame Branch; that a total sum of $900 had been paid by plaintiff since the entry of the interlocutory decree and that $600 of said sum had been paid on account of the property interest of affiant, and the sum of $300 had been received by affiant for her care, maintenance, and support; that affiant did not have on deposit in the Bank of America, Burlingame Branch, the sum of $900.

That prior to the granting of the interlocutory decree of divorce, affiant was in ill health and extremely nervous, suffering from a heart ailment, and that affiant is still suffering from said heart ailment and unable to engage in any type of work to earn her living; that the sum of $25 a month is grossly inadequate to provide for the care and support of affiant, and that affiant has been forced to use the moneys awarded to her under the terms of the decree as her interest in the property of the parties herein for her care, maintenance, and support.

That affiant for a long period of time has been suffering from an infected tooth and has not had sufficient means with which to pay for an operation to remove said infected and impacted tooth.

That affiant is informed and believes that said plaintiff has enjoyed considerable business since the granting of said interlocutory decree and has made a large profit therefrom; and said affiant is without sufficient means to compensate her attorney in defense of the motion and prays that the motion of plaintiff be denied, and that an order be made allowing affiant a reasonable sum for her attorney fees and defense of said action.

That thereupon Mrs. Leupe was sworn and testified that she borrowed $800 to buy the shop for Leupe and borrowed $700 more to pay their house rent and something for their living; that she had one dollar in the bank and about one dollar in her purse, and that she has no other money or resources or income than the payments made by her husband to her; that she had used all of the money her husband had given her, including the $25 a month he was to pay on the property settlement; that she is ill and very nervous, has a bad heart and has fainting spells and cannot do anything to support herself or earn any money for herself; she had to spend money for medicine to relieve the heart condition; she had no money with which to buy clothing; the clothes she had on were all given to her by friends; she needed work done on her teeth and had no money with which to have the work done; she had no money to pay her attorney to defend the motion and had not paid her attorney any money to defend the motion.

On cross-examination she testified that she was managing an apartment house for her brother in Seattle part of the time she was married to Louie; that she was not well enough to manage an apartment house now; that she tried to get employment from the Sisters in Sacramento; she speaks French and thought she could get some work teaching French but she told them about her fainting spells and they would not have her.

Louis Leupe was recalled by defendant for further examination and testified that the only difference between his total sales for the first five months of 1937 and the total sales for the first five months of 1938 was $534.32; that the labor costs for

1938 for the same period was $472.02 less than 1937; that the total sales for the first five months of 1937 was $3,104.27; the total sales for the first five months of 1938 was $2,569.95; his labor costs during the same period for 1937 was $933.96 and his labor costs for the corresponding period for 1938 were $461.91; his labor costs so far this year were $472.02; that the only difference in the income is that the income for the first five months' period of 1938 was $62.30 less; that he won $1,000 in a lottery in 1937 and also a Chevrolet automobile, and he borrowed money on the automobile, about $300; that he had money; that he had $365 in the Bank of America at Burlingame; that he had the property at the machine shop; that he lived at the shop; that the rent for the shop was $35 a month, which rent was charged to the business operation; that his living expenses were about $30 per month.

The matter was submitted and on June 27, 1938, the court made an order modifying the interlocutory decree of divorce as follows: That the personal property interest in said interlocutory decree described shall not be subject to a lien in favor of defendant for the payments to be made by plaintiff; that the interlocutory decree be further modified so that in case plaintiff shall fail to pay the installments set forth in the interlocutory decree that said defendant may not apply for an order to be issued to sell said personal property to satisfy a lien as described in said interlocutory decree; that the said interlocutory decree be modified in regard to the monthly payments to be made to said defendant as follows: That said plaintiff be and he is hereby ordered, adjudged, and required to pay to defendant the sum of $10 per month hereafter and, pending the further order of the court, as and for the care, maintenance, and support of said defendant. It was further ordered that upon completion of the payments of said original sum of $1,500, as provided in said interlocutory decree, that said interlocutory decree be amended so that there shall be no increase in the monthly payments to be made to said defendant for her care, maintenance, and support.

The order modifying the interlocutory decree was filed and entered on July 1, 1938. No notice was given to defendant of the entry of the order. On July 5, 1938, the final decree of divorce was made and entered, and the modified provisions of the interlocutory decree were incorporated therein.

On July 18, 1938, pursuant to an order to show cause why plaintiff should not be made to pay such sums as the court may deem reasonable as and for costs in perfecting her appeal and for such further sums as the court might deem reasonable for attorney's fees for said defendant, the motion for such allowances came on to be heard and was continued to, and finally heard on August 8, 1938. By stipulation all of the proceedings had on the motion to modify the interlocutory decree and the order modifying same, and the final decree, were used on said hearing. In connection with the motion an affidavit by defendant was presented and in which affidavit it is stated that plaintiff has in his possession a great amount of personal property, including the sum of $350 cash, and that defendant has no money or property whatsoever; that plaintiff has sufficient means of his own to pay defendant the sum stated by defendant as costs of appeal and to pay defendant or her attorney a reasonable sum as and for attorney's fees for the prosecution of the appeal.

At the conclusion of the hearing the court denied the motion and dismissed the order to show cause. Within the proper time defendant appealed from this last-named order.

Concerning the grounds of appeal from the order modifying the interlocutory decree, it is the contention of appellant that the court was without authority to order the modification and that the modification of the interlocutory decree was not a proper exercise of the discretion vested in the court in such matters.

It is to be noted that in his affidavit respondent states that he did not know that a hearing was to be had on April 21, 1937; that he was not present in court and did not consent to the terms of the interlocutory decree of divorce and the payments therein ordered to be made by the court, and had no knowledge of the terms and conditions thereof until after the entry of said decree. However, there is nothing in his affidavit to show how long after the entry of the decree he learned about the decree or the terms or conditions thereof. In appellant's affidavit it is stated that on April 19, 1937, she was present in court with her witnesses and that plaintiff was present with his witnesses; that the court

continued the trial to April 21, 1937, and ordered all witnesses to return at that time; that on April 21, 1937, respondent was not present but was represented by his attorney, Francis W. Murphy; that on April 19, 1937, respondent had agreed with his attorney and the attorney for appellant to the proposed settlement of the property rights of the parties and the amount of alimony to be paid in the event of the granting of an interlocutory decree, and that respondent consented to the terms of the interlocutory decree and the payments then ordered to be made and had knowledge of the terms and conditions prior to the entry of the decree; and that on June 2, 1937, respondent was served with a certified copy of the interlocutory decree of divorce. There was no specific denial by plaintiff of the service upon him of the certified copy of the interlocutory decree.

Respondent's affidavit states that none of the money has been necessary for appellant's maintenance and support; that she is amply provided for and does not need care, maintenance, and support from said respondent.

Appellant's affidavit specifically sets forth the condition of her health and of her finances. Respondent's affidavit further says that his business has practically disappeared and since June 1, 1938, he had been unable to do sufficient business and collect the money therefor to make any profit. However, the testimony discloses that there was no substantial difference in the proceeds from his business at the time of the granting of the interlocutory decree and the time of the hearing on the motion to modify the decree. It cannot be ascertained from respondent's affidavit whether the machinery which he purchased under conditional sales contract was secured prior to the time when the interlocutory decree was granted or subsequent thereto. The personal property described in the bill of sale hereinbefore referred to was the separate property of appellant.

[1, 2] The court was without authority to award this separate property to respondent without the consent of appellant. In the case of Fox v. Fox, 18 Cal.2d 645, 117 P.2d 325, quoting therefrom, at page 326, it is said: "In an action for divorce, only the community property and the homestead may be awarded; the court is not authorized to assign the separate property of one of the spouses to the other, nor to require one to pay to the other any amount in lieu of an assignment or division of it. Conard v. Conard, 5 Cal.App.2d 91, 41 P. 2d 968." See, also, Allen v. Allen, 159 Cal. 197, 113 P. 160; Heintz v. Heintz, 126 Cal. App. 106, 14 P.2d 317.

The interlocutory decree states that this personal property was awarded to respondent. The court was without authority to make this award without the consent of the appellant.

[3, 4] Whether it be called an award or a transfer, the consideration therefor to appellant was the $1,500, to be paid in accordance with the terms of the decree, the imposition of the lien, and the right to obtain the order of sale in the event of non-payment. The right of the lien and the right of sale were as much a part of the consideration as was the money payment. The respondent, in accepting the property, became bound by the conditions imposed by the interlocutory decree. He should not be permitted to accept and keep the benefit which he received from the transfer of the personal property to him without bearing the burdens attached to the entire consideration. The evidence presented to the trial court at the divorce hearing is not before this court. We must therefore presume that the court acted upon sufficient evidence as to plaintiff's ability to pay and as to appellant's necessities, in providing for the payments for her care, maintenance, and support as provided for in said interlocutory decree.

[5] Also, it is urged that the court, by reason of the lapse of time after the entry of the interlocutory decree and the making of the motion for modification thereof had lost jurisdiction. It may be conceded that the court may not dispose finally of the property rights of the parties, until the entry of the final decree of divorce, but it has been held that where a court does, by its order, make such disposal, its act in so doing constitutes an error of law, which can be remedied only on motion for a new trial or other appropriate motion—or on direct appeal.

In the case of Peis v. Mohr, 126 Cal. App. 300, 14 P.2d 878, 880, it is said: "A trial court should not by interlocutory decree of divorce eo instante assign and dispose of community or homestead property, although it may determine therein how such property shall be ultimately awarded and assigned when the marriage is dissolved by a final decree of divorce; but

if such court by its interlocutory decree does in fact make such determination and award, its act in so doing constitutes an error of law which can be remedied only on seasonable motion for new trial or other appropriate motion or upon direct appeal."

[6] As the motion to modify the interlocutory decree was not made for more than six months after the entry of such decree and under all of the circumstances herein appearing, we are satisfied that the motion to modify was not made in time, and that as to the property rights attempted to be settled, the trial court was without authority to order the modification.

[7] Generally an attorney is not vested with authority to bind his client in matters affecting property rights. From the evidence before the trial court perhaps an inference could reasonably have been drawn that there was an agreement between the parties settling their property rights but, in the view we take, it is not deemed necessary to determine the question of the authority of the attorney or whether, as a matter of law, there was such an agreement. These matters, in our opinion, are such as the trial court should determine after an opportunity for hearing directed to those questions.

[8-10] As no substantial difference is shown as to respondent's ability to pay at the time the order modifying the interlocutory decree was made, there is support for the contention that the trial court, in ordering the modification in respect to the alimony, did not exercise a proper discretion. Under the facts herein, the trial court exercised its discretion at the time of the making of the interlocutory decree of divorce providing for the payments for maintenance and support, and the financial circumstances of respondent were substantially the same at the time of the hearing on the motion to modify as they were at the date of the granting of the interlocutory decree. In such matters as this the court has a discretion but there is a definite limit to its exercise and it cannot be arbitrary or capricious. In view of this limitation, the principle set forth in Snyder v. Snyder, 219 Cal. 80, 25 P.2d 403, is applicable herein. In that case it appears that after denial of the motion to modify the interlocutory decree on November 12, 1931, an order was made modifying the interlocutory decree on the same set of facts on February 9, 1932. Therein the court said:

"It is not necessary to determine whether the showing made by defendant on either of the orders to show cause set forth grounds sufficient to authorize the modification of said maintenance order. For it is clear that the court, having denied the application on November 12, 1931, was without authority on February 9, 1932, to alter said decree upon an identical state of facts. It would be incongruous to allow an appealable order to become final and yet to concede the power of a court at a later date, upon the same state of facts, to issue an order nullifying it. The rule of law in this particular is stated in 1 Ruling Case Law, page 948, as follows:

"'Authority to modify the allowance, however, does not include the right to alter the award upon the state of case existing when the decree was entered, or to review the action of the chancellor therein. The parties had their day in court, with the right of appeal if the decree was deemed erroneous, and it cannot be suppposed that it was intended that the court should sit in review of its own decrees, or that the same or some succeeding chancellor presiding in the same court should, after the lapse of indefinite time, have power to reverse, alter or modify a decree for alimony upon the facts existing at the time of its entry.' See, also, to the same effect, 19 C.J. 273. This rule is followed by the District Court of Appeal in Molema v. Molema, 103 Cal.App. 79, 283 P. 956. See, also, a case directly in point decided by the Supreme Court of the state of Idaho, Simpson v. Simpson, 51 Idaho 99, 4 P.2d 345."

The case of Simpson v. Simpson appears to be directly in point. Therein it is held, under facts similar to those established herein, that authority to modify such a decree can only be exercised upon a showing of material, permanent, and substantial change in the circumstances and conditions of the parties.

In regard to the second appeal, it is to be noted that the motion there involved seeking the allowance for alimony, costs, and counsel fees on appeal was submitted upon the evidence theretofore introduced and the order denying the motion was based thereon. We have hereinbefore held that the order heretofore made modifying the interlocutory decree was erroneous and as to the amounts allowed for maintenance and support, was not a proper exercise of the discretion of the court.

[11] It appears very inconsistent, to say the least, that respondent should, by securing an order modifying the terms of an interlocutory decree and thus render appellant unable to support or maintain herself or to pay her counsel fees and costs of appeal, successfully prevent appellant from securing a review by an appellate court of the order thus sustained. We are satisfied that it was an abuse of discretion on the part of the trial court to deny the motion.

It is ordered that the order modifying the interlocutory decree be reversed and those portions of the final decree incorporating the modifications set forth in the interlocutory decree in pursuance of said order be stricken out, and that an amended final decree be entered as of the date of the original decree, conforming to the provisions of said interlocutory decree as they appeared prior to the making of said order of modification. It is also ordered that the order denying appellant's motion for alimony, costs, and counsel fees on the appeal be, and the same is hereby reversed; and that the trial court fix such amounts as may be found reasonable for costs and counsel fees on appeal.

TUTTLE, J., and THOMPSON, Acting P.J., concurred.



BLANTON et al. v. CURRY et al.

Civ. 2927.

District Court of Appeal, Fourth District, California.

Jan. 20, 1942.

Rehearing Denied Feb. 17, 1942.

Hearing Granted March 19, 1942.

1. Automobiles ⇐246(60)

In action for injuries sustained by 12-year old boy when struck by automobile while crossing street at night, giving of instruction on doctrine of res ipsa loquitur was error, where that doctrine was inapplicable because accident might have been caused by boy's negligence.

2. Negligence ⇐121(2)

Where plaintiffs in negligence case plead negligence in general terms, subsequent proof of specific acts of negligence relied upon destroys application of doctrine of res ipsa loquitur.

3. Automobiles ⇐242(2)

The doctrine of "res ipsa loquitur" was inapplicable in action to recover for injuries sustained by 12-year old boy when struck by automobile while crossing street at night, where, because of possibility that boy was negligent, it was not sufficiently established that accident was such as in the ordinary course of things would not have happened if driver of automobile had used proper care.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

4. Negligence ⇐121(2)

The doctrine of "res ipsa loquitur" does not apply where an unexplained accident might have been caused by plaintiff's own negligence.

5. Trial ⇐296(4)

In action for injuries sustained by 12-year old boy when struck by automobile, the fact that instruction concerning boy's right to presume that motorist would obey the law did not require that boy should have been exercising ordinary care before being entitled to such an assumption did not require reversal where court also instructed that motorist was entitled to assume that the boy would cross highway in a careful manner.

6. Appeal and error ⇐1195(3)

The conclusion of the Supreme Court on former appeal after considering instructions given at first trial constituted the "law of the case" relating to subject matter of those instructions and was binding upon the parties in the subsequent trial thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

7. Automobiles ⇐11

Where a street joins with or crosses another street having two traveled portions separated by a private right of way or parkway, there is one "intersection" within the Vehicle Code defining an intersection. Vehicle Code, § 86, St.1935, p. 99.

See Words and Phrases, Permanent Edition, for all other definitions of "Intersection".

8. Automobiles ⇐246(51)

Where side street did not go beyond a thoroughfare consisting of two roadways separated by a parkway, but ended at westerly curb of the thoroughfare, there was an "intersection" within provisions of Vehicle Code defining an intersection, and also defining an unmarked "cross-walk" as portion of roadway ordinarily included within prolongation of boundary lines of sidewalks at intersections, and therefore there was no error in use of term "cross-walk" in instruction upon right of way at a cross-walk, in action for injuries sustained by boy struck by automobile while crossing the west roadway of the thoroughfare. Vehicle Code, §§ 85, 86, St.1935, p. 99.

See Words and Phrases, Permanent Edition, for all other definitions of "Cross-Walk".

9. Trial ⇐295(6)

In action for injuries sustained by 12-year old boy when struck by automobile while crossing street at night, instruction that a motorist must take precautions against injuring any users of highway was not prejudicially erroneous when considered with preceding portion of instruction stating that both the boy and the motorist had a right to expect that the other would exercise care.

10. Trial ⇐295(3)

In action for injuries sustained by 12-year old boy when struck by automobile, a portion of instruction stating that a motorist must take precaution that he will not do injury to any of users of highway, when standing alone, was subject to criticism for not taking into consideration whether user of highway was himself negligent.

11. Trial ⇐296(4)

In action for injuries sustained by 12-year old boy when struck by automobile, deficiency in instruction stating in effect that care required of boy depended upon his age was cured by other instructions relating to care required of a child.

12. Automobiles ⇐246(35)

In action for injuries sustained by 12-year old boy when struck by automobile, the plaintiff, being a minor, was entitled to an instruction as to duty of care exacted of minors.

13. Appeal and error ⇐1064(4)

In action for injuries sustained by 12-year old boy when struck by automobile, instruction that burden was on defendants to establish affirmative allegations of their answer, although incomplete in form, was not harmful.

14. Negligence ⇐122(2)

Negligence on the part of a plaintiff is a matter of defense to be proved affirmatively by the defendant, unless it can be inferred from the evidence given in the plaintiff's case.

15. Trial ⇐296(4)

In action for injuries sustained by 12-year old boy when struck by automobile, instruction that to establish defense of contributory negligence it must be first shown that plaintiff's negligence concurred and co-operated with the negligence of the defendants up to the very time of the injury, although not a complete statement of the rule, was not harmful in view of other instructions. Civ. Code, § 1714.

16. Negligence ⇐56(1)

The "proximate cause" of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produced the injuries and without which the result would not have occurred.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

17. Negligence ⇐82

The defense of contributory negligence is predicated upon a defendant's own negligence, and any want of care on part of plaintiff which is appropriate under the circumstances is negligence and will prevent a recovery if it is one of the proximate causes of the injury.

18. Trial ⇐244(4)

In action for injuries sustained by 12-year old boy when struck by automobile, the fact that court, in giving instructions as to duty of both boy and motorist to use sense of sight, stated that age of boy and maturity of motorist could be considered, did not render instructions erroneous on ground that court overemphasized the matter of the boy's age and cast the greater burden on the motorist to look and see.

19. Trial ⇐244(1)

Courts should not unduly emphasize matters contained in instructions which would be detrimental to either party.

20. Negligence ⇐85(2)

Minors as well as adults are required to exercise ordinary care, but the ordinary

care required of a child is to be determined by a different rule than is required in the case of adults.

21. Appeal and error ⇐1068(4)

In action for injuries sustained by 12-year old boy when struck by automobile, oral instruction that judgment might be for $10,000 against driver of automobile but could be for only $5,000 against owner, but if owner was the principal and driver was the agent, then there was no such limitation as to the owner, was not prejudicially erroneous as suggesting amount of damages, where court specifically informed jury that amount stated was an example, notwithstanding that jury returned verdict of $10,000 against both.

22. Appeal and error ⇐1064(4)

In action for injuries sustained by 12-year old boy when struck by automobile, instruction that in making award for damages resulting in the future, jury could consider future pain and suffering which are the result proximately of the collision, was not prejudicially erroneous because of failure to use term "certain to result". Civ.Code, § 3283.

23. Automobiles ⇐246(51)

In action for injuries sustained by 12-year old boy when struck by automobile while crossing street, where evidence indicated that the boy was not in the unmarked cross-walk when struck, refusal of requested instruction in language of Vehicle Code stating that pedestrians crossing roadway at point other than cross-walk must yield right of way to vehicles was error. Vehicle Code, § 562(a), St.1935, p. 188.

24. Trial ⇐261

In action for injuries sustained by 12-year old boy when struck by automobile traveling north on westerly roadway of street consisting of two roadways separated by a parkway, where plaintiff conceded that motorist had right to travel north on the westerly roadway, defendants' requested instruction that street consisted of two separate highways, and that it was lawful to travel in both directions on each highway, should have been given, substituting the word "roadway" instead of "highway".

25. Highways ⇐166
Municipal corporations ⇐703(1)

The terms "street" and "highway" as used in the Vehicle Code are not synonymous with the term "roadway" in that term "roadway" covers only that territory improved, designed, or ordinarily used for vehicular travel, while term "highway" covers not only that portion used for vehicular travel but also that portion used for parking, sidewalks and pedestrian travel. Vehicle Code, §§ 81, 83, 84, 525, St.1935, pp. 98, 99, 181.

See Words and Phrases, Permanent Edition, for all other definitions of "Highway", "Roadway" and "Street".

26. Courts ⇐90(4)
Highways ⇐166
Statutes ⇐225

The words "highway" and "roadway" when used in the Vehicle Code are used for the special purposes of that act, and sections of other codes and decisions under them relating to those terms have little bearing on the meaning of the terms as used in the Vehicle Code. Vehicle Code, §§ 81, 83, 84, 525, St.1935, pp. 98, 99, 181; St.1931, pp. 2102, 2124, §§ 21, 122.

27. Municipal corporations ⇐655

A city thoroughfare consisting of two roadways separated by parkway did not come within provisions of Street and Highway Code authorizing separation of any state highway into separate roadways. St.1939, p. 1520, § 144.

28. Highways ⇐18

A "highway" may consist of two roadways.

29. Automobiles ⇐246(51)

In action for injuries sustained by 12-year old boy struck by automobile traveling north on westerly roadway of street consisting of two roadways separated by a parkway, where it appeared that the roadway had not been set aside for one-way traffic, although same roadway in another city several blocks away had been so designated, motorist was entitled to an instruction that it was lawful for him to travel on the right half of the westerly roadway. Vehicle Code, §§ 81, 83, 84, 459(e), St.1935, pp. 98, 99, 164.

30. Trial ⇐29(3)

In personal injury action, where plaintiff endeavored to impeach defendants' witness by showing that witness demanded $25 to testify for the plaintiff, although witness insisted that he merely stated that his loss in leaving his business would amount to that much, trial court's remarks in examining witness were subject to criticism in that court's attitude and words might have indicated to jury that no weight should have been given witness' testimony.

31. Automobiles ⇐245(74)

In action for injuries sustained by 12-year old boy when struck by automobile while crossing street, whether boy was contributorily negligent was a question for jury where evidence as to care exercised by boy was conflicting.

32. Automobiles ⇐223(2)

In determining whether 12-year old boy who was struck by automobile while crossing street was contributorily negligent, jury could properly consider not only boy's age, but also his capacity for understanding.

33. Negligence ⇐136(29)

The question as to capacity of a particular child at a particular time to exercise care in avoiding a particular danger is one of fact for the jury.

34. Damages ⇐130(3)

$10,000 for injuries sustained by 12-year old boy who suffered a linear skull fracture when struck by automobile and who complained of headaches, and impairment of hearing in his left ear four years after accident, and who stated that he had nose-bleed at night, that he could not watch movies very much and that he didn't learn like he did before the accident was not excessive.

35. Appeal and error ⇐1170(9)

In action for injuries sustained by 12-year old boy when struck by automobile while crossing street, error in giving instruction on doctrine of res ipsa loquitur could not be disregarded as immaterial error under the Constitution, but was prejudicial in view of other errors in the trial. Const. art. 6, § 4½.

MARKS, J., dissenting.

Appeal from Superior Court, San Bernardino County; Edward J. Kelly, Judge Assigned.

Action by John Blanton, Jr., a minor, by John Blanton, his guardian ad litem and another, against Robert B. Curry and others to recover for damages for personal injuries sustained when the minor plaintiff was struck by an automobile as he was crossing a street, and for consequential damages sustained by his father. Judgment for the plaintiffs and the defendants appeal.

Judgment reversed and a new trial ordered.

Rehearing denied; MARKS, J., dissenting.

Fred A. Wilson and Martin J. Coughlin, both of San Bernardino, for appellants.

Bautzer & Ryan, G. Bentley Ryan, and Gregson Bautzer, all of Hollywood, and Flanagan & Sampson, Bertin A. Weyl, and Perry Bertram, all of Los Angeles, for respondents.

GRIFFIN, Justice.

This action has been before this court heretofore on an appeal from a judgment in favor of the defendants which was reversed for reasons therein stated. Blanton v. Curry, 36 Cal.App.2d 575, 98 P.2d 221. Most of the essential facts regarding the accident and injuries are there related.

About 5:30 P. M. on December 12, 1936, John Blanton, Jr., was attempting to cross a thoroughfare known as Euclid Avenue in the city of Upland, when he was run into by a Buick roadster automobile being operated by the appellant Curry. Euclid Avenue is a street consisting of two roadways, each running north and south and having a 65-foot parkway in the center thereof planted with large pepper trees. Euclid Avenue intersects G Street. G Street is a 34-foot street extending east and west but which at its intersection with Euclid Avenue does not continue through to the west in a straight or right-angle course but dead-ends at the westerly curb of Euclid Avenue. John Blanton, Jr., aged 12 years, and his brother Virgil, aged 14, were walking southerly on the sidewalk on the west portion of Euclid Avenue, which roadway is 44 feet wide for a short distance before arriving at G Street. They then pursued a course on an angle toward the southeast to cross the parkway above described and both the east and west roadways of Euclid Avenue, which roadways are 37 feet wide. It was their intention to cross to the sidewalk of G Street on the southeast corner of the intersection. As they reached the west curb of Euclid Avenue, John Blanton, Jr., looked south but saw no cars coming from that direction. He then looked north and saw a car quite a distance away slowly approaching, with its lights burning. After stepping off the west curb of Euclid Avenue at a place described by at least one witness as within the area which would be encompassed by the prolongation of the south curb line of G Street and the south sidewalk line on the south side of G Street near the middle of the roadway, John looked to the south. He then for the first time "heard the motor" and saw a "dark object" ap-

proaching "almost on me" but he did not observe any lights on it. Seeing that the car approaching would strike him if he remained in the position he was in when he observed the car for the first time, he darted in a northeasterly direction to complete the crossing and in an attempt to run out of the way of the car, but was struck while in the easterly half of the west roadway of Euclid Avenue by the right portion of the appellants' automobile. He was rendered unconscious by a severe injury to his head. Virgil testified that he did not see any lights on the automobile of the appellants until after the car had come to rest, and at that time he did see the lights shining on the body of his brother which was about ten feet ahead of the standing automobile. Although the foundation for the opinion was quite unsatisfactory, he estimated the speed of the automobile at between "30 and 35 miles at least" when the car passed by, approximately a foot or two in front of him. Appellant Curry testified that he was operating his car in a northerly direction on the easterly half of the west roadway of Euclid Avenue at approximately 20 miles an hour when suddenly there appeared in front of his left headlight the figures of the boys who approached his car from a northwesterly direction, apparently from a point just north of the unmarked cross-walk in question; that he did not see them until he was immediately upon them and was unable to avoid colliding with one of them.

On a retrial of the case the jury returned a verdict for plaintiff John Blanton, Jr., in the sum of $10,000, and for plaintiff John Blanton in the sum of $466.10, against each of the defendants.

[1] It is now contended (1) that the giving of and refusal to give certain instructions was prejudicially erroneous. After giving an instruction to the effect that "the burden of proof in litigation is on the party holding the affirmative of an issue; * * *. It is not enough that the parties charged with the burden of proof produced some scintilla of evidence or enough evidence to raise a suspicion that the fact is as they contend; to maintain such contention it must be established by a preponderance of the evidence," the court, on its own initiative, gave the following instruction (our letters used for identification):

(A) "The court further instructs you that the plaintiffs are not required to show particularly what the specific act of negligence was which produced the accident, but are only required to show that the collision is one which ordinarily would not have occurred had due care been employed by defendant; when and if the plaintiffs made such proof, the burden of proof shifts to the defendants to show their freedom from negligence, or to show that the plaintiff, the minor plaintiff, was also negligent, and that his negligence proximately contributed to the collision."

[2, 3] Appellants contend that in effect this was an application of the doctrine of res ipsa loquitur; that the jury was instructed that the plaintiffs were not required to show any special act of negligence on the part of the defendant; that if the accident would not ordinarily have occurred had due care been employed by the defendants then the defendants were required to establish by a preponderance of the evidence their freedom from negligence; that the doctrine of res ipsa loquitur was not applicable to the case at bar and the giving of the instruction was prejudicial error, citing Gonzalez v. Nichols, 110 Cal.App. 738, 294 P. 758; Lake v. Churchill, 20 Cal.App.2d 411, 414, 67 P.2d 107; Keller v. Cushman, 104 Cal.App. 186, 189, 285 P. 399; Gritsch v. Pickwick Stages System, 131 Cal.App. 774, 783, 22 P.2d 554, and Michener v. Hutton, 203 Cal. 604, 609, 265 P. 238, 59 A.L.R. 480. This and other courts have criticized instructions attempting to expound the res ipsa loquitur rule wherein it is stated that the *burden of proof shifts* from side to side. Ireland v. Marsden, 108 Cal.App. 632, 642, 291 P. 912. Although respondents pleaded negligence in general terms, upon the trial they immediately endeavored to prove, as a part of their case, the specific acts of negligence relied upon. This has been held to destroy the application of the doctrine. Gorden v. Goldberg, 3 Cal.App.2d 659, 40 P.2d 276; Mansfield v. Pickwick Stages, N.D., 68 Cal. App. 507, 229 P. 890; Carlsen v. Diehl, 57 Cal.App. 731, 208 P. 150. Respondents did not sufficiently establish that the accident was such as in the ordinary course of things did not happen if those who had the management and control used proper care. This was an essential element to the application of the doctrine. The reasoning used in Tower v. Humboldt Transit Co., 176 Cal. 602, at page 607, 169 P. 227, at page 230, fully supports this conclusion and is particularly applicable. There it was said:

"As between street cars and other vehicles or persons on the public streets, neither has a superior right, and neither is bound to ex-

ercise a higher degree of care than the other. It cannot be said that 'in the ordinary course of things' a street car does not run into a person on the street if the street car is properly operated. On the contrary, the mishap is quite as likely to be due to the fault of the person struck, or of some third person, or to some unforeseen and unpreventable cause, as to the negligence of those operating the car. At best, the instruction was inapplicable, and therefore misleading."

[4] It has also been held that the rule does not apply where an unexplained accident might have been caused by plaintiff's own negligence. Olson v. Whitthorne & Swan, 203 Cal. 206, 263 P. 518, 58 A.L.R. 129. The rule has been held to apply in certain automobile accident cases not factually similar. 19 Cal.Jur. p. 714, § 129; 3 Cal.Jur. p. 964, § 196; Ireland v. Marsden, supra. Under the authorities cited the doctrine of res ipsa loquitur was not applicable to the facts in this case. The giving of this instruction was therefore error. Elsewhere in the instructions, however, the jury were repeatedly told that the burden was on the plaintiff to prove by a preponderance of the evidence that the negligence of the defendant was a proximate cause of the injury.

In the Tower v. Humboldt Transit Co. case, supra, a similar instruction on the doctrine of res ipsa loquitur was held erroneous because not applicable to the facts. Notwithstanding the fact that the court did give a proper instruction in reference to the burden of proof, the Supreme Court reversed the action because of that and other erroneous instructions. There the court pointed out that the proof of negligence in that particular case was *so unsatisfactory* that the errors in instructions could not be disregarded.

In Gonzalez v. Nichols, supra, it was held that the giving of the res ipsa loquitur instruction similar in form was error, but due to the *exceptionally clear case* of negligence presented under the facts it was held that the giving of the instruction did not result in a miscarriage of justice. The question to determine here is whether under the facts of this case, the evidence of negligence may be so classed and therefore the error can be disregarded under the provisions of section 4½ of article VI of the Constitution. We will consider this question in conjunction with the other instructions and other claimed errors hereinafter set forth.

[5] The next two questioned instructions (B and C) involved the right of the plaintiff to presume that the defendant would obey the law. It is argued that neither of these instructions contained the necessary limitation that the plaintiff should be exercising ordinary care before he would be entitled to assume that the defendant was exercising ordinary care. A similar instruction with slight variations to meet the factual situation involved was approved in Schroeder v. Baumgarteker, 202 Cal. 626, 628, 262 P. 740. Immediately following the two criticized instructions the court said: "And the defendant Curry had a right to expect that the minor plaintiff, or anyone else of his age and experience, would cross the highway in a careful and prudent manner." It thus appears that the court told the jury in effect that both the minor plaintiff and the defendant Curry had a right to assume that the other would obey the law and would exercise due care and caution in respect to their use of the highway. While it may be true that they do not contain all of the elements which should enter into instructions of this character, the instructions, when considered as a whole, were no less favorable to the defendants than to the plaintiffs and not so incomplete as to justify a reversal of the case.

Objection is made to instruction lettered (D) (plaintiff's instruction No. 7), upon the question of the right of way at a cross-walk. Exception is taken to this instruction particularly as to the use of the term "cross-walk," as defined in section 85 of the Vehicle Code, St.1935, p. 99, viz.: "That portion of a roadway ordinarily included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles, * * *." It is contended that there was no cross-walk at the intersection in question because there was no sidewalk, the boundary lines of which could be prolonged on the highway under consideration; that because there was no sidewalk across the highway adjacent to G Street as it intersected the parkway, there was consequently no cross-walk over the westerly roadway of Euclid Avenue in the vicinity where the accident occurred which could be attributed to the prolongation of a sidewalk across the parkway; that any claimed cross-walk across the east roadway of Euclid Avenue would not constitute the prolongation of any sidewalk paralleling G

Street, as that sidewalk terminated and merged in the sidewalk paralleling Euclid Avenue; that the above-quoted section of the Vehicle Code limited unmarked cross-walks to those which were the result of a prolongation of the boundary lines of sidewalks and removed the portion of the roadway under consideration from those classified as cross-walks. In other words, it is appellants' contention that there was no legally defined cross-walk at the place of the accident.

[6] Upon the first appeal in this case the appellants urged this identical point and argued that these particular instructions which the court refused to give and which were requested at the first trial were erroneous in defining the rights of pedestrians at cross-walks. It was there held that these instructions were in accordance with the law and that it was error to refuse to give them. In their petition for a hearing in the Supreme Court the appellants again made the same argument which again was disposed of adversely to their contention. The conclusion of the upper court reached on the former appeal, after considering the instructions given at the first trial, constitutes the law of the case in this respect and is binding upon the parties in the subsequent trial thereof. Reid v. Northern Assurance Co., 63 Cal.App. 114, 218 P. 290; Table Mt. T. Co. v. Stranahan, 21 Cal. 548.

[7, 8] Irrespective of this conclusion, section 85 of the Vehicle Code defines an unmarked cross-walk as the "portion of a roadway *ordinarily* included within the prolongation or connection of the boundary lines of sidewalks at *intersections* * * *." [Italics added.] Section 86 of the Vehicle Code defines an intersection as "the area embraced within the prolongation of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways, of two highways *which join* one another at approximately right angles or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict." [Italics added.] It has been uniformly held that where a street joins with or crosses a double street, that is, where one whose two traveled portions are separated by a private right of way or parkway, there is one intersection within the meaning of our statute. Cruzen v. Wilcox, 20 Cal.App.2d 728, 67 P.2d 709; Driscoll v. Shipp, 13 Cal.App.2d 591, 57 P.2d 177; Lowenbruck v. Stiglmeier, 7 Cal.App. 2d 204, 46 P.2d 251; Schulman v. Los Angeles Ry. Corp., 44 Cal.App.2d 122, 111 P.2d 924; Colburn v. Schilling, 41 Cal.App. 2d 541, 107 P.2d 279; Kienlen v. Holt, 106 Cal.App. 135, 288 P. 866. The intersection here involved comes within the provisions of sections 85 and 86 of the Vehicle Code.

[9, 10] On its own initiative the court gave this instruction:

(E) "Our streets are dedicated to the use of the public at all times, the old and the young, the strong and the active. The driver of a vehicle must, accordingly, take precaution that he will not do injury which may be injurious or fatal to any of the users of the highway."

Appellants complain because this instruction in effect, it is claimed, advised the jury that the driver of a vehicle was required to take such precautions as would prevent injury to any of the users of the highway; that the obligation on the part of the driver of an automobile is to exercise ordinary care; that the instruction in question obligates the driver of a motor vehicle to "take precaution that he will not do injury"; that this, in effect, makes the driver of an automobile an insurer of the safety of the users of the highways; and that appellant was only required to take such precaution as would be taken by an ordinarily prudent person under the circumstances, citing Prato v. Snyder, 12 Cal. App.2d 88, 95, 55 P.2d 255. This instruction as given and standing alone meets with condemnation for the reason that the question whether the user of the highway was himself negligent is not taken into consideration. Thompson v. Baldwin, 26 Cal. App.2d 703, 80 P.2d 198. The basis of the instruction is that in the enjoyment of a common right the participant must exercise constant care that the correlative rights of others may not be unnecessarily impaired or destroyed. Meyers v. Bradford, 54 Cal.App. 157, 201 P. 471. The criticized portion of the instruction was taken out of the context of an instruction in which the court told the jury "that every person has a right to presume that every other person will perform his duty and obey the law * * * Specifically applying that instruction to the case before you, the plaintiff in this case had the right to expect that the defendant Curry would drive his car with due care and circumspection and caution; and the defendant Curry had a right to expect that the minor plaintiff, or anyone else of his age and experience, would cross the highway in a

careful and prudent manner." Then followed the criticized quoted portion. The instruction, when considered as a whole, is not prejudicially erroneous.

[11] Relative to the degree of care required of minors the court gave this instruction which was deficient:

(F) "You are to determine with reference to the pleadings what would an ordinarily prudent child *of the age* of the boy at the time of the accident do under similar circumstances, or the same circumstances. (Italics ours) * * * In determining the question * * * you must take into consideration, as I have indicated to you, that he is to be judged by the standard of due care of a child of his age at the time of the injury, and that the defendant Curry should be judged by the standard of the age which he appears to be, as to care and caution."

A more complete rule is stated in Todd v. Orcutt, 42 Cal.App. 687, 691, 183 P. 963, 965, where the court said that "plaintiff was required to exercise the same degree of care, no more and no less, than would be expected from a child of his age, *or which children of his years ordinarily exercise under like circumstances, taking into consideration, not only the boy's age, but his capacity for understanding.*" (Italics ours.) The court did give additional instructions, one covering part of the deficiency complained of which appellants also criticize, without merit, for other reasons. It reads in part:

(G) "The plaintiff in the instant case is a minor and judgment is not passed on his conduct with the same strictness as in the case of adults. Children are not regarded as possessing the same mental capacity to appreciate the danger incident to the use of a public thoroughfare as those of mature age. What is required of a child is that he shall exercise the same degree of care as will ordinarily be expected of a reasonably careful child of the same age and intelligence under like circumstances."

In addition to many similar instructions, at appellants' request the court gave an instruction to the effect that:

(H) "The fact that the plaintiff was a boy between 12 and 13 years of age did not free him of the obligation of exercising ordinary care for his own protection. He was required to exercise that care which an ordinarily prudent person of his age, discretion and intelligence would have used under the circumstances."

[12] The plaintiff John Blanton, Jr., being a minor, was entitled to an instruction as to the duty of care exacted of minors. Bowdoin v. Southern Pacific Co., 178 Cal. 634, 174 P. 664. Similar instructions have been upheld. Studer v. Southern Pacific Co., 121 Cal. 400, 404, 53 P. 942, 66 Am.St.Rep. 39; Shannon v. Central-Gaither Union School District, 133 Cal. App. 124, 23 P.2d 769.

It is argued that it is equally as dangerous for a minor as for an adult to cross a street after ascertaining the approach of an automobile. There can be no claim that the jury was incorrectly advised as to the law in this respect.

[13, 14] Appellants next complain of an instruction (I) given on the court's own motion, on the question of burden of proof. This instruction informed the jury that "the burden is on the defendants to establish the affirmative allegations of their answer, for example, regarding the point of contributory negligence * * * that is, negligence of the minor plaintiff, which proximately contributed to the injury of the plaintiff, the burden is on the defendants to sustain that contention."

Appellants argue that the instruction did not clearly state the rule which is that the defendants have the burden of proving contributory negligence, *unless it affirmatively appears* from the plaintiffs' own evidence, citing Marr v. Whistler, 49 Cal.App. 364, 371, 193 P. 600; Soda v. Marriott, 118 Cal.App. 635, 642, 5 P.2d 675. The rule, correctly stated, is that negligence on the part of a plaintiff is a matter of defense to be proved affirmatively by a defendant unless it can be inferred from the evidence given in the plaintiffs' case. Marr v. Whistler, supra. In Daniel v. Asbill, 97 Cal.App. 731, 276 P. 149, the appellant claimed that a similar instruction was erroneous. In answering that argument the court held that the instruction was a correct statement of the law and did no more than inform the jury as to the question of the burden of proof; that if the defendant desired a further instruction to be given, he should have requested it, but obviously, no harm could have resulted from the giving of the instruction. To like effect see Richmond v. Moore, 103 Cal.App. 173, 284 P. 681. Appellant offered no additional instruction on the subject. Although incomplete in form, no harm could have resulted from the giving of the criticized instruction.

[15-17] On its own motion the court gave this instruction:

(J) "In order that contributory negligence may be successfully established as a defense, it must be first shown that negligence of plaintiff alleged to be contributory negligence, concurred and cooperated with the negligence of the defendants *up to the very time of the injury.*" (Italics ours.)

Appellants charge error because this instruction led the jury to believe that the failure of the minor plaintiff to look before crossing the roadway may not have proximately contributed to the accident because it occurred prior to the "very time of the injury" and did not concur and cooperate with the negligence of the defendants "up to such time," and argue that the error was aggravated by the refusal of the court to give two of appellants' instructions bearing on the question. To say that the negligence of a plaintiff, in order to be contributory, must concur and cooperate with the negligence of a defendant up to the very time of the injury is not a complete statement of the rule. Salomon v. Meyer, 1 Cal.2d 11, 32 P.2d 631. It is apparent that the court was endeavoring to paraphrase the rule that the proximate cause of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produced the injuries, and without which the results would not have occurred; that the defense of contributory negligence is predicated upon a defendant's own negligence; and that any want on the part of a plaintiff of the care which is appropriate under the circumstances is negligence and will prevent a recovery if it be one of the proximate causes of the injury. Civ.Code, § 1714; Wiezorek v. Ferris, 176 Cal. 353, 167 P. 234; Konig v. Lyon, 49 Cal.App. 113, 192 P. 875; Steinberger v. California Electric, etc., Co., 176 Cal. 386, 168 P. 570. The instruction as given, when considered with other proper instructions on the subject, was not harmful. Similar instructions have been approved. 19 Cal.Jur. 649, § 78.

[18-20] The court voluntarily on its own motion gave several instructions, designated (K), which outline a general rule respecting both plaintiffs and defendants as to the duty to look and see that which they could have seen had they looked. In many instances the court commented with words to this effect: "In determining that issue, you must take into consideration the age of John Blanton, Jr., and the maturity of Curry, of course." Appellants contend that the court overemphasized the matter of the age of respondent John Blanton, Jr., and accordingly cast a greater burden on the defendants than on the minor respondent to look and see. No error appears. Duehren v. Stewart, 39 Cal.App.2d 201, 209, 102 P.2d 784. Courts, of course, should not unduly emphasize matters contained in instructions which would be detrimental to either party. Minors, as well as adults, are required to exercise ordinary care, but it is well settled that the ordinary care which a child is required to exercise must be determined by a different rule than is required in the case of adults. Mayne v. San Diego Electric Ry. Co., 179 Cal. 173, 178, 175 P. 690; Schierhold v. North Beach & M. R. R. Co., 40 Cal. 447. It was therefore proper to say to the jury in effect that in determining whether or not the failure of the minor plaintiff to see, if he looked, assuming it did find that he looked and failed to see constituted negligence, it should take into consideration the fact that he was a minor. It cannot be said that the action of the trial court in this respect was erroneous.

[21] The trial court, *by way of explanation and example,* orally instructed the jury (L) that the judgment in the case might be for $10,000 against Curry, the driver, but could be for only $5,000 against Koehler, the owner of the car, but if Koehler was the principal and Curry was the agent, as stipulated, then there was no such limitation as to Koehler. The jury returned a verdict of $10,000 against both, the same amount suggested in the example. Appellants complain because they believe the jury followed the suggestion of the court and not the evidence as to the amount of damages. It is difficult to appraise the power of suggestion, especially as between the trial judge and the jury. Precaution should be taken to prevent criticism in this respect. In the instant case, however, the trial court did specifically inform the jury that the amount stated was "as an example, and not in any way as a suggestion." While this instruction is not to be commended, standing alone, it cannot be considered prejudicially erroneous.

[22] The court in one instruction (M) upon the issue of damages, on its own motion, said: "* * * damages, if any, * * * may be awarded for the detriment resulting after the commencement of the

action and for damages *resulting in the future* * * *. You are to take into consideration * * * pain and suffering to the injured in the future, if any, *which are the result proximately of the collision.*" (Italics ours.) The instruction is claimed to be prejudicially erroneous because it did not contain the limitation "for detriment resulting or *certain to result* in the future," citing Melone v. Sierra Ry. Co., 151 Cal. 113, 116, 91 P. 522; Civ.Code, § 3283. This was the only instruction upon the issue of future damages. It is clear that the instruction as worded does not use the term "certain to result," as used in section 3283 of the Civil Code. Since the decision of Melone v. Sierra Ry. Co., supra (1907), several cases have been before our higher courts which, to some extent, have relaxed the rule therein stated. In several of these cases the courts discuss the propriety of instructions relative to future damages which do not contain the words "certain to result in the future" and which appear to be less favorable to a defendant than the instructions in question here. They are held to be proper and not to constitute error. Zerbo v. Electrical Products Corp., 212 Cal. 733, 735, 300 P. 825; Learned v. Peninsula R. T. Co., 49 Cal.App. 436, 439, 193 P. 591. We do not believe the language used in the instruction is such that it left the estimation of future damages to the conjecture or whim of the jury as contended. Although the word "certain" does not appear in the instruction as given, nevertheless the element of certainty is present and there can be no room for conjecture when the jury has been limited to the loss or damage "resulting in the future" which the evidence shows the minor plaintiff will sustain and "which are the result proximately of the collision." The instruction given, while not a model to be followed in the future, cannot be held to be prejudicially erroneous.

[23] The trial court refused appellants' instruction 25 (N), offered in the language of section 562, subdivision (a) of the Vehicle Code (1935), St.1935, p. 188. There is evidence that the respondent might have been crossing the roadway at a point other than in an unmarked cross-walk.

In this respect Robert E. Curry testified that:

"Q. You are familiar with the place where G Street intersects the west roadway, are you? A. I am.

"Q. With relation to that intersection where were you when you first observed the Blanton boys? A. I was even with the curb of the curb line; the front of my bumper was almost even with the north curb line." A diagram of the car was then placed on the map (indicated C-1). The position of the front end of the car at that place, from the map, would be approximately on the north line of the unmarked cross-walk in question.

Appellant then testified:

"Q. When you reached this point 'C-1,' you say you first saw something abnormal there in the road? A. Well, I saw two boys coming to me from off my left, it couldn't have been more than five or six feet from my left-hand bumper—

"Q. You have indicated, but probably not expressed verbally the direction from which the boys approached you. A. They came, they were coming into my car diagonally from the northwest from me," (about a 45 degree angle).

"Q. Prior to the time you collided with him, he had proceeded on an angle, something like this, towards your automobile (indicating)? A. I don't know what angle he was proceeding; when I saw the boys they were running directly at my left front fender; they were coming more from the north—or as much from the north as they were from the west.

"Q. In other words, you would say about a 45 degree angle? A. Yes, sir.

"Q. Then he turned off in the opposite direction, at about the same angle, like this (indicating)."

"Q. Can you locate approximately the point, Mr. Curry, where the two collided * * * where the car and the boy came together? A. Well, they were just about even with the front curb—maybe a little bit farther north.

"Q. With respect to the two points indicated as C-1 and C-2, can you indicate about where your car was when you struck the boy? A. I would say just about beyond the curb on the north of 'G' when I hit the boy.

"Q. This is the curb you were talking about and indicating? A. Yes, sir; I was maybe a little bit farther north when I hit the boy." (Which point was outside of the unmarked cross-walk.)

"Q. How far from 'C-1' did you progress before your car was brought to a stop? A. Well, the front end of my

bumper was about even with the south curb of G Street on the north" (point C-2). This distance would be approximately 30 feet. Curry testified that "I stopped in about 12 feet" after striking the boy. The place of the accident then, according to this testimony, would be 12 feet back from point C-2, which would be about 18 feet north of the cross-walk in controversy.

From this evidence, together with the inferences that may be drawn from the facts stated, this court cannot say that there was no evidence from which the jury may have been justified in believing that the injured boy was not crossing within the unmarked cross-walk. At the time the car struck the boy, it is most convincingly shown that the boy was not in the unmarked cross-walk.

The instruction in question should have been given. It was material to the issue. Garcia v. Conrad, 40 Cal.App.2d 167, 104 P.2d 527. This was error. However, the court did give an instruction on the subject that "Curry" was bound "under the law to yield the right of way to * * * Blanton, Jr., provided you find that" he "* * * was crossing * * * within the unmarked cross-walk * * *." The only question to determine is whether or not the error was prejudicial under the circumstances. This will be subsequently discussed.

[24] The court refused appellants' instruction No. 10 (O). The evidence produced by appellants indicates that some cars use the east roadway or lane of Euclid Avenue, both northbound and southbound; that a portion of the northbound traffic also uses the east half of the west roadway of Euclid Avenue. Upon cross-examination appellant Curry was interrogated with the apparent effort to establish that the westerly roadway of Euclid Avenue was used exclusively by southbound traffic. The interrogation was directed towards establishing that appellant was driving his automobile at a place where he did not have a right to be. This refused instruction was as follows:

"You are instructed that at the time and place involved in this case, Euclid Avenue consisted of two separate highways; that for the purpose of traveling thereon each highway constituted a complete highway, which could be lawfully used as such, independent of the other highway, and that upon each of said highways, it was lawful to travel in both directions."

The reason why the trial court refused the instruction is not given. Whether an instruction on the subject, proper in form, should have been given depends on the nature of the roadway at the point involved, and whether appellant was lawfully and rightfully on that portion of the highway. Appellant has raised the question and claimed the right to this instruction, but does not fortify the claim by applicable authorities. We are not enlightened on this subject by respondents' brief because they justify the court's refusal to give the instruction, not on the theory that appellant was traveling on the wrong side of the highway, but on the theory that the trial court properly refused the instruction because "there was no dispute" on the trial of the case as to the right of appellant to travel north on that portion of Euclid Avenue where he was traveling, "and in fact the right was conceded" by respondents. If this concession is correct, the instruction should have been given, but using the word "roadway" instead of "highway" where that word appears in the instruction.

In Casalegno v. Leonard, 40 Cal.App.2d 575, 105 P.2d 125, the court used the term "highway" instead of "roadway" in an instruction. It was there held that the misuse of the word "highway" did not mislead the jurors, who were assumed to be of ordinary intelligence.

In Raymond v. Hill, 168 Cal. 473, 143 P. 743, 748, the court said: "There may well have been a misapprehension in the minds of the jury concerning the right of vehicles to use the left-hand portion of a highway. Appellant was entitled to the instruction that he was lawfully and rightfully upon that portion of the highway."

[25, 26] Section 81 of the Vehicle Code [1935], St.1935, p. 98, defines "street" or "highway" as "a way or place of whatever nature open to the use of the public as a matter of right for purposes of vehicular travel." Section 83 of the Vehicle Code [1935] defines a "roadway" as "that portion of a highway improved, designed or ordinarily used for vehicular travel." The terms "street" and "highway" as used in the Vehicle Code are not synonymous with the term "roadway." The term "roadway" covers only that territory improved, designed or ordinarily used for *vehicular travel*. The term "highway" covers not

only that portion used for vehicular travel but also that portion used for parkings, sidewalks and pedestrian travel. § 84, Vehicle Code [1935]; Casalegno v. Leonard, supra; Buchignoni v. DeHaven, 23 Cal.App.2d 76, 80, 72 P.2d 159; Ketchum v. Pattee, 37 Cal.App.2d 122, 98 P.2d 1051; Summers v. Dominguez, 29 Cal.App.2d 308, 84 P.2d 237; Scalf v. Eicher, 11 Cal.App. 2d 44, 53 P.2d 368; Mecchi v. Lyon Van & Storage Co., 38 Cal.App.2d 674, 102 P. 2d 422, 104 P.2d 26. In considering the definitions of the words "highway" and "roadway", as used in these sections, we must bear in mind that when used in the Vehicle Code they are used for the special purposes of that act, and that sections of other codes and the decisions under them relating to the use of the same or similar words can have little bearing on the solution of this problem. Sills v. Forbes, 33 Cal.App.2d 219, 223, 91 P.2d 246; Scalf v. Eicher, supra. In 1931 section 21 of the California Vehicle Act, St.1931, p. 2102, defined a highway as "Every highway, road, * * * laid out or erected as such by the public or dedicated or abandoned to the public, or intended or used by or for the general public, except such portions thereof as are used or prepared for use by pedestrians as sidewalks." There was no definition of a "roadway," as such, nor was there a legal distinction drawn between a highway and a roadway. Section 122 of the California Vehicle Act [1931], St.1931, p. 2124, then provided that "Upon all highways of sufficient width, other than one-way highways, the driver of a vehicle shall drive the same upon the right half of the highway," with certain exceptions. It will be noted that the word "highway" is used rather than the word "roadway." Section 525 of the Vehicle Code [1935], St.1935, p. 181, provides that "upon all roadways of sufficient width a vehicle shall be driven upon the right half of, and as close as practicable to the right-hand curb or edge of, *such roadway*" [not highway] (Italics ours), with certain exceptions, among them being, "(d) Upon a roadway designated and signposted for one-way traffic."

[27, 28] The record in the instant case indicates that the roadway in question, in the city of Upland, has not been designated by that city under ordinance as, nor signposted for, one-way traffic. The evidence discloses, however, that several blocks south of the place where the accident occurred, in the city of Ontario, this same roadway has been designated and signposted for one-way traffic by an ordinance of that city under section 459, subdivision (e) of the Vehicle Code [1935], St.1935, p. 164. This fact strengthens the argument that this particular roadway here involved would not be considered as a one-way traffic lane until so designated and signposted by the city of Upland under proper ordinance. Section 144 of the Street and Highway Code, Chapter 268, Stats.1939, p. 1520, provides for the dividing and separating of any *state highway* into separate roadways, and makes it unlawful to drive other than on the right of the central dividing curb or separation. The street or highway under consideration here does not come within the provisions of that act. A highway may consist of two roadways. This court so held in Kienlen v. Holt, 1930, 106 Cal.App. 135, 288 P. 866, 867, where a similar condition of roadways existed. It was there stated: "There are two roadways for vehicular traffic, each 35 feet in width, separated between intersecting streets by a parking 40 feet in width." The case of Driscoll v. Shipp, 1936, 13 Cal.App.2d 591, 57 P.2d 177, involved two roadways along San Vicente Boulevard in Los Angeles. Each roadway was 40 feet wide and was separated by a railway right of way. One of the cars involved in the accident was proceeding west on the southerly roadway of San Vicente Boulevard. No question was raised as to its right to travel on that roadway. Lowenbruck v. Stiglmeier, 1935, 7 Cal.App.2d 204, 46 P.2d 251, involved an accident on Crenshaw Boulevard in Los Angeles. That boulevard runs north and south, having two roadways, each about 59 feet in width. These roadways, at that time, were each used for both north and south travel and were separated by a strip of land 33 feet in width on which street car tracks were laid. Each of the roadways were paved and had a curb on each side. There the plaintiff drove his car south on the westerly roadway of Crenshaw Boulevard. The court gave an instruction to the effect that "* * * in law, there are really two streets which constitute Crenshaw boulevard." The court then, as a part of that same instruction, erroneously defined the intersection. The instruction was disapproved because of the definition of the intersection. Again no contention was advanced that the plaintiff was on the wrong side of the roadway.

The highway described in Cruzen v. Wilcox, 20 Cal.App.2d 728, 67 P.2d 709, is factually similar to the instant case. See, also, Cunningham v. Cox, 126 Cal.App. 685, 15 P.2d 169.

[29] Our attention has not been directed to and we find no provisions of law which would have prevented the appellant from lawfully traveling on the right half of the roadway where his car was admittedly traveling. The appellant was therefore entitled to an instruction to that effect. Raymond v. Hill, supra.

[30] The appellants called Paul V. Snyder, a storekeeper in Upland, California, who testified that on the night of the accident appellant Curry came to his store to make a purchase and upon leaving called attention to the fact that one of the lights on his car was out; that thereupon Curry got into his automobile and changed the beam; that the lights were then satisfactory; that the witness so indicated to appellant who then drove away north on Euclid Avenue. At the previous trial Snyder had been called by the appellants and testified to the same effect. Before the second trial, for some reason, Snyder was subpoenaed by the respondents through a Mr. Kerr. After the witness testified for the appellants, upon cross-examination respondents endeavored to impeach his testimony as follows:

"Q. Did you tell Mr. Kerr at that time, before you came up to this trial to testify for the plaintiff that you would want $25 to come up? A. I told Mr. Kerr that it was worth that much to leave my business and lock it up because I operate it almost single handed, with the exception of a delivery boy.

"Q. Mr. Kerr told you that he would give you the exact mileage provided by law plus $4? A. No, he didn't. Mr. Kerr refused to pay me anything. I presume it was because he knew I was subpoenaed by the other side; and he said he had no authority to make any payment. * * *

"Q. But you demanded $25 of him? A. I didn't demand $25; I told him it was worth that if I closed up my business.

"Q. And you told him you would not do anything unless you got your $25, isn't that correct? A. No, that is not true."

Thereupon the court took up the examination and instead of accepting the witness's testimony that he had not demanded $25 as a fee to appear as a witness for the plaintiffs, assumed the attitude of the attorney for the plaintiff that the witness had demanded $25 as a fee for appearing in court. The court then proceeded to examine the witness upon the assumption that his testimony had been purchased by the appellants as evidenced by the following part of the record:

"By the Court: When you were subpoenaed by the defendants, were you paid a fee? (Objection by Mr. Wilson.)

"The Court: I want to know if this witness is at all partisan. You will answer the question. A. I was not paid fees at the time. I was paid fees before I came on the witness stand.

"Q. Did you demand fees of the process server who served process for the defendants? A. I did, and he told me that he would take care of it under the circumstances that he did at the first trial; due to the fact that I would have extra expense of the store he was glad to take care of that.

"Q. How much have you been paid for coming in here? A. $15 * * *.

"Q. And you wanted $25 from the process server of the plaintiff also? A. No, I didn't ask him for $25, I told him that it would cost me that much to come—the loss of time and business.

"Q. You were attempting to get $25 out of the plaintiff, plus the extent of your extraordinary expenses from the defendant? A. * * * I didn't know how much time would be required, and might have to come one day for one side and one for the other.

"Q. (By the Court): You realize that courts of law are entitled to some consideration, and your duty is to come in and serve the court when you are served with process. (Objection by Mr. Wilson.)

"The Court: Overruled. What I am concerned with is the demand of this witness for compensation considerably beyond the statutory requirement, the statutory fees and the statutory mileage; and the reason I am concerned about that is to determine whether or not this witness is interested, by the fact that he has been paid money by the defendant in excess of that to which he is entitled. A. I didn't know in civil actions that I was forced to comply with subpoenas of that kind; I know that I would in criminal actions.

"Q. You are a citizen, I take it. A. Yes, sir.

"The Court (addressing the jury): Because of the extraordinary character of the

examination of this witness, you are not to reach a conclusion prejudicial to the defendant, except insofar as the weight of the testimony of this witness is concerned. This witness's examination as to his compensation was to determine the weight of his testimony, as to whether he was influenced by receiving fees beyond the statutory provision * * *. The only prejudice the defendant can suffer is as to the weight of this witness's testimony. The court made a special inquiry because of the surprise of the court that any man, that any citizen, could think that he had a right to fix his own fee for coming in and testifying in the courts of law. The processes of our courts are mandatory; the functions of government are far more important than the personal rights of any individual and our citizens must respond to the agencies of the government *without being bought.*" (Italics ours.)

"Mr. Wilson: With all due respect and deference to Your Honor, may I now note an exception to the concluding remarks of the court insofar as they may, if they do, reflect on the defendant or the defendants' case now on trial?

"The Court: Very well, you may have an exception."

It is now contended by the appellants that the effect of this examination by the court, regardless of his instructions or his statements, was to leave the jury with the impression that the testimony of the witness had been purchased by the appellants; that the witness had committed some irreparable offense for accepting money from a person who was willing to reimburse him against loss; that regardless of the witness's denial, the court was convinced that he had demanded a witness fee of $25 from the defendants and that no weight should be given to this testimony; that the attitude of the court, as expressed by his words and actions, resulted in a complete rejection of the witness's testimony and a natural discrediting of the appellants' case.

In Anderson v. Mothershead, 19 Cal.App. 2d 97, 100, 64 P.2d 995, 997, where the trial court was charged with prejudicial misconduct, it was stated:

"It would be but natural for the jury to believe that the judge looked with disfavor upon defendant's statements concerning the circumstances of the collision. The error was made worse by the court's remarks which tended to discredit defendant's counsel with the jury. The words of the court in McMinn v. Whelan, 27 Cal. 300, may appropriately be quoted here: 'From the high and authoritative position of a Judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties. By words or conduct he may on the one hand support the character or testimony of a witness, or on the other may destroy the same, in the estimation of the jury; and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the other." See also, Davis v. Pezel, 131 Cal.App. 46, 50, 20 P.2d 982; Nicholas v. Crosetti, 16 Cal.App.2d 376, 60 P.2d 335; Robbins v. Roques, 128 Cal.App. 1, 8, 16 P. 2d 695.

In Davis v. Pezel, supra [131 Cal.App. 46, 20 P.2d 984], the court said: "We have long known of the excellence of the judge who presided in the court below, and we appreciate the difficulties and annoyances besetting any trial judge. But these considerations must yield to the principle that obtains in this state's courts that the jury must have free rein under the law to determine the facts of the case without intimation thereon from the judge. Whatever loose street criticism is current, it is nevertheless a very fortunate fact that citizens impaneled as jurors look up to and respect the person and opinions of judges presiding. They are quite apt to catch even a slight prejudicial act of the judge and enlarge it into a controlling feature of the case, the most careful and emphatic instructions to the contrary notwithstanding. Some of the comments and actions of the judge presiding in this case could well have impressed the jury with the idea that he had more than a slight leaning toward the plaintiff's side of the case."

Grouping the incidents as reflected from the record, it seems to us that these same remarks would be appropriate here, and the attitude assumed by the trial judge may be similarly summarized.

[31-33] Appellants next contend that the evidence is insufficient to justify the verdict and in particular that it established contributory negligence as a matter of law. The jury had the right to determine from the evidence that the injured boy was within an unmarked cross-walk at the time of

the accident; that it was the duty of the driver of the approaching car to yield the right of way to him; that the driver of the automobile failed to look; that the lights on his automobile were not lighted; that these acts were acts of negligence and were the proximate cause of the injuries. The evidence in reference to the care taken by the injured boy is conflicting and open to two opposite conclusions, that is, that he was guilty of negligence which proximately contributed to the cause of his injuries, or that he was not guilty of such contributory negligence. In this connection the jury had the right to take into consideration not only the age of the injured boy but also his capacity for understanding. Todd v. Orcutt, supra. It has been repeatedly held that the question as to the capacity of a particular child at a particular time to exercise care in avoiding a particular danger is one of fact falling within the province of a jury to determine. Mayne v. San Diego Electric Ry. Co., supra. It cannot be said that the respondent John Blanton, Jr., was guilty of contributory negligence as a matter of law.

[34] The last objection presented is that the judgment is excessive. It is contended, under this heading, that the jury accepted the illustration or example given as an indication of the court's attitude as to the extent of the damage incurred by the respondent; that the amount awarded may also be attributed to the influence upon the jury of the court's instructions concerning future damages, which were not limited to those damages *reasonably certain to be incurred;* that the medical testimony, so far as future damages are concerned, left the matter one of conjecture; that the amount of the verdict was the result of passion and prejudice of the jury as well as the errors committed by the trial court.

The injuries complained of and established by the evidence show that John Blanton, Jr., suffered a linear skull fracture in his left occipital region as revealed by X-rays; that he was rendered unconscious and remained so for about a week; that he subsequently complained of headaches, some disturbance of vision, and some impairment of hearing in his left ear; somewhat run down and loss of weight; that these headaches still persisted at the time of the second trial, almost four years after the accident; that they were then recurring at least four times a week. John Blanton, Jr., testified that his "left ear is awful deaf; I cannot talk over the telephone and listen; I cannot hear well over the telephone; and my eyes bother me quite a bit." He testified that he hears better after his ears are treated but after the treatment they go "back to the deafness awful fast"; that he has "nose bleed awfully at night"; that he does not wear glasses but when he goes to movies he "can't watch them very much"; and that in his school work he did not "get his mind to function" and he didn't learn like he did before the accident.

Although the verdict is quite a substantial amount, considering the injuries, it cannot be said that it is the result of passion and prejudice of the jury and not supported by sufficient evidence. Bowman v. Motor Transit Co., 208 Cal. 652, 284 P. 443; Lahti v. McMenamin, 204 Cal. 415, 268 P. 644.

[35] The question now presented is whether, notwithstanding the errors committed by the trial court in giving the erroneous instructions indicated, and the refusal to give the other instructions indicated, together with the prejudicial conduct noted, considered in connection with the evidence of appellants' negligence and the evidence of respondents' contributory negligence, the judgment can be affirmed under section 4½ of article VI of the Constitution, or whether the proof of negligence of appellants was so unsatisfactory and the question of respondents' contributory negligence so close that the errors in instructions and the prejudicial conduct of the court cannot be disregarded under the above-mentioned provision of the Constitution.

It will be remembered that upon the first trial of this case, on practically the same evidence, but of course without the benefit of full and complete instructions, the jury found for the defendants.

We are convinced that the question of the negligence of the appellants and the question of the contributory negligence of the respondents is so close that, when considered in connection with the erroneous instructions given, particularly instruction lettered (A) in reference to the res ipsa loquitur rule, the giving of the instruction under the circumstances constituted prejudicial error. In this connection the jury may have concluded that the burden of proof shifted to the defendants to establish their freedom from negligence. This erroneous instruction, when considered in connection with the attitude of the trial court in endeavoring to impeach the wit-

ness Snyder, produced by the appellants to establish the fact that the lights were burning on his car shortly prior to the accident, was most prejudicial because the trial court indicated, at least by innuendo, that the witness had *been bought*. This, in connection with other erroneous instructions given and the error of the court in refusing certain instructions, in our opinion deprived the appellants of a fair and impartial trial.

The judgment therefore must be and is reversed and a new trial ordered.

BARNARD, P. J., concurs in the reversal of the judgment.

MARKS, Justice (dissenting).

I dissent:

In order to make my reasons clear for failing to agree with my associates in reversing the judgment, I must enlarge on the statement of facts contained in the foregoing opinion.

The portion of Euclid Avenue here involved is a public street of the city of Upland with two driveways, separated, between intersections, by wide central parkways. It runs north and south and has a total width of 196.2 feet between the exterior edges of the sidewalks which extend along its two sides. These cement sidewalks run along both sides of the avenue and are each five feet in width. Between the sidewalks and the driveways are parking spaces 19.7 feet wide bounded on the street sides by curbs. The easterly driveway of the avenue is 37 feet wide and the westerly is 44.2 feet wide. The central parkways north and south of the G Street intersection are 65.6 feet wide. These parkways are bounded by curbs which return on broad curves at G Street. The returns start at points about opposite the inside of the sidewalks on the two sides of G Street. The intersection is 24 feet wide at its narrowest part which is between the curbs of the central parkways. G Street enters Euclid Avenue at right angles from the east. For the purposes of this opinion it can be stated that G Street dead ends at the west curb line of the west driveway of the avenue.

The evidence in many important particulars is not conflicting. The main conflicts are: (1) Whether John Blanton, Jr., and his brother Virgil were walking or running across the west driveway of Euclid Avenue; (2) the exact point of impact; (3) whether the lights on the car driven by Curry were illuminated.

John and Virgil both testified that they were walking in the unmarked cross-walk across the west driveway, at least until John became conscious of the car almost upon him and tried to get out of its way. Curry testified that he first saw the boys when they were five or six feet from his front bumper; that they were running and approaching from the northwest; that Virgil clung to the side of his car until it came to rest; that John turned and ran to the northeast and was struck in the intersection.

Both John and Virgil traced the course they had pursued in crossing the driveway on a map introduced in evidence. They both testified that they looked for approaching cars, both before and at the time they entered the west driveway and saw none approaching from the south; that they entered the intersection at about the center of the unmarked cross-walk; that they proceeded easterly and did not leave the area of the unmarked cross-walk; that John was struck in or near that unmarked cross-walk when he was about two-thirds or more across the west driveway, that is, in the east half of the west driveway. Curry placed the point of impact further north.

The evidence on the question of the illumination of the lights on the Curry automobile is sharply conflicting.

John Blanton, Jr., testified that after looking for approaching automobiles and seeing none, "we started across, and heard a noise, and it sounded like a motor of a car—I guess that is what it sounded like—and looked south, and there was a car, and I started to get out of the way as fast as I could, and that is all I remember. * * * Virgil was just a step or so behind be, and when I heard this noise of the motor I looked south, and the car was just almost on me, so far as I remember, and I was about like that. (Indicating.)

"Q. You have indicated that as being in a northeasterly direction—in other words, you were engaged in an effort to get by the car—is that right? A. Yes, sir.

"And, as you testified, that is the last thing you remember? A. Yes, sir. Virgil corroborated this evidence.

Ned Duvall, a boy who was out in front of a house about 115 feet north of the intersection, testified that he did not see the

collision but heard the impact and saw a form flying through the air "that looked like a bale of hay in the air". * * * I heard the screech of brakes and looked around and saw something going through the air. * * *"

Curry testified that he was driving north on the east half of the west driveway of Euclid Avenue at a speed of "about 20 or 25 miles an hour"; that when his car was in the unmarked cross-walk, "well, I saw two boys coming to me from off my left. It couldn't have been more than five or six feet from my left-hand bumper.

"Q. What did you do then? A. Well, they were running quite fast, and I put my brakes on and of course swerved my car a bit to the right; I didn't have a chance to swerve very far; one boy dodged to his left and jumped in front of my car and jumped up in the air when I hit him, and the other boy jumped on the side of my car and grabbed my seat"; that when he first saw the boys they were approaching him from the northwest at an angle of about forty-five degrees. Curry further testified:

"Q. So you started on up the street, and came to the point of collision, as we understand it, and just at the moment, or just as you hit the boy, or just before, he darted and swerved to his left? A. Yes, sir.

"Q. In a northerly direction? A. Yes, sir.

"Q. In other words, towards the north? A. Yes, sir." It seems clear from Curry's testimony hereafter quoted that John's course of flight was to the northeast instead of the north.

This evidence, with the other evidence by Curry quoted in the foregoing opinion, is the only evidence in the record to support an inference that the two boys were crossing the driveway outside the unmarked cross-walk. Curry was not asked and did not attempt to locate the position of the two boys when he first saw them, whether they were inside or outside of the unmarked cross-walk. He did locate the position of his car on the map when he first saw the boys and as I view it placed the car well within the unmarked cross-walk and not approximately on its north line. If the markings on the map are reasonably correct the boys were in the cross-walk when he first saw them. I realize the difficulty of attempting to scale a map, such as the one we have before us, where, as here, the witness first marked the position of his car on a map and then an attorney drew broad lines over those marked by the witness. However, Curry saw the boys when they were close to his car. He was not asked whether they were then inside or outside the cross-walk. It must be presumed that his answer to that important question, had it been put to him, would have been against him. It is my opinion that the evidence clearly shows that the boys were crossing in the unmarked cross-walk and were entitled to the protection afforded them by section 560 of the Vehicle Code, St.1935, p. 188. (All references to that code will be to it as enacted in 1935.) The most that can be said to the contrary is that the great preponderance of the evidence shows the boys to have been in the cross-walk with very slight, if any, evidence to the contrary.

It may be, and perhaps is true that John left the cross-walk and ran to the northeast when he saw the Curry car almost upon him and was hit outside the cross-walk. He was in a position of great peril and it was a natural thing for him to run in a vain attempt to escape the imminent danger of being run down by the Curry car. No negligence can be predicated on this attempt to escape, especially in view of Curry's testimony that had John "stopped right then, or maintained his course, I would have hit him with my left front fender; as it was, I hit him on the right side of my car."

I must consider the propriety of giving defendants' proposed instruction number 10, refused in the court below, which in effect told the jury that Euclid Avenue consisted of two separate *highways,* each of which constituted a separate *highway,* upon each of which it was lawful to travel in both directions.

If I understand the foregoing opinion correctly, it is conceded that this instruction was not a correct statement of the law; that before it could be given as a correct statement of the law, the word "roadway" would have to be substituted for the word "highway" wherever the latter appeared.

This concession that the instruction as proposed was not correct should end the argument concerning any error in refusing to give it. A trial judge is not required to give a proposed instruction which is not correct and no error can be predicated upon a refusal to give such an instruction.

However, the foregoing opinion seems to argue that the instruction should have been

modified, and as modified should have been given; that it was prejudicial error to fail to do so. I cannot subscribe to any such holding nor do I agree with the argument made at length to the effect that the driveways between the center parkways and the curbs along the outside parking spaces constituted separate roadways upon each of which vehicles could travel in both directions. Such a holding would make it impossible for drivers so traveling to obey other rules of the road established in the Vehicle Code.

In the Vehicle Code, the terms "street" and "highway" are synonymous. § 81, Vehicle Code.

The term "street" means the land set apart and designated for the use of the public (Earl v. Dutour, 181 Cal. 58, 183 P. 438, 6 A.L.R. 1163), and includes sidewalks. § 84, Vehicle Code; Marini v. Graham, 67 Cal. 130, 7 P. 442; Ex parte Taylor, 87 Cal. 91, 25 P. 258; Martinovich v. Wooley, 128 Cal. 141, 60 P. 760.

"A sidewalk is a walkway along the margin of a street or other highway, designed and prepared for the use of pedestrians, to the exclusion of road vehicles and horsemen. It may embrace all that portion of a street from the building line to the curbing, including grass plats or park strips between the walk proper and the curbing." 25 Am.Jur., page 343.

I therefore conclude that Euclid Avenue, a public street, includes all that portion of ground between its east and west bounding property lines, regardless of the particular use to which any portion of it is put.

Prior to the adoption of the Vehicle Code, the California Vehicle Act, § 122, required drivers of vehicles to drive upon the right half of the highways. At that time driveways were included within the definition of highways and referred particularly to ways to be used by the public on the grounds of universities, colleges and institutions, § 21, California Vehicle Act, as well as certain private ways. § 22, California Vehicle Act, St.1923, p. 520. There was no statutory distinction made by that act between highways and roadways.

When the Vehicle Code was adopted in 1935, the statutory distinction between highways and driveways was omitted and the term "roadway" was defined as "that portion of a highway improved, designed or ordinarily used for vehicular travel." § 83, Vehicle Code. Based upon this definition my associate argues that the two driveways (used here to denote separated portions of a street used for vehicular travel) were separate and distinct roadways on both of which vehicles could travel in both directions. I cannot agree with this conclusion because a vehicle proceeding south on the west half of the east driveway or north on the east half of the west driveway could not possibly cross an intersection without violating the law. This is demonstrated when we consider the definition of an intersection as applied to this case.

I agree with my associate that there was but one intersection at the point here involved. This conclusion is sustained by the authorities cited. The intersection is bounded on the east by the production of the east curb line of Euclid Avenue across G Street and on the west by the west curb of Euclid Avenue.

This satisfies the definition of an intersection as given in section 86 of the Vehicle Code. All of this intersection is paved and is "improved, designed or ordinarily used for vehicular travel" and so it constitutes a single roadway as defined in section 83 of that code.

Section 525 of the Vehicle Code requires a vehicle to "be driven upon the right half of, and as close as practicable to the right-hand curb or edge of, such roadway," with certain exceptions not important here. Thus as each intersection on Euclid Avenue constitutes but a single roadway, in order to obey the law it is necessary for all vehicles to cross each intersection to the driver's right of the center of the intersection, which is a medial line equally distant from the west curb and the east curb line of the highway produced across intersecting streets. Thus a driver proceeding north on the east half of the west driveway must, to obey the law, cause his car to make a lateral right angle leap of over 32 feet to his right when reaching the south line of the intersection in order to proceed across the intersection on the right half thereof and obey the provisions of section 525 of the Vehicle Code.

No such impossible construction need be given to section 83 of the Vehicle Code if it is remembered that the singular includes the plural for then roadways *are* those portions of highways improved, designed or ordinarily used for vehicular travel.

While this is true of section 83 of the Vehicle Code it does not entirely clear the further ambiguity created by section 525 of

the same code which provides in part as follows: "Upon all roadways of sufficient width a vehicle shall be driven upon the right half of, and as close as practicable to the right-hand curb or edge of, such roadway * * *."

The construction to be given this section is probably responsible for the divergence of opinion in this case. My associate gives the section the literal interpretation of permitting a vehicle to be driven on the right-hand side of a driveway and the left-hand side of the center line of a highway without considering the effect of such a holding on other sections of the Vehicle Code, while I believe the various sections of the code should be construed together and brought into harmony if possible.

In Fresno City H. S. Dist. v. De Caristo, 33 Cal.App.2d 666, 92 P.2d 668, 671, it is said: "It is a cardinal rule of construction that, where possible, every clause and word of a statute should be given effect and meaning. Sec. 1858, Code Civ.Proc.; Smith v. State Board of Control, 215 Cal. 421, 10 P.2d 736; Los Angeles County v. Graves, 210 Cal. 21, 290 P. 444; Crowe v. Boyle, 184 Cal. 117, 193 P. 111; Gill v. Johnson, 103 Cal.App. 234, 284 P. 510; Cory v. Cooper, 117 Cal.App. 495, 4 P.2d 581. It is equally true that in construing the component parts of a legislative act the courts should, where possible, give force and effect to each so that the whole act may have life and vitality. Ahern v. Livermore Union H. S. Dist., 208 Cal. 770, 284 P. 1105; In re Haines, 195 Cal. 605, 234 P. 883; People v. Rabe, 202 Cal. 409, 261 P. 303."

In Re Washer, 200 Cal. 598, 254 P. 951, 954, the Supreme Court said: "We are mindful of the rules of construction which must bind us, which said rules are as follows:

"'Absurd or unjust results will never be ascribed to the Legislature and it will not be presumed to have used inconsistent provisions as to the same subject in the immediate context. The courts will be astute to avoid such results. (Wells Fargo & Co. v. Mayor, etc., of Jersey City, D.C., 207 F. 871.) In the interpretation of statutes courts are not bound by grammatical rules, and may ascertain the meaning of words by the context. Cavender v. Hewitt, 145 Tenn. 471, 239 S.W. 767, 22 A.L.R. 755.

"'"The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. 'While the intention of the Legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words.' Words or clauses may be enlarged or restricted to effectuate the intention or to harmonize them with other expressed provisions. Where general language construed in a broad sense would lead to absurdity it may be restrained. The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they were intended to be used as they are found in the act." Lewis' Sutherland on Statutory Construction, (2d Ed.) § 376, p. 721.' In re Haines, 195 Cal. 605, 613, 234 P. 883, 886." See, also, Pasqual v. De Vries, 101 Cal.App. 479, 281 P. 1057; Southern Pacific Co. v. Riverside County, 35 Cal.App.2d 380, 95 P.2d 688.

With these rules of construction before me I cannot conclude that the legislature intended to permit drivers to travel both ways on each side of a highway having two driveways such as we have here. To so hold would make lawful driving impossible by a driver proceeding south on his right-hand side of the east driveway or north, as Curry was doing, on his right-hand side of the west driveway. He could not lawfully cross the intersection. I therefore conclude that Curry was driving on the wrong side of the street at the time and place of the accident and in doing so was negligent as a matter of law.

This conclusion does no violence to the language used in the quoted paragraph of section 525 of the Vehicle Code. It merely construes that section as though it read as follows: "Upon all roadways of sufficient width a vehicle shall be driven upon the right half of, and as close as practicable to the right-hand curb or edge of such roadway"—*upon which such vehicle may lawfully travel under the provisions of other sections of this code.* The emphasized phrase does not change the necessary meaning of the quoted provision but merely adds to it the limitations contained in other sections, which construction is necessary under the rules already quoted. It harmonizes

the various provisions of the code pertaining to this subject without doing violence to the language of any instead of producing an impossible condition under which lawful driving is impossible, which construction is unnecessary and should be avoided.

I am unable to understand what possible bearing an ordinance of the city of Ontario declaring the two driveways of Euclid Avenue in that city one-way streets can have on this case as the portion of that avenue involved here is in the city of Upland. The ordinances of one city can have no force or effect in another municipality. Because one city has legislated on a given subject, and another has not, is of no importance.

Nor can I attach any importance to the evidence found in the record that numerous vehicles were driven in both directions on both of the driveways. Proof that others had violated the law cannot excuse a like violation of the law by Curry. Scalf v. Eicher, 11 Cal.App.2d 44, 53 P.2d 368.

The statement in respondents' brief filed in this court to the effect that the right of Curry to drive north on the east half of the west driveway is conceded, should not influence the decision here. That the question was raised in the trial court is evident from the fact that the instruction under consideration was proposed there. Having been raised there it may be considered here.

I have read all of the cases cited in the foregoing opinion on this question, as well as numerous others, and can find nothing in any of them which is in conflict with the conclusions I have reached. Because in some of them the statements of facts show that one of the parties was driving on his right-hand side of the left roadway does not tend to show a holding that such party was lawfully driving in that position when that question was neither raised, presented nor considered in either the trial or the appellate courts.

In the case of Kienlen v. Holt, 106 Cal. App. 135, 288 P. 866, 867, the statement there made that "There are two roadways for vehicular traffic, each 35 feet in width, separated between intersecting streets by a parking 40 feet in width" cannot be construed into a holding that each driveway constituted a complete separate roadway through its entire length and across intersections upon each of which vehicles might be driven in both directions. The accident in that case happened in 1926 and the opinion was filed in 1930. At that time the word "roadway" had no statutory definition given to it in the California Vehicle Act as it now has in the Vehicle Code, adopted in 1935. In that opinion "roadway" was used in the same sense that "driveway" is used here, namely, as descriptive of the separated portion of a street which was used for vehicular travel.

I agree that the res ipsa loquitur instruction should not have been given, one reason being because the evidence did show particularly what the specific acts of negligence were which produced the accident. For that same reason I cannot regard the instruction as prejudicial. The evidence clearly shows Curry guilty of two acts of negligence, namely, (1) in not yielding the right of way to a pedestrian in an unmarked cross-walk, and, (2) in driving on the wrong side of the street. These acts of negligence are sufficient to support the verdict and judgment.

Generally speaking, I agree with much of the balance of the opinion of my associate except the holding that the errors are so prejudicially erroneous as to have caused a miscarriage of justice and require a reversal of the judgment. With this I cannot agree.

The cross-examination of the witness Snyder should not be condoned. However, I do not regard this error so serious as to require a reversal. Snyder's evidence was directed to the sole question of the illumination of the lights on the Curry car. If those lights had been illuminated Curry should have seen the two boys in the unmarked cross-walk and should have yielded the right of way to them. If they were not illuminated, that fact, in itself, constituted negligence. Regardless of the illumination of the lights, Curry stands charged with two acts of negligence established by the evidence, namely, failing to yield the right of way to a pedestrian in an unmarked cross-walk and driving on the wrong side of the street. With these facts established in the record by a great preponderance of the evidence, the judgment is amply supported and I can see no miscarriage of justice. It follows that the mandate of section 4½ of Article VI of the Constitution comes into play and that the judgment should be affirmed.

19 Cal.2d 308

SPARKS v. BERNTSEN et al.

JOHNSON v. SAME.

COKER v. SAME.

Sac. 5497–5499.

Supreme Court of California.

Jan. 26, 1942.

1. Automobiles ⇐200, 249

Under statute limiting liability of owner of motor vehicle driven by another with owner's permission, owner is primarily and directly liable jointly with the operator for damages caused and the owner's liability is the same as the operator's unless the verdict or judgment is in excess of the prescribed amounts. Vehicle Code, § 402, St.1935, p. 153, as amended by St.1937, p. 2353.

2. Trial ⇐328, 335

In trial against two or more defendants jointly liable for the same tort, there should be but one verdict for a single sum against all the defendants.

3. Automobiles ⇐249

Where jury rendered verdicts in favor of three plaintiffs against driver and owner of automobile involved in accident, in favor of one for $11,000 of which $8,000 was assessed against the driver and $3,000 against the owner, in favor of another for $2,095 against both defendants, $1,250 against the driver and $845 against the owner, and in favor of the third a total of $2,000 against both defendants, divided $1,250 against the driver and $750 against the owner, the trial court, in accordance with the statute limiting the owner's liability, properly entered judgments in the first case for $11,000, limiting the amount recoverable against the owner to $5,000, in the second against both defendants for $2,095, and in the third against both defendants for $2,000. Vehicle Code, § 402, St.1935, p. 153, as amended by St.1937, p. 2353.

4. Judgment ⇐239

Where the jury renders a verdict against two or more defendants jointly liable for the same tort, any statutory limitation of liability applicable to any defendant as distinguished from the full liability of other defendants should be incorporated in the judgment entered on the verdict.

5. Trial ⇐339(2)

Where jury found for the injured parties and assessed damages in specified sum against driver and a separate specified sum against the owner of an automobile in accordance with the statute fixing liability upon owner of motor vehicle for injuries caused by negligence of one using the vehicle with his permission, trial court properly resubmitted the case to the jury in order for jury to clarify its verdict. Vehicle Code, § 402, St.1935, p. 153, as amended by St.1937, p. 2353.

6. Statutes ⇐225

The statute providing that, after polling the jury, if no disagreement be expressed the verdict is complete and the jury should be discharged, must be read with the statute providing that when the verdict is announced, if it is informal or insufficient in not covering the issues, the jury may be sent out again. Code Civ.Proc. §§ 618, 619.

7. Trial ⇐339(2)

Under statute providing that if after polling the jury, no disagreement be expressed, the jury's verdict is complete and jury should be discharged, and statute providing that an informal or insufficient verdict in not covering the issues submitted may be corrected by the jury under the advice of the court or the jury be sent out again, although the jury has been polled, the court may on appropriate objections resubmit the issue for the purpose of correcting an incomplete verdict, since the court retains control over such proceedings with power to procure correction of an insufficient verdict until the verdict is recorded and the jury finally discharged. Code Civ.Proc. §§ 618, 619.

8. Trial ⇐339(2)

In action against automobile operator and owner for injuries sustained in an automobile accident, where on plaintiff's objection the case was resubmitted to the jury after it had returned an insufficient verdict, and defendant's objection after return of second verdict was directed solely to the entry of any greater judgment against owner and operator than in accordance with jury's arbitrary division of total damages assessed against them, trial court was authorized to resubmit again the cause to the jury in order that their verdict might accord with the statute fixing liability of owner and operator of automobile. Vehicle Code, § 402, St.

1935, p. 153, as amended by St.1937, p. 2353; Code Civ.Proc. §§ 618, 619.

In Bank.

Appeals from Superior Court, Placer County; Raymond McIntosh, Judge.

Actions by Bert Sparks, by James L. Johnson and by Bernard A. Coker, etc., against Paul Anker Berntsen and another for injuries sustained in an automobile collision. From judgments for plaintiffs, defendants appeal.

Affirmed.

For prior opinions, see 112 P.2d 742, and 113 P.2d 735.

Hoge, Pelton & Gunther, of San Francisco, and Butler, Van Dyke & Harris, of Sacramento, for appellants.

Nathan Goldwater and Leo Murcell, both of Oakland, Orrin J. Lowell and Lowell & Lowell, all of Auburn, and Henry & Bedeau and Grover W. Beadeau, all of Sacramento, for respondents.

SHENK, Justice.

Appeals from judgments for the plaintiffs in consolidated actions.

The plaintiffs sued for damages sustained by reason of the conceded negligence of the defendant Berntsen, who was operating an automobile owned by the defendant Enge, when it collided with an automobile in which the three plaintiffs, Sparks, Johnson and Coker, were riding. At the time of the accident Berntsen was operating the automobile with the consent of Enge, but not in the latter's business or employment. The only question on the trial was the amount of damages. The only question on these appeals is whether the trial court entered judgments against each defendant and in favor of each plaintiff in accordance with the jury's verdict and the law of this state.

[1] The court instructed the jury on the limitation of the owner's liability as prescribed by section 402 of the Vehicle Code, St. 1935, p. 153, as amended St. 1937, p. 2353. That section provides that the owner of a motor vehicle driven by his permission or consent but not in his employment or business is liable for death or injury resulting from negligence in the operation of the vehicle to the extent of not more than $5,000 for death of or injury to one person in one accident and not more than $10,000 for the death of or injury to more than one person in one accident, and not more than $1,000 for damages to the property of others in one accident.

Under the statute the owner is primarily and directly liable jointly with the driver, and the owner's liability is the same as the driver's unless the verdict or judgment is in excess of the prescribed amounts. Broome v. Kern Valley Packing Co., 6 Cal.App.2d 256, 44 P.2d 430; Milburn v. Foster, 8 Cal.App.2d 478, 480, 47 P.2d 1106; Carnes v. Pacific Gas & Electric Co., 21 Cal.App.2d 568, 572, 69 P.2d 998, 70 P.2d 717.

After the case was submitted to it the jury returned to the court room for further instructions on the question of the liability of the respective defendants. By stipulation the written instructions were taken to the jury room for consideration by the jury in its deliberations. Thereupon the jury returned verdicts in favor of the plaintiffs in all three actions. It assessed the damages in the Sparks case at $8,000 against the defendant Berntsen, the driver, and $3,000 against Enge, the owner; in the Johnson case, at $1,250 against the driver and $845 against the owner; and in the Coker case at $1,250 against the driver and $750 against the owner. The difference between the sums so assessed against the owner in the two latter cases represented the stipulated property damage sustained by the plaintiff Johnson.

At the request of the plaintiffs the jury was polled. The plaintiffs objected to the entry of the verdicts on the ground that they were not in accordance with law and the court's instructions. The plaintiff requested further submission of the issue to the jury. The court referred the cases again to the jury, with appropriate typewritten instructions. During the course of its further deliberations the jury returned to ask the question whether, if it assessed a certain sum against each defendant, the total of such sums was assessed in favor of the plaintiff. The court then instructed the jury to write its verdict in its own way. The jury then returned a verdict in favor of the plaintiff Sparks and against both defendants and assessed "damages against the said defendants in the total sum of $11,000.00, of which sum we assess damages against defendant Paul Anker Berntsen in the sum of $8,000.00 and assess damages against defendant Reidar Enge in the sum of $3,000.00." Similarly in the Johnson

case it assessed a total of $2,095 against both defendants, dividing it $1,250 against Berntsen and $845 against Enge; and in the Coker case, a total of $2,000 against both defendants, divided $1,250 against Berntsen and $750 against Enge. On motion of the plaintiffs and over the objection of the defendants the court directed the entry of the verdicts as follows: In the Sparks case against the defendants and in favor of the plaintiff in the sum of $11,000, limiting the amount recoverable against the defendant Enge to the sum of $5,000; in the Johnson case, against both defendants in the sum of $2,095; and in the Coker case against both defendants in the sum of $2,000. From the judgments so entered the defendants have appealed.

The defendants contend that the trial court erred in sending the cases back to the jury after the jury was polled and that in any event the court could properly enter the verdicts only in the sums assessed against the defendant driver, namely, $8,000, $1,250 and $1,250, and against the owner in accordance with his statutory liability. The defendants rely on King v. Unger, 35 Cal.App.2d 192, 94 P.2d 1040, and the provisions of section 618 of the Code of Civil Procedure.

In the case of King v. Unger the jury returned a verdict against defendants driver and owner and assessed damages in the sum of $6,677.16. The case was resubmitted to the jury under instructions to correct its verdict to reflect the owner's statutory liability, whereupon the jury returned a verdict against the defendant driver in the sum of $5,341.71 and against the owner in the sum of $1,335.45. The jury was polled on the final verdict and, over the plaintiff's objection, that verdict was entered and judgment entered accordingly. On appeal the plaintiff indicated his willingness to accept the verdict of $5,341.71 against the driver, and the District Court of Appeal directed entry of judgment against the driver in the sum of $5,341.71, and against the owner, based on his statutory liability, in the sum of $5,000. The District Court of Appeal held, however, that the failure of the trial court properly to guard the rights of the plaintiff in the matter of assessment of damages amounted to a miscarriage of justice and that, except for the agreement of the plaintiff to accept the lesser sum, he would have been entitled to a reversal and a new trial. As was pointed out in the concurring opinion in that case, the jury may not substitute its arbitrary judgment for the fixed statutory liability of the owner.

[2-4] The case relied on involves the converse of the situation here presented. Here the final verdict was in a single total sum against both defendants in each case. No more was required of the jury. In one trial against two or more defendants jointly liable for the same tort, a separate verdict against each defendant is improper. There should be but one verdict for a single sum against all the defendants jointly liable. Marriott v. Williams, 152 Cal. 705, 711, 93 P. 875, 125 Am.St.Rep. 87. Any statutory limitation of liability applicable to any defendant as distinguished from the full liability of other defendants may and should be incorporated in the judgment entered on the verdict. Any limitation of liability of the owner would follow as a matter of law, and that liability the jury could not change. The final verdicts of the jury in the present case needed no interpretation. The arbitrary division of the total damages by the jury was not in accordance with law and was mere surplusage which the trial court refused to effectuate.

[5] The same observation, however, may not be made as to the first verdicts. Those verdicts were similar to the second verdicts returned in the Unger case. In accordance with the holding in that case, if the court in the present cases had entered judgment on the verdicts so returned, parties objecting thereto would have been entitled to a reversal and a new trial. In the Unger case the jury's intent was clearly expressed in its first verdict, and its intent, defeated by the resubmission; while in the present case its intent, which was ambiguous and insufficiently expressed by the first verdicts, was clarified by the resubmission. We conclude that the judgments rendered by the court were in accordance with the verdicts and with law.

There is nothing in the provisions of section 618 of the Code of Civil Procedure which contravenes our conclusion. The pertinent provisions are that after the reading of the verdict either party may require the jury to be polled, and if "no * * * disagreement be expressed, the verdict is complete and the jury discharged from the case." Section 619 provides that when the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the

jury under the advice of the court, or the jury may be again sent out.

[6, 7] The sections should be read together. We can attach no such formality to the polling of a jury as would preclude the exercise of the court's powers under section 619 for the purpose of correcting an incorrect or insufficient verdict. The trial court retains control over such proceedings with power to procure correction of informal or insufficient verdicts until the verdict is recorded and the jury finally discharged. Brown v. Regan, 10 Cal.2d 519, 524, 75 P.2d 1063; Redo Y Cia v. First National Bank, 200 Cal. 161, 166, 252 P. 587. General power to that effect was also recognized in Prager v. Isreal, 15 Cal. 2d 89, 98, 98 P.2d 729, and in Mitchell v. Stringer, 133 Cal.App. 207, 209, 23 P.2d 765. As was said in Vitimin Milling Corp. v. Superior Court, 1 Cal.2d 116, at page 120, 33 P.2d 1016 at page 1018, "In the absence of a verdict entered as required by law, there is no finality to the proceedings."

The duty of the court upon appropriate objection to require the jury to correct its verdict after it had been polled was recognized in Pray v. Trower Lumber Co., 101 Cal.App. 482, at page 491, 281 P. 1036, on authority of section 619 of the Code of Civil Procedure. The defendants present no case holding that it was too late for the court to order a correction of the insufficient verdict after the jury had been polled thereon.

[8] It is not contended that the objection of the defendants to the entry of the second verdicts was made for the purpose of having the verdicts corrected a second time. Their objection was directed solely to the entry of any greater judgment against the respective defendants than in accordance with the jury's arbitrary division of the total damages assessed against them. In the absence of any proper objection it may be assumed that the trial court, on the return of the first verdicts herein, could have entered judgment against the defendant driver in the sum assessed against him, and against the defendant owner in accord with his statutory liability. But upon appropriate objection it would be the duty of the trial court to refer the verdicts back to the jury as was done in the present case upon the objection of the plaintiffs. Brown v. Regan, supra. A resubmission under somewhat similar circumstances was also approved in Kerrison v. Unger, 135 Cal.App. 607, 611, 27 P.2d 927, and a contention that the first verdict was neither insufficient nor informal was rejected.

The judgments are affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.



49 Cal.App.2d 221

UNIVERSITY REALTY CO. v. NEYLAN.

Civ. 11745.

District Court of Appeal, First District, Division 1, California.

Jan. 21, 1942.

1. Appeal and error ⇐1078(3)

Where appellant did not brief the question of the sufficiency of a count it was disregarded on appeal.

2. Brokers ⇐52

Where broker's offer to sell prospect certain land was refused and a counter offer of $20,000 and $1,000 as the broker's commission on consummation as an additional consideration was made which broker transmitted to owner as a $20,000 offer and on its rejection accompanied by a counter offer of $21,000 net with $4,000 deposit broker then informed owner prospect had agreed to raise his offer $1,000 to net $20,000 and on owner's rejection broker advised owner the $21,000 offer and its conditions were accepted by the prospect and owner confirmed but no conveyance was made due to parties' inability to agree, broker was not entitled to recover commissions from prospective purchasers.

3. Brokers ⇐60

Where a broker agrees to receive his commission out of the purchase price, and the purchase price for any reason is not paid, there is no fund out of which the commission is payable.

4. Brokers ⇐60

Where prospective purchaser continued negotiation for execution of his offer to pur-

chase after the time limit fixed thereby had expired by filing instructions and depositing a check with the title company named therein and by holding an interview with the owner's broker in which prospect demanded compliance of the owner, such acts did not "waive" purchaser's right to rely on the other terms of his offer with regard to amount of price, payment, encumbrances on the title, delivering of deed, and adjustment of commission with the broker, as respects purchaser's liability for broker's commissions when deal was not consummated.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by the University Realty Company, a corporation, against John Francis Neylan for real estate broker's commission. From a judgment for defendant, plaintiff appeals.

Affirmed.

Hankins & Hankins and Olin F. Nuckolls, all of San Francisco, for appellant.

Turner H. McBaine and A. M. Flood, both of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a judgment by the court, sitting without a jury, in favor of defendant in an action to recover from him the sum of $1,050 alleged to be due plaintiff corporation, whose president, as real estate broker, conducted negotiations for the sale of certain real property.

For an understanding of the case, it is necessary to set forth the facts in detail. The property involved is owned by one Robert V. Anderson, a resident of New Jersey; is approximately 800 acres in extent and is situated in San Mateo County. The terms of the agreement for its sale are to be gathered from letters and telegrams exchanged between appellant and its principal, Anderson, and letters and conversations between appellant and respondent.

On May 23, 1939, Mr. Smith, president of appellant corporation, acting for Anderson, sought an interview with defendant and offered to sell him the land for a price of $25,000. This defendant declined, and made a counter offer in writing of $20,000, agreeing also to assume payment of $1,000 as the agent's commission as an additional consideration in the event the sale was consummated. The offer contained as conditions the following: "Title free and clear. No leases. No easements other than existing Rapley and Sumner road easements and P. G. & E. power line. Taxes to be prorated. I to have six weeks to examine title and close." On the same day appellant communicated with Anderson, stating that Neylan offered $20,000 cash, but did not mention that the latter agreed to assume payment of the commission as above. Anderson immediately, May 24th, replied by telegram, declining the offer, and suggested a compromise figure of $21,000 net to him, with $4,000 to be paid immediately to close the bargain. Thereupon, without any further communication with Neylan, appellant informed Anderson that Neylan had raised his offer $1,000 so as to net Anderson $20,000, and received from him, on May 27th, the following telegraphic reply: "Regret conditional offer fails to meet $21,000 minimum agreed with wife." Two days later, May 29th, appellant advised Anderson: "Neylan agrees to meet twenty-one thousand in accordance with telegram May 27th and accepts conditions. Will send deed for signatures. Please wire confirmation." Anderson sent the following reply: "I confirm agreement sale Neylan terms my telegram May 27th." On June 1st appellant advised Neylan of the interchange of telegrams between him and Anderson, and was immediately informed by Neylan in a letter dated June 2nd that he was surprised by the unqualified character of Smith's telegram to Anderson of the 29th regarding the acceptance of conditions, and further stating categorically that he did not propose to pay any deposit prior to the 5th day of July, and that the sale if made would not be predicated upon Anderson's wire of May 27th, but upon his, Neylan's, offer, with the sole modification that he would pay Anderson $21,000 and would adjust the commission matter with appellant. On June 13th, appellant wrote Anderson that it had misunderstood the latter's telegram of May 27th; had thought that Anderson had waived the matter of a payment of $4,000 and had been endeavoring to get Neylan to agree to such a payment but without success.

On June 16th appellant wrote Neylan disclosing for the first time an encumbrance upon the property, involving a quarry on adjoining land with a road easement over the Anderson land. Appellant again wrote

Neylan on June 22nd stating that it had advised Anderson of the full details as to how the deal would be closed in accordance with Neylan's offer, and that in the absence of hearing from Anderson it would appear that he was either out of town or acquiescing. Neylan replied on June 26th. He expressed concern about the encumbrance disclosed in the letter of June 16th, pointed out that he had already heard from the title company that it was ready to proceed but was awaiting instructions, and referred to the inadvisability of depending on Anderson's acquiescence through silence.

In a letter dated June 28th, appellant communicated to Neylan the following telegram from Anderson dated the previous day: "Authorize delivery deed to Neylan against payment on or before July fifth of $21,000 to my account American Trust Company, Palo Alto." On the following day, June 29th, Neylan in a conversation with Smith, in which the matter of the encumbrance on the property was discussed, informed the latter that if he would get an option to July 15th and deliver it to him before 5 P. M. of the 30th he would make the deal.

On the same day, June 29th, appellant sent Anderson the following telegram: "Rapley has leased quarry for county and other work. Neylan objects continuous hauling. Had Neylan up there; argued matter there and here and he finally agrees to waive objection if granted before tomorrow night ten day extension to close * * *." To this telegram Anderson immediately replied: "On strength Neylan's contract I refused other offer for property and made commitments relying upon him as man of his word. Will grant ten days' extension but only on condition that four thousand dollars part payment is deposited to my credit at American Trust Company by July fifth * * *." On June 30th appellant informed Anderson by wire that Neylan had accepted the condition—which was untrue—and mailed copy of the telegram to Neylan, who received it on July 3rd. Neylan thereupon, on the same day, wrote appellant in part as follows: "I did not, and do not, agree to deposit any money as a consideration for an extension. The fact is, there was nothing to be extended. I did agree on Friday, June 30th, that I would deposit, on July 5th, $4,000 as a part payment on a total purchase price of $21,000 for the Anderson ranch, if by July 15th the California Pacific Title & Trust Co. will write a policy guaranteeing a clear title, with the exceptions noted in my original offer, plus an exception of the easement in relation to the Johnson quarry on the Rapley property which, prior to July 15th, must be reduced to legal form acceptable to me. * * * On Saturday morning your son read to me escrow instructions sent by you to the title company. One of these instructions was to the effect that I was to deposit on July 5th $4,000 in the American Trust Company to the credit of Professor Anderson. I was very much astonished at this instruction as I never contemplated the rather absurd suggestion that anyone would consider paying money to a seller for property in advance of a report on title. * * * I think this whole matter ought to be reduced to an orderly basis so as to avoid misunderstandings in the future. Therefore, let me outline these steps, which are essential if a deal is to be made: (1) Professor Anderson will deposit with the California Pacific Title & Trust Co. a grant deed acceptable to me, covering all of his holding of ranch land in the area of the Skyline Boulevard in San Mateo County; * * * (3) A definite legal agreement covering the matter of the privilege granted to Johnson operating the quarry on the Rapley property, which shall be in terms agreeable to me, must be deposited with the title company before July 15th; (4) The only other exceptions to clear title shall be those outlined in my original offer; (5) On July 5th, I shall deposit with the [title company] $4,000 to be held by them under instructions covering the entire deal; (6) On or before July 15th, I shall deposit with the [title company] an additional $17,000, being the balance of the purchase price of $21,000 which is to be paid Professor Anderson on July 15th if all conditions are complied with; (7) The matter of commission shall be adjusted between you and myself; (8) The payment of the commission by me, however, shall not be construed as giving you any agency from me, but as additional consideration for the property. To avoid any misunderstanding, I desire a confirmation of the terms herein set forth on the enclosed copy of this letter before five o'clock, Wednesday, July 5th."

On July 5th Neylan filed his instructions with the title company, in accordance with his letter to Smith of July 3rd, together with check for $4,000. On the following day, July 6th, Neylan and Smith had a

telephone conversation. Appellant and its principal had failed to comply with Neylan's letter of July 3rd. In the conversation Neylan informed Smith that he was sick and tired of the whole matter; that his money was on deposit; that he was legally committed to Anderson, and demanded compliance of Anderson immediately. Smith asked Neylan to bear with him for a day or two and said he was getting in touch with Anderson immediately, to which Neylan replied: "Yes, wire Anderson immediately, and tell him that I am sick of this thing, and either get it cleared up or I am going to call the deal off."

On July 7th, Neylan wrote the title company suggesting a time for an examination by him of the deed and the hauling privilege, and stating that Mr. Smith had been requested to dispose of the conflict in the instructions.

With reference to the above telephone conversation of Neylan and Smith on July 6th, contrary to Neylan's request Smith did not wire Anderson, but wrote him on the 7th and did not receive a reply until July 11th.

In the meantime, the extension requested having been granted by Anderson only upon the condition, unacceptable to Neylan, that $4,000 should be deposited to the former's credit at his bank—the Anderson instructions to the title company being also to the same effect—Neylan wrote the title company advising that it had been impossible to reconcile the instructions and requesting a return of his deposit—which was done—and on the same day wrote Smith informing him of the course he had taken.

[1] The complaint is in three counts. The first, to which defendant's demurrer was sustained without leave to amend, was based upon an express contract. Appellant's briefs do not discuss the sufficiency of this count against demurrer; hence it will be disregarded. The two counts upon which the action went to trial were common counts. Count two alleged that on or about July 8th defendant became indebted to plaintiff in the amount in dispute for services, work and labor performed by plaintiff as a real estate broker for defendant at his special instance and request. Count three alleged that between May 24, 1939, and July 15, 1939, plaintiff performed services for defendant at his request, as broker, in the purchase of real estate.

The court made findings that plaintiff was not the agent of Neylan, but represented Anderson in negotiations for the purchase of the land; that there was no agreement in writing subscribed by defendant or any agent of his authorizing plaintiff as agent or broker to purchase the Anderson lands for compensation or a commission, but that defendant "did assume and promise in writing to pay the plaintiff's commission as a broker in the event that the defendant's proposed purchase of the Anderson lands was consummated"; that defendant's counter offer was not accepted within the time limits set therein, and that his proposed purchase was never consummated through no fault or wrongful act on his part. The remaining findings are to the effect that plaintiff was not employed to investigate water rights on neighboring lands in San Mateo County.

[2, 3] It is appellant's contention that through telegrams and other communications a contract of purchase and sale came into existence on May 31st, and that appellant at this point had earned its commission by bringing the parties together. This contention is not sound for, as above shown, there had been a misrepresentation or misinterpretation on the part of appellant as to there having been a meeting of the minds of the contracting parties.

As found by the court, Neylan at no time employed appellant as a broker—his employment being by Anderson—and Neylan's promise to pay him the commission was as a further consideration for the conveyance of the land. The land through no fault of the respondent never having been conveyed, the stipulated consideration never became payable, either in whole or in part. Colton v. O'Brien, 217 Cal. 551, 20 P.2d 43. The situation is analogous to that in which the broker agrees to receive his commission out of the purchase price. In that case, if the purchase price for any reason is not paid, there is no fund out of which the commission is payable.

[4] The respondent did not waive his right to rely on the terms of his agreement with Anderson by permitting a continuation of negotiations for its execution after July 5th, the limit of time set for its performance. As shown, Anderson's response to Neylan's request for an extension of time was a renewed demand for the payment of $4,000 to his credit at his bank as part

payment of the purchase price; and the filing of vendor's instructions with the title company to that effect was entirely contrary to the agreement previously entered into between the parties in conformance with which Neylan's instructions were filed. The parties had never been able to agree on the steps necessary to be taken to consummate the sale, and this situation was ample justification for Neylan's determination to terminate the matter.

The evidence is ample to support the court's findings, and the judgment rendered. The judgment is affirmed.

PETERS, P. J., and B. C. JONES, J., pro tem., concurred.



49 Cal.App.2d 278

GIBSON, County Treasurer, et al. v. RIVER FARMS CO. OF CALIFORNIA (COOPER et al., Interveners).

Civ. 6706.

District Court of Appeal, Third District, California.

Jan. 22, 1942.

Rehearing Denied Feb. 21, 1942.

Hearing Denied March 19, 1942.

1. Waters and water courses ⇐222

Where court retained continuing jurisdiction of interlocutory decree, quieting title to realty in reclamation district, which had purchased realty at sale for delinquent interest installments on reclamation district bonds, subject to right of former owner to redeem realty or any portion thereof by payment within specified time of all delinquent assessments and taxes thereon, equity had jurisdiction to extend time for making such payments, and properly exercised such jurisdiction by giving former owner additional time to meet requirements of judgment in order to avoid forfeiture.

2. Contracts ⇐318

Equity abhors forfeitures.

3. Judgment ⇐301

The material determinations of an interlocutory decree may constitute a "final judgment," with respect thereto, which may not ordinarily be modified or changed, but there is a clear distinction between material adjudicated portions of a judgment or decree and mere procedural matters incident to determined issues which are incorporated as the proposed means of fulfilling the judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

4. Judgment ⇐301

Where a judgment reserves jurisdiction to change or modify mere procedural provisions, as distinguished from material adjudications of substantial issues, it is not an abuse of discretion for the chancellor to extend the time limit for fulfillment of the judgment in accord with equity so as to enable party thereto to fulfill the specified terms of the judgment.

5. Judgment ⇐301

Directions with respect to carrying a judgment into effect, but which do not change or modify the judgment with respect to matters put in issue and determined by the judgment, may be inserted or modified by amendment.

6. Waters and water courses ⇐222

Where former owner of land, sold to reclamation district for delinquent interest installments on reclamation district bonds, in accordance with terms of interlocutory decree, quieting title to land in reclamation district subject to right of former owner to redeem land or any portion thereof by payment within specified time of all delinquent assessments and taxes thereon, and within the time specified as extended by subsequent orders of court, exercised right to redeem a particular tract, and there were at the time in the hands of receiver sufficient funds belonging to former owner to effect such redemption, court had no authority to enter final judgment quieting title in reclamation district to all the land, including tract redeemed by former owner.

Appeal from Superior Court, Colusa County; Arthur Coats, Judge Assigned.

Action to quiet title to realty by California Gibson, as County Treasurer and as trustee of Reclamation District No. 108, and others against the River Farms Company of California, a corporation, wherein Frederick F. Cooper and others and Mary E. Morris, intervened. From a judgment quieting title in plaintiff, regardless of a

provision in interlocutory decree, which in effect quieted title in plaintiff subject to the right of defendant to redeem the land or any portion thereof, by the payment of all delinquent assessments, taxes, interest and penalties thereon within a specified time, defendant appeals.

Judgment modified, and, as modified, affirmed.

A. I. Diepenbrock, of Sacramento, for appellant.

Arthur C. Huston, of Woodland, and Thomas Rutledge, of Colusa, for respondents.

Athearn, Chandler & Farmer and Milton T. Farmer, all of San Francisco, for plaintiffs, interveners and respondents Cooper and others.

Clark, Nichols & Eltse, of Berkeley, for intervener and respondent Morris.

THOMPSON, Acting Presiding Justice.

The defendant, River Farms Company, has appealed from a final judgment quieting title in plaintiff to land in Reclamation District 108, contrary to, and regardless of, a provision in the interlocutory decree in effect quieting title thereto in defendant, subject to the payment of all delinquent assessments, taxes, interest and penalties which were charged against the land or any redeemed portion thereof, within a specified time. The proceeds derived from crops raised on the land in 1938 were awarded to the defendant for the purpose of redeeming any portion of the land. The interlocutory decree specifically reserved jurisdiction to modify its terms at any time prior to the entry of a final judgment. An appeal from that interlocutory decree was perfected. The judgment was affirmed by this court October 29, 1938. Gibson v. River Farms Co., 28 Cal.App.2d 757, 83 P. 2d 966. On account of that appeal, the time for payment by the defendant of delinquent assessments, taxes, interest and penalties was extended from time to time until September 11, 1939. On April 26, 1939, the defendant gave written notice exercising its option to redeem Tract 17A, and to apply thereon the proceeds of sales of crops in the possession of the referee, which on September 19, 1939, exceeded the amount necessary for that purpose, entitling the defendant to a final decree quieting title to said tract in its favor. On motion of the respondent and intervener Morris, a judge of the court in which the action was pending, other than the chancellor who tried the case, rendered a final decree quieting title to all of the land, including Tract 17A, in plaintiff, regardless of the previous extensions of time and in spite of defendant's previous election to redeem Tract 17A in accordance with the terms of the interlocutory decree. The theory upon which the final decree was granted is that the previous extensions of time for performance of the conditions specified in the interlocutory decree constituted an unlawful attempt to materially change substantial terms of a decree over which the chancellor had lost jurisdiction, and that such orders were therefore ineffectual and void. From the last-mentioned final decree the defendant has appealed.

The problem to be determined on this appeal is whether a court of equity has authority to reserve in its interlocutory decree quieting title to real property the right to subsequently extend the time allowed therein for a party to perfect its title by conforming to a specified condition incorporated in the final decree, by the payment of ascertained delinquent assessments, taxes, interest and penalties attached thereto.

The defendant, River Farms Company of California, a corporation, owned 29 tracts of agricultural land in Reclamation District Number 108, consisting of 13,000 acres, subject to a bonded indebtedness of that district. The plaintiff, California Gibson, was a trustee of Reclamation District Number 108. The defendant failed to pay reclamation assessments which were levied against the land in 1931. For failure to pay these assessments the land was sold and conveyed to plaintiff December 29, 1932, pursuant to the provisions of the statute. The district retained possession of the land until 1937. On account of delinquent county taxes, the land was subsequently sold and conveyed to the State of California, July 2, 1937. Thereafter the land was leased by the State of California to the defendant, which reentered, took possession thereof in the fall of the last-mentioned year and farmed the entire tract in 1938. The Trustees of the Reclamation District brought suit against the defendant in 1936, to quiet title. The defendant answered that complaint, setting up the invalidity of the assessments under which the purported sales of property were made to the district. The defendant also affirmatively asked that title thereto be quieted in it. Judge Jones of Lake County, who tried that suit, adopt-

ed findings favorable to the defendant, holding that the proceedings preliminary to the sale, including the reclamation assessments, were void and that the sales were invalid. In the exercise of its equitable authority, the chancellor rendered an interlocutory decree vesting title to the land in plaintiff, "subject, however, to defeasance" thereof by defendant's payment of the delinquent assessments, taxes, interest and penalties on or before November 25, 1938. In effect, this constituted a decree quieting title to the several tracts of land in the defendant, conditioned upon its payment of all the assessments and tax obligations existing against the land, before the specified date. The decree then awarded to the defendant "the net proceeds of the 1938 crop (including pasturage) grown upon all the parcels of land described in said Exhibit 'A', which is received by said receiver," for the purpose of fulfilling the conditions and accomplishing the defeasance. The decree authorized the defendant to redeem or perfect its title to all or to any one of said 29 tracts of land, and to apply the proceeds from the sales of crops produced in 1938 on the entire property, to the redemption of any one selected tract, if so desired. A receiver was appointed. The above-mentioned proceeds of sales were paid to and retained by the receiver. Jurisdiction to modify the decree in any authorized manner was reserved by the following language: "This court retains continuing jurisdiction of this suit and of the interlocutory decree entered herein until the entry of final judgment herein."

Upon motion, and on due notice of hearings thereof, the trial judge made five successive orders extending the time within which the defendant was authorized to pay said assessments, taxes, interest and penalties and to reclaim the property, the last one of which designated September 11, 1939, as the final date therefor. On that date the total amount of delinquent assessments, taxes, costs and penalties necessary to redeem or perfect title in the defendant to Tract 17A of the land in question was $63,886.93. It appears there was then net cash in the hands of the receiver, belonging to the defendant for the purpose of clearing its title to the whole or to any one tract of said land, the aggregate sum of $66,253.65 which included the sum of $6,157.51, earned in connection with said lands as federal soil conservation benefits, which had then been paid to the receiver.

April 26, 1939, the defendant served upon the trustees of the reclamation district and upon the receiver a written notice exercising its right to claim and to redeem Tract 17A by payment of all designated charges against it, by application of its funds in the hands of the receiver. This notice of election to redeem Tract 17A was served upon all interested parties and the necessary proceeds were demanded six and a half months before the expiration of the time fixed therefor by the last order of the court. Prior to the expiration of the time for redemption, the referee's account was filed for settlement, showing there was a sum of money in his hands on September 11, 1939, available for the foregoing purpose which, added to the soil conservation benefits fund, which was subsequently paid, amounted to $66,926.77. That account was first disallowed because the referee neglected to take into account the proceeds of sales of crops produced from Tract 17A in the year 1939. The account was, however, settled subsequent to September 11, 1939, which was the final date set for completing title to defendant's Tract 17A, by payment of the assessments and taxes imposed thereon. However, the defendant had previously elected to do so. March 20, 1940, in spite of the formal extensions of time, and, regardless of the written notice of election to redeem Tract 17A of the land, the respondent and intervener Morris presented to the judge of the superior court in which the action was pending, other than the chancellor who tried the case, an application for final decree, which was granted, quieting title in plaintiff to all of the land, including Tract 17A. The theory upon which this final decree was granted was that the several extensions of time to perfect defendant's title to all or any portion of the land in question constituted an unlawful attempt to change substantial terms of an interlocutory decree, over which the court had lost jurisdiction.

[1, 2] We are of the opinion the extensions of time for the defendant to perfect its title to land involved in that suit were lawfully authorized as a just prerogative of a court of equity. These orders did not have the effect of changing substantial terms of the interlocutory decree. They merely extended the time for enabling the defendant to follow the procedure prescribed by the decree to secure the title and to apply funds belonging to defendant in satisfaction of delinquent assessments and

taxes so as to redeem the land and to save it from forfeiture. The extensions were in the interest of equity which abhors forfeitures. In the former appeal from the interlocutory decree it was definitely determined that the sales of the land for delinquent assessments and taxes, upon which the plaintiff relies for title, were void. In spite of that fact, title was quieted in plaintiff, with the privilege of defendant's redeeming or defeating that tentative title by paying in full all delinquent assessments, taxes, interest and penalties against the whole or any selected portion thereof on or before the designated date. It was certainly just and equitable for the court to award to the defendant the net proceeds of sales of the crops which were produced from the lands by defendant's efforts and at its expense in the year 1938. It was also equitable that, since the redemption of the property was necessarily suspended for nearly a year before the first appeal was finally determined, and since the proceeds of the sales of crops in 1938 were held by the referee in the custody of the court, and not finally settled until the latter part of 1939, the court should extend the time for the exercising of defendant's option to redeem the property, or any portion thereof, so as to prevent forfeiture of title thereto. The defendant was thereby enabled to save one small tract of land. The plaintiff, nevertheless, secured title to the remaining portion of the entire property, consisting of 13,000 acres, in spite of the fact that the former appeal determined that the conveyances to plaintiff were void on account of irregularities which occurred in the foreclosure proceedings.

[3, 4] It is true that the material determinations of an interlocutory decree may constitute a final judgment with respect thereto, which may not ordinarily be modified or changed. But there is a clear distinction between material adjudicated portions of a judgment or decree, and mere procedural matters incident to the determined issues, which are incorporated as the proposed means of fulfilling the judgment, such as the granting of a limited period of time within which payments of alimony, delinquent taxes or deferred purchase money may be made. It has been held in California that when a decree or judgment reserves jurisdiction, as it did in the interlocutory decree which is involved on this appeal, to change or modify mere procedural provisions, as distinguished from material adjudications of substantial issues, it is not an abuse of discretion for the chancellor to extend the time limit, in accord with equity, to enable the party thereto to fulfill the specified terms of the judgment or decree. Leslie v. Federal Finance Co., Inc., 14 Cal.2d 73, 81, 92 P.2d 906; Los Angeles A. T. Co. v. Superior Court, 94 Cal.App. 433, 271 P. 363; Tyler v. Shea, 4 N.D. 377, 61 N.W. 468, 50 Am.St.Rep. 660; 15 R.C.L. 678, sec. 129; 34 C.J. 232, secs. 451, 452.

In the Los Angeles A. T. Co. case [94 Cal.App. 433, 271 P. 364], first cited, a court of equity rendered an interlocutory decree determining that plaintiff's title to certain land would be quieted "unless within 30 days after entry of the interlocutory judgment the company paid to a 'trustee,' appointed and named in the decree, and for the plaintiff, the sum of $15,500 and interest, and certain sums expended by plaintiff for taxes," in which case the defendant would be relieved from the forfeiture, and title would thereupon be quieted in defendant. The money was not paid within that limited time. On application, the time for making the designated payment was extended five successive times. It was held these orders did not constitute a material change in substantial adjudicated portions of the judgment. On the contrary, it was held those extensions of time merely applied to procedural matters intended to accomplish the enforcement of the judgment, and that the orders constituted a valid exercise of jurisdiction retained by the court. That case appears to be determinative of the issue on appeal in the present action.

The Leslie case, supra, approves the principle determined in the last-mentioned case by special reference thereto. Quoting with approval from that case, the court says at page 81 of the Leslie opinion [14 Cal.2d 81, 92 P.2d 910]:

"Under the authorities cited, the superior court had the right to relieve against the forfeiture of this sum. * * * No payment was made within the time limited and plaintiff moved for final judgment. The motion was denied on a showing that defendant would be able to comply within a short time. Thereafter the court granted numerous extensions of time. * * *

" 'The power of a chancery court to supervise the execution of its orders, and even to modify them in ways affecting only the details of their performance, has long been recognized. "There are some cases

of decrees which, although they are final in their nature, require the confirmation of a further order of the court, before they can be acted upon. In cases of decrees of foreclosure, the court will, upon application, enlarge the time for payment of the money, even though the final order has been enrolled." Daniell's Chancery Practice, 6th Am.Ed. pp. 991–993. We find nothing in our statute or decisions which can be said to have been intended to limit the power of the superior court in a suit in equity to grant relief properly adjusted to the equitable rights of the parties as determined by the court, and to control the parties in all matters connected with their required obedience to the orders embodied in the decree.'"

[5] In support of the text found in 34 C.J., page 235, sec. 452, that "Directions [in a decree] with respect to carrying a judgment into effect, but which do not change or modify the judgment with respect to matters put in issue and determined by the judgment, may be inserted or modified by amendment," the note under citation 95b, quoting from the Tyler case, supra, has this to say regarding the right of the court to extend time for payment of money to perfect title to land:

"The court has power to make an order extending the time within which, by the terms of a judgment for specific performance, a defendant is required to pay purchase money and accept title to land. Adams v. Ash, 46 Hun., N.Y., 105.

"Where a time is prescribed within which money must be paid to entitle a party to the benefit of the judgment, the court may, even after such time has expired, extend it by a modification of the judgment in furtherance of justice."

[6] We conclude that the foregoing authorities support the principle that a court of equity has power and jurisdiction to extend the time specified in an interlocutory decree quieting title to land within which payment of delinquent assessments and taxes shall be made. That is exactly what the court did in the present case. Sufficient money belonging to the defendant was in the hands of the receiver, subject to order of the court, with which to fulfill the judgment in that regard, before the defendant exercised its option under the order extending the time therefor, and elected, in writing to redeem Tract 17A of the land in question, entitling it to a final decree quieting title to that particular tract of land. The orders extending time were not subsequently modified or set aside. They remained in full force until after the option was exercised. It follows that the court was not authorized to disregard those orders and to render a final judgment defeating defendant's adjudicated rights, or to quiet title to Tract 17A in plaintiff regardless of equity and the express terms of the interlocutory decree as properly modified.

The judgment is modified and the trial court is directed to quiet title to Tract 17A of the land involved on this appeal in the appellant, River Farms Company of California (a corporation), subject to all assessment calls of assessment number five of Reclamation District No. 108, commencing with that of October 1, 1939. As so modified the judgment is affirmed. The appellant may recover its costs. It is so ordered.

COMSTOCK, Justice pro tem., and TUTTLE, J., concurred.



49 Cal.App.2d 259

PEOPLE v. DORIUS.

Cr. 2208.

District Court of Appeal, First District, Division 2, California.

Jan. 22, 1942.

1. Parent and child ⇐17(6)

Evidence supported conviction of willful failure to provide without lawful excuse for defendant's minor children. Pen. Code, § 270.

2. Criminal law ⇐1170(1)

In prosecution for willful failure to provide for minor children, error, if any, in trial court's refusal to admit testimony to show receipt by defendant's wife of monthly check for services of minor son during part of period covered by the information was not prejudicial, where, even if defendant had been credited with an additional contribution by reason of such receipt, evidence would still have been sufficient to sup-

port a conviction. Pen.Code, § 270; Civ. Code, § 197.

3. Criminal law ⇐90(1)

The words "shown by", as used in statute providing that, for purpose of determining jurisdiction of any justice's court therein, the population of a judicial township shall be deemed to be above or below 30,000 either as may have been found to be the fact in any proceeding in mandamus brought in a court having jurisdiction thereof, or as "shown by" the last preceding census taken under the direction of Congress, whichever may be later, refers to a census which has been officially announced so that the figures may be definitely ascertained and may be the subject of judicial notice. Code Civ. Proc. § 81; § 1875, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Shown by".

4. Criminal law ⇐90(2)

In determining whether justice's court of San Rafael township was a class A justice's court on January 31, 1941, so as to have jurisdiction of a prosecution for willful failure to provide for minor children, population of township would be deemed to be population as shown by the census of 1930, and not as shown by the census of 1940, where the results of the 1940 census were not announced until after date of filing the information. Code Civ.Proc. § 81; § 1875, subd. 3; Pen.Code, §§ 270, 1425.

5. Criminal law ⇐995(3)

In prosecution for willful failure to provide for minor children, failure of superior court clerk's entry of judgment to show that defendant's failure to provide for his children was "willful" and "without lawful excuse" did not render judgment void, where such elements were charged in the information, and there was a verdict of guilty which constituted an adjudication that the offense was willful and without lawful excuse. Pen.Code, §§ 270, 1151, 1207.

6. Criminal law ⇐996(1)

Under statute providing that in criminal trials in superior court clerk in entering judgment must state briefly the offense for which conviction was had, if a defendant feels prejudiced by an omission from clerk's entry, his remedy would be to secure a correction of the entry to state the offense for which he had been convicted by jury's verdict or finding of court entered in the minutes. Pen.Code, § 1207.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Rellis Q. Dorius was convicted of willful failure to provide for minor children, and he appeals.

Affirmed.

David B. Fyfe, of San Rafael, for appellant.

Earl Warren, Atty. Gen., and Dennis Hession, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendant was charged by information with wilful failure to provide without lawful excuse for his two minor children. Penal Code, sec. 270. He was found guilty upon a trial by jury. His motion for a new trial and his motion in arrest of judgment were denied. He was sentenced to the county jail for thirty days, execution of said sentence was suspended and probation was granted. Defendant appeals from the order denying his motion for a new trial and from the order denying his motion in arrest of judgment.

[1] Defendant first contends that the evidence was insufficient to sustain the verdict but we find no merit in this contention. The information charged that on or about December 31, 1940, and for more than six months prior thereto, defendant did wilfully and without lawful excuse fail to provide his two minor children with necessary food, shelter, clothing, medical attendance and other remedial care. It appeared from the evidence that defendant was a journeyman painter who was capable of earning and did earn good wages during said period except at the times that he failed to obtain or retain employment by reason of his excessive use of intoxicating liquor. He was nevertheless employed during the greater portion of said period. Defendant took the stand and testified from recollection regarding the amount of his earnings and the amounts turned over to his wife for the support of the family. This testimony appears to have been rather indefinite and unsatisfactory but it did definitely show that defendant averaged over $160 per month in earnings for at least three months of the period covered by the information. His wife testified that she had no record of the money turned over to her but that it was about $45 per month, not over $50. She further testified that the money turned over to her was never sufficient to pay the rent

and other necessary household expenses, all of which she was expected to pay therefrom; that in December, 1940, there was a large accrued indebtedness for rent, utilities and food; that the electricity had been disconnected on two occasions for nonpayment of the electricity bill; that the credit of the family with the dairy company has been discontinued for nonpayment of that company's bill; that on two occasions she had been compelled to borrow money for necessaries as she was unable to procure it from defendant; and that the minor son had left home because conditions were intolerable and said son had joined the Civilian Conservation Corps. Defendant himself conceded that "Sometimes we might be short of food a day or two certain times."

We deem it unnecessary to summarize further the evidence. A reading of the record shows that the jury could properly conclude from the evidence that defendant did not diligently seek employment and perform the services which he was able to perform in order to provide for the family; that he used a considerable portion of his actual earnings for the purchase of intoxicating liquor; and that he wilfully failed without lawful excuse to provide his minor children with the necessaries of life in violation of said section 270 of the Penal Code.

[2] Defendant further contends that the trial court erred in refusing to admit testimony to show that his wife received a check in the sum of $22.50 each month for the services of the minor son after said son had joined the Civilian Conservation Corps. Defendant states that he and his wife were equally entitled to said earnings of said minor son (Civil Code, section 197) and that defendant was entitled to have one-half of each check or $11.25 applied to the support of the minor daughter who was the only minor child then needing support from him. Assuming, without deciding, that error was committed in excluding said testimony, we do not believe that such error was prejudicial to defendant. The information covered a period of time prior to as well as after the entry of said son into the Civilian Conservation Corps, and furthermore, even if said evidence had been admitted and defendant had been credited with an additional contribution of $11.25 per month for each month after said minor son left home, the evidence would still have been sufficient to show a violation by defendant of said section 270.

Defendant further contends that the trial court was without jurisdiction of the offense charged. It is claimed that the justice's court of San Rafael Township was a Class A justice's court (Code of Civil Procedure, section 81) at the time of the filing of the information herein and that said justice's court, rather than the superior court, had jurisdiction of the offense charged. (Penal Code, section 1425.) The consideration of this contention requires the statement of further facts.

At the time of the filing of the information, the 1930 census was the last published census and it showed that San Rafael Township had a population of less than 30,000. The justice's court of that township was therefore acting at that time as a Class B justice's court. Code of Civil Procedure, sec. 81. Concededly, Class B justice's courts did not have jurisdiction over the offense charged but Class A justices' courts did have such jurisdiction. Penal Code, sec. 1425. In 1940, a new census was taken but the results thereof were not announced until February 18, 1941. The information herein had been previously filed in the superior court on January 31, 1941, and the trial was concluded on February 26, 1941. When the results of the 1940 census were announced on February 18, 1941, it appeared that the population of San Rafael Township on April 1, 1940, was 30,111. Upon learning the results of the 1940 census showing that San Rafael Township then had a population which was slightly in excess of 30,000, defendant urged these facts in support of his motion in arrest of judgment which motion was denied.

Defendant cites and relies upon Los Angeles County v. Justice's Court, 208 Cal. 429, 281 P. 611; People v. Tossetti, 107 Cal. App. 7, 289 P. 881; and People v. Wong Wang, 92 Cal. 277, 28 P. 270, to support his contention that it is the fact of population which is determinative of the question of jurisdiction of the justices' courts. These cases were all decided, however, prior to the 1933 amendment and later amendments to section 81 of the Code of Civil Procedure. Said cases illustrate the perplexing jurisdictional problems which were presented to the courts prior to the amendment of said section and it appears that the amendments to said section were adopted for the purpose of making it possible to determine definitely the question of jurisdiction at any given time.

[3, 4] Said section 81 of the Code of Civil Procedure now reads in part "For the purpose of determining the jurisdiction of any justice's court therein, the population of a judicial township shall be deemed to be above or below 30,000 either as may have been found to be the fact in any proceeding in mandamus brought in a court having jurisdiction thereof, or as shown by the last preceding census taken under the direction of the Congress of the United States, whichever may be later." It is conceded that the population of San Rafael Township has never been determined in any proceeding in mandamus.

It will be noted that the words "shown by" are the words employed in said section with reference to the census. These words necessarily refer to a census which has been officially announced so that the figures may be definitely ascertained and may be the subject of judicial notice. Code of Civil Procedure, sec. 1875, subd. 3. The words "shown by" could not possibly refer to a census which has been taken but the results of which have not been officially announced. We are therefore of the view that for the purpose of determining the jurisdiction of the justice's court of San Rafael Township on January 31, 1941, the population of said township was deemed to be the population as then shown by the census of 1930 and not the population as subsequently shown by the census of 1940. Said justice's court therefore did not have jurisdiction of the offense and the information was properly filed on January 31, 1941, in the superior court, which last mentioned court continued to have jurisdiction for the purpose of hearing and disposing of the cause. 22 C.J.S., Criminal Law, § 165, p. 261.

[5, 6] The final contention of defendant is that the "judgment is void for the reason that it fails to show that appellant's failure to provide for his children was wilful and without lawful excuse." Defendant cites and relies upon In re Cowan, 137 Cal.App. 209, 30 P.2d 443 and In re Mize, 11 Cal.2d 22, 77 P.2d 472. There is language in the Cowan case which tends to support defendant's contention but that case is distinguished in the Mize case. In re Mize, supra, 11 Cal.2d page 27, 77 P.2d 472. Furthermore, both cases involved petitioners who had been convicted in the justices' courts. In the case before us the defendant was charged by information in the superior court. The allegations of the information were full and complete including the allegations that defendant failed to provide for his minor children "wilfully" and "without lawful excuse." Defendant was tried by a jury which rendered a verdict of "Guilty." This was a sufficient verdict as it "imports a conviction * * * of the offense charged." Penal Code, sec. 1151. Judgment was thereafter rendered upon said verdict.

But defendant calls attention to section 1207 of the Penal Code which reads "When judgment upon a conviction is rendered, the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction, if any." Here the clerk's entry in the minutes, before setting forth the sentence imposed, merely recited that "Whereas, the said Rellis Q. Dorius having been found guilty in the court of misdemeanor to wit: Failure to Provide for Minor Children:" It did not recite that defendant had been convicted of failing to provide for his minor children "wilfully" or "without lawful excuse" or that he had been convicted of a violation of section 270 of the Penal Code. It is a sufficient answer to defendant's contention to point out that the verdict of the jury here "constituted an adjudication that the offense was wilful and without lawful excuse" which was ground of distinction pointed out in In re Mize, supra, 11 Cal.2d at page 27, 77 P.2d 472. It was there said on page 26, of 11 Cal.2d on page 475 of 77 P.2d, in discussing said section 1207, that if a defendant felt prejudiced by an omission from the clerk's entry in a superior court action, "his remedy would be to secure a correction of the entry to state the offense of which he had been convicted by verdict of the jury or finding of the court entered in the minutes. The clerk's record may be amended to speak the truth."

The order denying the motion for a new trial and order denying the motion in arrest of judgment are affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

49 Cal.App.2d 198

STOOPS v. JOHNSON et al.

Civ. 11711.

District Court of Appeal, First District, Division 1, California.

Jan. 17, 1942.

1. Appeal and error ⇐792

Where party taking an appeal has failed to furnish the reviewing court with a copy of the judgment roll as required by statute, appeal may properly be dismissed by court of its own motion. Code Civ.Proc. § 950.

2. Appeal and error ⇐673(1)

In action to quiet title, where plaintiff had executed a trust deed on the property which had been transferred to defendant and plaintiffs alleged an agreement by defendant to accept lesser amount in full satisfaction of the trust deed and note secured thereby, finding against plaintiffs' contention that they had made an actual tender of the money required by such agreement to defendant would not be disturbed on appeal where no part of agreement was set out in record.

3. Appeal and error ⇐1010(1)

In an action to quiet title, when there was evidence to support trial court's finding as shown in bill of exceptions as to the amount due on a trust deed and the judgment of the trial court did not appear in the record, finding of the trial court would not be disturbed on appeal.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Don Theodore Stoops against Joe E. Johnson and others to quiet title to property covered by trust deed. From judgment for defendants, plaintiff appeals.

Affirmed.

Paul S. Crouch, of Los Angeles, for appellant.

Harriet Pugh, of Los Angeles, for respondents.

KNIGHT, Justice.

[1] Plaintiff appeals from a judgment entered in favor of defendants after trial on the merits, and the appeal is presented on a bill of exceptions; but plaintiff has not complied with the mandatory provisions of section 950 of the Code of Civil Procedure which require an appellant on an appeal from a final judgment to furnish the reviewing court with a copy of the judgment roll. Consequently, it is impossible to ascertain from the transcript, or for that matter from either of the briefs filed by the respective parties, the nature of the action, the relief sought, the defenses interposed, the issues tried and determined, or the form of the judgment rendered. Under well-settled rules an appeal may properly be dismissed by the court of its own motion if the record fails to comply with legal requirements; however, consideration has been given to the points urged by plaintiff in support of the appeal, and it is apparent that no finding of error can be based thereon.

[2] The evidence set forth in the bill of exceptions consists of the testimony given by the plaintiff and one of the defendants; also several documentary exhibits introduced by them; and the facts to be gleaned therefrom may be stated as follows: Joe E. Johnson and his wife, Zula Joyce Johnson, were the owners and holders of a trust deed dated December 30, 1936, covering real property belonging to the plaintiff Don Theodore Stoops, and given to secure the payment of a promissory note of even date therewith for the sum of $1,550. On April 15, 1937, the defendant Ernest R. Van Houten acquired said trust deed and note by transfer and assignment from the Johnsons as part payment in a real estate transaction which took place between the Johnsons and Van Houten. Some time thereafter, the date not appearing in the record, Stoops brought the present action against the Johnsons and Ernest R. and Doris K. Van Houten, presumably to quiet title to the property, claiming according to Stoops' testimony, that the Johnsons had given him an agreement to the effect that he was to pay them only $500, and that he, Stoops, had told Van Houten about the agreement before the latter acquired the trust deed and note. The agreement was never recorded, and while the bill of exceptions recites that it was introduced in evidence, no portion of its contents is set forth in the record, in substance or otherwise; nor is there anything in the record showing when it was made. Stoops claimed also in his testimony that he had tendered Mrs. Johnson $250, which she refused to accept, and that

thereafter his attorney sent a letter to the Johnsons tendering $194 and informing them "that a promissory note was executed in their favor." But there is nothing in the record showing when these asserted tenders were made, whether before or after Van Houten acquired the trust deed and note, or whether before or after the commencement of the present action.

Van Houten denied having any knowledge whatever of the existence of said agreement prior to or at the time of the transfer to him of the trust deed and note. In this respect he testified that the Johnsons had never mentioned the agreement to him, and that he met Stoops for the first time on April 17, 1937, which it will be noted was two days after the trust deed and note had been transferred to him. He testified that on that date he called on Stoops to notify him that he was then the owner of the trust deed and note and that all future payments should be made to him; also to inquire whether Stoops had paid the taxes on the property; that upon being so notified, Stoops became "very angry" and declared he would not pay Van Houten anything; that he "had nothing to do with him"; and that Stoops then went on to say that the Johnsons had made an agreement with him "to take $500 for the trust deed." Continuing Van Houten testified that he told Stoops he knew nothing of the existence of such an agreement; that he "did not want to get into any trouble" over the matter, and that although the transaction with the Johnsons had been closed he would see if it could be undone; and his testimony shows that he took steps to that end, but his efforts were unsuccessful. The Johnsons were not called as witnesses by either side.

The evidence further shows that there was a second conversation between Stoops and Van Houten which took place in the tax collector's office, but again there is a direct conflict as to whether it occurred before or after the date of the transfer of the trust deed and note to Van Houten. Therefore, in view of the trial court's judgment in favor of defendants, it must be taken as true as testified by Van Houten that both conversations took place after he had acquired the trust deed and note.

With respect to the findings, the bill of exceptions recites merely that the court found that Stoops "did not pay or tender to" the Johnsons $250 nor deliver to them his promissory note for that amount; also that there was a finding "to the effect" that the trust deed was a lien for the sum of $1,550 on the property. No other findings are mentioned; and as to the judgment the bill recites only that it was therein decreed that the Van Houtens were "the owners and holders in due course and for a valid consideration of the first trust deed mentioned in their answer"; also that the agreement entered into between plaintiff and the Johnsons "was not a valid and subsisting lien upon the property * * * and was of no force and effect."

The first point made by plaintiff in his brief is that contrary to the trial court's finding the uncontradicted testimony shows that plaintiff "made an actual tender of money and an actual tender upon a promissory note pursuant to his agreement" with the Johnsons. Obviously, however, to be binding on Van Houten it was essential to establish either that the tender was made prior to the transfer of the trust deed and note to Van Houten, or that the latter acquired the trust deed and note with knowledge of the existence of the agreement. With respect to the latter, as already pointed out, there is an implied finding based on conflicting evidence that Van Houten had no such knowledge; and as to the former, no portion of the agreement is set out in the record; hence there is nothing to show that any tender was ever made in conformity with the terms thereof, or if so, then there is an entire absence of evidence showing when it was made. For aught that appears in the record the tender may have been made after the commencement of the action.

[3] Plaintiff's second point is that "the evidence is * * * uncontradicted to the effect that there was $1,200 balance due on the trust deed and despite this fact, the court made findings to the fact that there was $1,550 due on the trust deed." Just what, if anything, the trial court decreed in this respect does not appear in the record because of the absence of a copy of the judgment, and the only reference made thereto in the bill of exceptions is the finding already mentioned "to the effect that the trust deed was a lien for the sum of $1,550 on the property"; and there is evidence to support such finding. In this connection Van Houten testified that he "was the owner and holder of a promissory note in the principal sum of $1,550 * * * secured by a trust deed on the property described in the complaint, in the same

amount," and that the Johnsons had transformed said trust deed and note "to him in payment of $1,200 due him under an agreement they had with him for his parking lot. * * *" True, plaintiff testified that during the first conversation between him and Van Houten the latter told him he "understood that there was $1,200 due on the trust deed"; but apparently the trial court declined to accept as true that portion of plaintiff's testimony, as it did the remainder of his version of the conversation. In any event, if before Van Houten acquired the trust deed and note the amount due thereon had been reduced to $1,200, plaintiff certainly would have known thereof and he gave no testimony to that effect.

Plaintiff calls attention to the fact that the Johnsons did not testify, and in this connection he devotes the last two and a half pages of the four-page printed brief he filed in support of the appeal to quoting excerpts from decisions embodying restatements of the disputable presumption declared by subdivision 5 of section 1963 of the Code of Civil Procedure, "That evidence willfully suppressed would be adverse if produced." Wherein plaintiff claims those decisions are here pertinent is not made clear, for nowhere in the record is there anything to justify even a suspicion of suppression of evidence.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.



49 Cal.App.2d 228

WILSON v. GREY et ux.

Civ. 11265.

District Court of Appeal, First District, Division 2, California.

Jan. 21, 1942.

Rehearing Denied Feb. 20, 1942.

1. Payment ⇐73(1)

In action to set aside a conveyance from husband to wife as in fraud of a creditor and to subject property to satisfaction of a judgment based on money loaned to defendant husband for use in conducting a dog coursing track, evidence was insufficient to support a finding that receipt by plaintiff of stock in corporation organized for purpose of operating the track, pursuant to an agreement among creditors of defendant husband, but to which neither defendant husband nor defendant wife was a party, constituted "payment" of the indebtedness, where it appeared that agreement provided that debts were to be paid from profits derived after issuance of the stock.

See Words and Phrases, Permanent Edition, for all other definitions of "Payment".

2. Estoppel ⇐114

Although ordinarily estoppel must be pleaded, where it is relied upon by plaintiff to meet new matter affirmatively pleaded in the answer, introduction of evidence of estoppel to meet the new matter is permitted under statute. Code Civ.Proc. § 462.

3. Husband and wife ⇐129(4)

Evidence that deed was delivered to defendant wife by defendant husband on November 8, 1920, but was not recorded until July 3, 1933, and that plaintiff extended credit to defendant husband in reliance on ownership of the property prior to recording of deed by defendant wife, if established, would operate to "estop" both defendant husband and wife from asserting the transfer of the property to defendant wife prior to time money was advanced by plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

4. Husband and wife ⇐129(4)

Where a wife permits her husband to hold record title to her realty, the general rule is that she is "estopped" to assert her title thereto as against one extending credit to husband in reliance on such ownership.

5. Estoppel ⇐52

The doctrine of "estoppel" does not require a showing of some actual turpitude on part of one against whom estoppel is asserted, but rather all that is meant in the expression that an estoppel must possess an element of fraud is that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Action by Blanche Wilson against Arthur L. Grey and wife, to set aside a conveyance from defendant husband to defendant wife as in fraud of a creditor and to subject the property to the satisfaction of a judgment. From a judgment for defendants, the plaintiff appeals.

Reversed.

Charles Reagh, of San Francisco, for appellant.

Rea, Free & Jacka and Irvin A. Frasse, all of San Jose, for respondents.

DOOLING, Justice pro tem.

Plaintiff appeals from a judgment refusing to set aside a conveyance from defendant Arthur L. Grey to defendant Hazel A. Grey, his wife, and to subject such property to the satisfaction of a judgment theretofore recovered against defendant Arthur L. Grey.

The complaint alleged the recovery of the judgment in the sum of $5000, the failure to satisfy it except to the extent of $56.18, and that after the indebtedness was incurred the defendant Arthur L. Grey on or about July 3, 1933, had conveyed the property to his wife without consideration and for the purpose of preventing the satisfaction of the judgment. The answer pleaded as affirmative defenses: 1. That plaintiff had been paid by the receipt of certain stock in a corporation; and 2. that the property in question was conveyed to defendant wife on November 8, 1920.

[1] Upon this appeal respondents do not in their brief urge the defense of payment although the trial court found in their favor on that issue. The agreement relied on does not support the finding of payment. The money was lent by plaintiff for use in the conduct of a dog coursing track. After the original project failed certain creditors entered into a contract with the owner of the land upon which the track was located, whereby a corporation was to be formed to operate the track, and the signatories were to receive equal amounts of stock in the proposed corporation. Defendants were not parties to this agreement. It was provided in this agreement that the profits to be derived from the venture should be applied after certain pressing claims were first met, 50% to the payment of liens against the property, and 50% to the creditors joining in the agreement, including plaintiff, "until their full amount * * * has been paid." It is clear that the parties did not agree that the issuance of the stock in the proposed corporation should constitute payment of their debts. They were later to be paid from profits, and it is not claimed or found that they were paid from profits or indeed that there ever were any profits from the venture.

At the trial, after it developed from the evidence that the deed was delivered to defendant wife on November 8, 1920 as affirmatively pleaded in the answer although not recorded until July 3, 1933, the plaintiff introduced evidence that prior to making the loan to defendant husband which resulted in the $5000 judgment against him, defendant Arthur L. Grey had informed plaintiff that he owned real property, and that plaintiff had caused an investigation to be made and after learning that the property involved in this action stood of record in his name, and relying on that fact, she had advanced the $5000. To this evidence defendants objected on the ground that it was outside the issues, no estoppel having been pleaded in the complaint. The court received the evidence but failed to make any finding on the subject and of this failure appellant now complains.

[2] While ordinarily estoppel must be pleaded this is subject to the settled exception that where it is relied upon by a plaintiff to meet new matter affirmatively pleaded in the answer the provisions of section 462, Code of Civil Procedure, take the place of a replication at common law and permit the introduction of evidence of estoppel to meet the new matter pleaded in the answer. The rule is well stated in Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 213, 155 P. 986, 987: "It is well settled that under our simplified system of procedure, where plaintiff's pleadings on the facts begin and end with the complaint, there is by law afforded him an opportunity, without pleading, to interpose evidence overcoming any affirmative matter of defense set up in the answer. Thus he may establish a fraud or an estoppel."

The same rule was tersely stated in Buford v. Florin Fruit Growers' Ass'n, 210 Cal. 84, 91, 291 P. 170, 173: "In this case it was not necessary to plead estoppel, for it was relied upon as a defense to matter set up in the manner."

See also Corporation of America v. Harris, 5 Cal.App.2d 452, 462, 43 P.2d 307; First Nat. F. Corp. v. Five-O Drilling Co.,

209 Cal. 569, 576, 289 P. 844; Bliss v. California Co-op. Producers, 23 Cal.App.2d 245, 250, 72 P.2d 885; General Motor Accept. Corp. v. Gandy, 200 Cal. 284, 294, 253 P. 137; California Breeders', etc., Co. v. Showers, 86 Cal.App. 239, 243, 260 P. 955.

[3, 4] The evidence recited above if believed by the trial court would operate to estop the defendants from asserting the transfer of the property to defendant wife prior to the time the money was advanced to the husband in reliance upon his ownership of the property. "When a wife permits her husband to hold the record title to her realty, the general rule is that she is estopped to assert her title thereto as against one extending credit to the husband in reliance on such ownership." 10 R.C.L. 743.

[5] Respondents insist that the doctrine of estoppel requires a showing of some actual turpitude on the part of defendant wife. This may once have been the rule in California (10 Cal.Jur. 633, 634), but it is now settled that there need be no showing of actual fraud. "All that is meant in the expression that an estoppel must possess an element of fraud is that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon. * * * There need be no precedent corrupt motive or evil design." Seymour v. Oelrichs, 156 Cal. 782, 796, 106 P. 88, 95, 134 Am.St.Rep. 154; Comer v. Associated Almond Growers, 101 Cal.App. 687, 690, 282 P. 532; Standard Oil Co. v. Woolner, 113 Cal.App. 66, 70, 298 P. 77.

The case of Franck v. Moran, 36 Cal. App. 32, 171 P. 841, is direct authority for the proposition here asserted by appellant that where credit is extended on the faith that the grantor was owner of the property it would be unequitable to allow the grantee who failed to record his conveyance until after the indebtedness was incurred to prevent the creditor from resorting to the property to satisfy his judgment for the debt so incurred. The same rule has been frequently applied in the case of personal property. 10 Cal.Jur. 641, 642.

It follows that the failure to find on the issue of estoppel raised by appellant was prejudicial error.

The judgment appealed from is reversed.

NOURSE, P. J., and STURTEVANT, J., concurred.

TADIN v. CROFOOT et al.

Civ. 6627.

District Court of Appeal, Third District, California.

Jan. 13, 1942.

1. Mines and minerals ⇐85

An agreement stating that defendants were owners of mining property and that plaintiff's deceased husband had invested $1,500 with defendants, and providing that husband should have interest in mining property in a value equal to $7,500 on the ground floor price of the property when appraised, and stating that the property was to be incorporated and that in such corporation the husband should be designated as one of the owners, was an "agreement to sell an interest", and did not create a "trust" or a "partnership". Civ.Code, § 2219.

See Words and Phrases, Permanent Edition, for all other definitions of "Agreement to Sell an Interest", "Partnership" and "Trust".

2. Pleading ⇐216(2)

For purposes of demurrer to amended complaint, prayer of amended complaint cannot be considered.

3. Limitation of actions ⇐180(2)
Mines and minerals ⇐85

An amended complaint alleging that defendants, by misrepresentations, induced plaintiff's deceased husband to enter into contract by which husband investing $1,500 with defendant was to receive interest in defendants' mining properties, to be evidenced in a corporation to be incorporated, in which husband was to be designated as an owner, and that the consideration had failed, and seeking an accounting and recovery of any balance found to be due, was sufficient to state cause of action, and overruling of demurrer thereto was not error, where bar of statute of limitations did not appear on face thereof.

4. Account ⇐18

A plaintiff suing for accounting and for any balance found due based on misrepresentation and failure of consideration for agreement to sell an interest in mining properties, and to issue certificates of stock in corporation to be formed, had burden to establish the allegations of her complaint.

5. Fraud ⇐50, 58(1)

Generally, fraud is not presumed, and must be established by the party alleging it by at least sufficient evidence.

6. Account ⇐18

Evidence was insufficient to support judgment for plaintiff suing for an accounting and for any balance found due based on misrepresentation and failure of consideration for an agreement to sell an interest in mining properties and to issue certificates of stock in a corporation to be formed.

7. Evidence ⇐65

All parties to agreement to sell interest in mining properties and to issue certificates of stock in a corporation to be formed must be presumed to have entered into agreement with knowledge of requirements of law in respect to formation of corporations and issuance of certificates of stock.

8. Limitation of actions ⇐60(2)

An action for accounting and for any balance found due, based on misrepresentation and failure of consideration for agreement of November 3, 1924, to sell an interest in mining properties and to issue certificates of stock in corporation to be formed, was barred by statute of limitations, where amended complaint was not filed until January 23, 1937. Code Civ.Proc. §§ 336, 337, 338, subds. 1, 4, and § 343.

9. Appeal and error ⇐110

An order denying motion for new trial is not appealable.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by Frances Tadin against H. C. Crofoot and others for an accounting and for payment of any balance found in the defendants' hands, based on misrepresentation and failure of consideration. From a judgment for the plaintiff after denial of a motion for new trial and from an order denying a new trial, the defendants appeal.

Reversed, and appeal from order dismissed.

John H. Leonard, of Santa Cruz, for appellants.

Frank V. Kingston, of Redwood City, for respondent.

MONCUR, Justice pro tem.

The above matter is before the court upon an appeal from a judgment in favor of plaintiff and against defendants after denial of a motion for a new trial. The case was tried upon a first amended complaint and the answer of defendants thereto, defendants having answered after the overruling of their demurrer, which demurrer was for the want of sufficient facts to constitute a cause of action and the bar of the statute of limitations.

In view of the contention of defendants that the first amended complaint did not state a cause of action, it appears necessary to set forth, at considerable length, the allegations of this pleading. It alleges that at all times mentioned, beginning with November 3, 1924, and for a long time prior thereto, up to and including the time of the death of Philip Forencich, the latter and plaintiff were husband and wife; that said Philip Forencich died on June 14, 1931, and that plaintiff is the surviving widow; that on October 11, 1935, after proceedings duly had in the matter of the estate of Philip Forencich, deceased, the court assigned to plaintiff as surviving widow of said decedent, the whole of decedent's estate, including a certain contract referred to in the amended complaint, attached thereto and marked Exhibit "A"; that ever since said October 11, 1935, plaintiff has been and is now the owner and holder of all the rights of decedent in and to said contract; that at all times mentioned, beginning with November 3, 1924, defendants were, and ever since have been and now are partners or joint adventurers in a mining business, which partnership or joint adventure had never been dissolved; that on November 3, 1924, defendants and said Forencich entered into the said contract above referred to; that at the time said contract was made defendants represented to decedent that they were the owners and holders of certain leases, agreements, and options to purchase and contracts on certain mining property situated in Butte County and known as the Mammoth Channel Gold Mining Properties; that at said time said defendants further represented to said decedent that if decedent would invest with said defendants the sum of $1,500, that they, said defendants, would convey to said decedent an interest in said mining properties, leases, contracts, and options in value equal to $7,500 of the ground floor price of the properties when appraised; that at said time defendants represented to decedent that they would cause the incorporation of said properties and that in said corporation said decedent

would be designated as one of the owners of said corporation; that said representations were made by said defendants to said decedent for the purpose of inducing said decedent to pay to said defendants the said sum of $1,500 and that by said representation decedent was induced to pay and at said time did pay to defendants the sum of $1,500; that thereafter and at all times since November 3, 1924, and up to the time of the death of said decedent said defendants represented to decedent that they were the owners of said properties; that they had conveyed to said decedent said interest agreed to be conveyed as aforesaid and that said properties had been incorporated as agreed as aforesaid, and that decedent was designated in said corporation as the owner of an interest therein in value equal to $7,500 of the ground floor price of said property when appraised, and that said properties were appraised; that said representations were false in the following particulars, to-wit: that said defendants were not on said November 3, 1924, the owners and holders of said leases, agreements, options to purchase, and contracts; that defendants did not convey to said decedent an interest in said properties in value equal to $7,500 of said ground floor price or any other value whatsoever; that said properties were never appraised; that said properties were never incorporated in any corporation wherein said decedent was designated as one of the owners thereof; that at all times during the lifetime of decedent from and after November 3, 1924, said decedent, believing said representations and relying thereon, believed that defendants were the owners and holders of the said properties; that they conveyed to said decedent said interest therein and that said properties had been incorporated and that said decedent was designated in said corporation as one of the owners thereof; that said defendants never at any time informed said decedent, and that said decedent never at any time knew that said defendants were not the owners of said property or that said defendants had not conveyed said interest to said decedent or that said properties had been incorporated and that said decedent was designated in said corporation as one of the owners thereof; that said defendants never at any time informed said decedent, and that said decedent never at any time knew that said defendants were not the owners of said property or that said defendants had not conveyed said interest to said decedent, or that said properties had never been incorporated in such manner as would show that said decedent was one of the owners thereof; that on December 18, 1935, said plaintiff made her demand in writing to said defendants that said defendants account to plaintiff for said moneys, but that said defendants have refused to account therefor.

The prayer is for judgment against defendants for an accounting of said moneys and that defendants be ordered to pay over to plaintiff any balance thereof found in their hands, and for her costs.

[1] The agreement involved is as follows:

"Exhibit 'A'

"Agreement to Sell Interest.

"Whereas, H. C. Crofoot and John H. Leonard, are the owners and holders of certain leases, agreements, and Options to Purchase, and Contracts, on certain mining property situate in Butte County, and known as the Mammoth Channel Gold Mining Properties, and Philip Forencich has invested with said H. C. Crofoot and John H. Leonard, the sum of Fifteen Hundred Dollars ($1500.00), the receipt whereof is hereby acknowledged, it is

"Agreed That said Philip Forencich shall have an interest in said mining properties and Leases, Contracts, and Options, in a value equal to Seventy-five Hundred Dollars ($7,500.00) of the ground floor price of the properties when appraised.

"It Is Understood That said properties are to be incorporated at the earliest possible time, and that in such corporation said Philip Forencich shall be designated as one of the owners.

"Dated: November 3d, A. D. 1924.

"(Signed) H. C. Crofoot, by
J. H. Leonard
"John H. Leonard
"Philip Forencich."

"Endorsed: Filed January 23, 1937.
"H. E. Miller, Clerk of said court."

It is the contention of respondent that the foregoing agreement creates a trust. In support of this contention, Civil Code, section 2219; Scovill v. Guy, 205 Cal. 386, 388, 389, 270 P. 934; Dow v. Swain, 1899, 125 Cal. 674, 683, 58 P. 271; Thomas v. Lamb, 1909, 11 Cal.App. 717, 719, 106 P. 254, are cited. An examination of said code section and of the authorities cited, in

our opinion, does not support this contention, and we are satisfied that the said agreement does not create a trust.

Appellants in their brief cite the case of People v. Crowfoot, 84 Cal.App. 107, 257 P. 463, in support of their contention, which will be hereinafter referred to, that a corporation was formed. Evidentiary foundation for consideration of that case for that purpose is not in the record. However, an agreement was referred to therein which was similar in its terms to the one here involved, and in that case the court held that it was merely a case where a sale was made and where the vendee had failed to make payment of the consideration called for. There was no evidence to show either a bailment or a trust between the parties. From the evidence it is apparent that there was no confidential relationship existing between the parties and, in fact, appellant Leonard had only met Forencich about two days prior to the making of the agreement and appellant Crofoot, if he had ever met Forencich, had no recollection of it. We are satisfied that the instrument is just what it says it is, an agreement to sell an interest. The agreement says nothing about a partnership and it is clear that none was intended.

[2, 3] For the purposes of the demurrer, the prayer of the amended complaint cannot, of course, be considered. The agreement does nothing more than evidence a sale by appellants to Forencich of certain leases, agreements, and options to purchase and contracts on the mining property therein mentioned and represents that appellants are the owners thereof and that Forencich has invested with them the sum of $1,500, the receipt being acknowledged, Forencich to have an interest in said mining properties, leases, contracts, and options of a value equal to $7,500 on the ground floor price of the properties when appraised, to be evidenced in the corporation to be incorporated and that in such corporation said Forencich should be designated as an owner.

In the usual procedure in such matters this simply means that title to the mining properties was to be vested in a corporation; that Forencich would come in as one of the promoters and that certificates of stock in the corporation would be issued to him to the value of $7,500. So construing the amended complaint and the contract, the action is one based upon misrepresentation and the failure of the consideration for which the $1,500 was paid and, as so construed, we are of the opinion that the complaint states a cause of action; the bar of the statute of limitations does not appear upon the face of the complaint. There was, therefore, no error in overruling the demurrer to the first amended complaint.

In the answer to the complaint it was said: "That defendants save and do not waive the point that plaintiff's alleged cause of action is barred by the provisions of Sections 336, 337; Subdivisions 1 and 4 of Section 338; and Section 343 of the Code of Civil Procedure of California; that defendants save and do not waive the point that said complaint does not state facts sufficient to constitute a cause of action." The answer does not deny the making of the agreement but denies the other allegations of the complaint except as is therein alleged that defendants or neither of them at any time made to Philip Forencich any representations other than the representations made in the agreement referred to in the complaint. The answer further alleges that the sum of $1,500 was entirely expended in the work and development of the mine mentioned in the agreement, and upon information and belief it is alleged that the properties were incorporated and at the time of the said incorporation the commitment to the said corporation was made in favor of said Forencich in fulfillment of the terms of said agreement; also that the defendants nor either of them, expended or used any part of the $1,500 for their, or either of their, individual benefits or for any other purpose except the purpose of mining the properties as mentioned in said agreement.

The motion for a new trial was based upon the grounds of excessive damages; insufficiency of the evidence to justify the decision and judgment, and errors in law occurring at the trial and excepted to by the defendant. The appeal is from the judgment and the whole thereof and from the order denying the motion for a new trial. The findings of the court follow substantially the allegations of the first amended complaint and the judgment is based thereon.

[4-7] Plaintiff Frances Tadin, following the death of Philip Forencich, married Tony Tadin. Plaintiff and said Tony Tadin were called as witnesses for plaintiff, and appellants H. C. Crofoot and John H. Leon-

ard were also called for plaintiff under section 2055 of the Code of Civil Procedure. From the evidence of plaintiff and her husband it is apparent that they had no knowledge of the circumstances existing leading up to the execution of the agreement involved herein, the plaintiff's evidence of those facts depending upon the testimony of appellants. From the testimony of the latter it appears that they did own, at the time of the making of the agreement, a lease, options to purchase, and contracts on the mining property referred to; that a corporation was formed; title to the properties was vested in the corporation and that under a permit from the Corporation Commissioner, stock was issued to Philip Forencich and placed in escrow to be delivered to him upon the fulfillment of certain conditions by the incorporators. Also, that notice of the proceedings leading up to the forming of the corporation and of the formation of the corporation was given to the parties interested, including Philip Forencich. The testimony of appellants herein was not deemed sufficient by the trial court without corroboration but there appears nothing inherently improbable in their testimony and there is nothing in the record to show why their testimony should not be weighed as required under the settled rules of evidence. The burden was upon the plaintiff to establish the allegations of her complaint. Generally, fraud is not presumed and must be established by the party alleging it by at least sufficient evidence. If the testimony of appellants be entirely disregarded, there is no evidence in the record to support the allegations of the complaint concerning the alleged misrepresentation and of the failure of the consideration and the findings of the trial court respecting those allegations.

On the other hand, if the testimony of appellants respecting the alleged misrepresentations and of the performance by them of the provisions of the contract is given any weight whatever, the findings of the trial court are against the evidence. In either event, there is no support for the judgment.

We are not unmindful of the fact that the stock in question was not delivered directly to Philip Forencich but was placed in escrow to be delivered to him upon the performance of the requirements of the Corporation Commissioner. This was a matter not within the power of appellants. All of the parties to the agreement must be presumed to have entered into it with knowledge of the requirements of the law in respect to the formation of corporations and the issuance of certificates of stock thereof in this state. There is no evidence to disclose that Philip Forencich was not familiar with the law in respect to such matters or that appellants did anything or said anything to deceive him in respect to this matter. There is no evidence to show that from the time he entered into the agreement until the date of his death, a period of about seven years, he appeared to be dissatisfied with what was being done.

The agreement does not provide that the $1,500 involved should be expended in the mine or upon the mining property, but the testimony of appellants is that the said $1,500 was so expended.

[8] The record does not disclose when the original complaint was filed but it appears that the first amended complaint was filed January 23, 1937. If the testimony of appellants be entirely disregarded there is no showing sufficient to toll the statute of limitations. If any weight whatever be given to the testimony of appellants it affirmatively appears that the plea of the bar of the statute of limitations as set forth in the answer must be upheld.

[9] It appearing to us that there is no evidence in the record to support the findings and conclusions of law and judgment, and that the action is barred under the provisions of the statute of limitations referred to, it is ordered that the judgment be reversed. An order denying a motion for a new trial is not appealable. The appeal from that order is dismissed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

49 Cal.App.2d 171

ANTIOCH COLLEGE OF YELLOW SPRINGS, GREENE COUNTY, OHIO, v. BARNHART.

Civ. 12794.

District Court of Appeal, Second District, Division 1, California.

Jan. 15, 1942.

1. Appeal and error ⇐1010(1)

Where maker of notes to be paid out of proceeds of his inventions did not avail himself of opportunity to testify as to offsets applicable to sum shown to be available for payment, finding of the trial court that the entire amount should be devoted to payment would not be disturbed on appeal.

2. Bills and notes ⇐452(1)

Where agreements were canceled by the parties without reference to notes alleged to be part thereof, such other agreements were not part of the contracts represented by the notes so as to bar recovery from the maker by the assignee of the payee.

3. Bills and notes ⇐462(1)

In action on a non-negotiable note, a complaint which did not plead a previously canceled contract incorrectly contended by the defendant to include the note sued on stated a cause of action.

4. Limitation of actions ⇐180(2)

A demurrer on the ground of bar of the statute of limitations did not lie where the complaint on a note showed merely that the action may have been barred, since it must affirmatively appear that the right of action is necessarily barred upon the facts stated.

5. Limitation of actions ⇐15

The provision in a note that the statute of limitations was waived and did not begin to run until the maker should inform the holder that profits which were to be applied toward payment had been received, "waived" the defense of the statute of limitations as between the parties.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

6. Contracts ⇐129(5)

The statute of limitations may be waived as between the parties by contract.

7. Appeal and error ⇐1010(1)

Where it was shown that maker of notes to be paid out of profits realized from his invention had received profits therefrom and he failed to testify to any offsets applicable thereto, finding of trial court that the entire sum should be applied to payment of the notes would not be disturbed on appeal.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Antioch College of Yellow Springs, Greene County, Ohio, a corporation, against G. Edward Barnhart for money due on a note. Defendant filed cross-complaints and counterclaims. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals.

Judgment affirmed. Appeal dismissed.

Waldo & Waldo, of Pasadena, for appellant.

Henry L. Knoop, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

The plaintiff as assignee of the original payee sued to recover from the defendant maker on 26 non-negotiable promissory notes. These notes are similar in form, with the exception of amounts and dates, and some unimportant minor differences in text. In each note there appears the following two clauses:

"* * * payable semi-annually, out of the profits, proceeds or other avails of the inventions, whether patented or unpatented of said G. Edward Barnhart for or in connection with seamless metal tubing, whether straight or tapered or metal rods, beams, and other metal parts, as and when the same shall be realized by said G. Edward Barnhart and not otherwise * * *.

"The Statute of Limitations is hereby waived and shall not begin to run until the Maker shall inform the Holder of the above note that profits, proceeds, or other avails have been received which are applicable to the payment of said note."

[1] Upon the primary issue as to whether or not the defendant had received money from inventions referred to in the notes, the trial court found that he had received $41,569.13 in profit, proceeds, and other avails applicable to the payment of

the notes. Although given the opportunity so to do, the defendant failed to testify to any proper offsets to this amount. On this issue the defendant's testimony was evasive and shifty. After reviewing the extensive record, we can find no reason why we should disturb the finding of the trial court.

[2] All through the case runs what might be termed another primary issue: Whether or not the notes in suit were an integral part of a contract represented by the notes and other writings between the maker and the plaintiff. This defense was urged by defendant on a number of different occasions, and ruled upon by different judges of the superior court. First, when the trial court sustained demurrers to portions of defendant's answers, cross-complaints and counterclaims, without leave to amend. There were three of these pleadings: The answer, cross-complaint and counterclaim; the first amended answer, cross-complaint and counterclaim; the second amended answer, cross-complaint and counterclaim. Second, upon the refusal of the trial court to permit amendments to the pleadings to be made upon the trial of the case. And thirdly upon the offer in evidence of the contracts which the defendant alleged were part and parcel of the notes in suit.

We agree with the decision of the several judges of the trial court who heard the several matters to which we have referred, that a reading of these contracts demonstrates that they were no part whatever of the contracts represented by the promissory notes. In finally disposing of this contention it may be said that the other agreements were cancelled by the parties thereto without making any reference to the notes.

[3] Finally, the appellant complains because of the ruling of the trial court overruling his demurrer to the complaint. This instrument we have likewise read carefully, and we agree with the trial court that it states a cause of action. It is apparent that the defendant endeavored to require the plaintiff to plead in his complaint the contract relationship which the defendant contended for. This was not required.

[4] Also, the demurrer raised the point that on its face the causes of action pleaded were barred by the statute of limitations.

"* * * A demurrer on the ground of the bar of the statute of limitations does not lie, where the complaint merely shows that the action may have been barred. It must appear affirmatively that, upon the facts stated, the right of action is necessarily barred." Pike v. Zadig, 171 Cal. 273, 277, 152 P. 923, 925; Vassere v. Joerger, 10 Cal.2d 689, 693, 76 P.2d 656.

[5, 6] And the clause in the notes which we have quoted waived the running of the statute of limitations as between the parties. This may be done by contract. Brownrigg v. DeFrees, 196 Cal. 534, 238 P. 714; Dexter v. Pierson, 214 Cal. 247, 4 P.2d 932.

Appellant's brief raises a number of other points which are not necessary to our decision. There is no question here about the fact that the notes are non-negotiable, or that the holder takes them subject to equities running between the maker and the payee, or principles of accounting or joint adventure.

[7] A review of the record in this case, which includes 773 pages of appellant's brief and supplement (which brief and supplement contains a citation of 540 authorities, including 60 text books and encyclopedias) brings the case down to this: The defendant made and delivered to the payee a series of non-negotiable promissory notes, for which he received the money in full; the payee assigned them to plaintiff, and the defendant has paid no part of the money he received. During the years which elapsed after the making of the notes, the defendant was paid $41,569.13 which should have been applied upon payment of the notes. He had an opportunity to explain what part of this money, if any, could have been used as a set-off thereto,—an opportunity of which he did not avail himself. There is no merit to his contention that the notes were part of a larger contract involving some different contractual relationship between him and the payee of the notes than that embodied in the contract expressed by the notes themselves. This is just another case in which there is substantial evidence to support the findings and judgment of the trial court.

The judgment is therefore affirmed. The appeal from the order denying the motion for a new trial is dismissed.

YORK, P. J., and DORAN, J., concurred.

49 Cal.App.2d 239

DAVIS v. DAVIS.

Civ. 11840.

District Court of Appeal, First District, Division 2, California.

Jan. 21, 1942.

1. Husband and wife ⇐297

In wife's action for separate maintenance, evidence that husband, who had separated from wife, left the state and engaged in conduct calculated to deprive wife of all means of support before wife executed a property settlement agreement wherein she agreed to waive further claims against husband for support, sustained finding that agreement was executed by wife without sufficient consideration, and that she was induced to sign agreement by "duress", "undue influence", and "fraud", and that agreement was not binding on wife. Civ.Code, §§ 158, 2228.

See Words and Phrases, Permanent Edition, for all other definitions of "Duress", "Fraud", and "Undue Influence".

2. Husband and wife ⇐297

In action for separate maintenance, the trial court could consider husband's conduct in dismissing a divorce suit before wife could file a cross-complaint for support in determining whether a subsequent property settlement agreement wherein wife agreed to waive further claims against husband for support was executed by wife under duress, undue influence, and fraud practiced upon wife by husband.

3. Husband and wife ⇐278(1)

Property settlement agreements between husband and wife are subject to close scrutiny.

4. Husband and wife ⇐279(2)

A wife, who executed a property settlement agreement wherein she agreed to waive further claims against her husband for support, was not required to tender back the amount which she received under agreement, and which amount was needed and used by wife in the meantime for her necessary support, before commencing action against husband for separate maintenance.

5. Husband and wife ⇐279(2)

When a property settlement agreement, obtained through abuse of confidential relations, is pleaded defensively, plaintiff can always attack its validity.

6. Husband and wife ⇐279(2)

Where husband pleaded a property settlement agreement as a defense to wife's action for separate maintenance, the wife was not "estopped" from attacking validity of agreement by the fact that she had used funds received under agreement for her support.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

7. Husband and wife ⇐297

Evidence that husband had received $13,000 from sale of stock in a dairy a few months before trial of wife's action for separate maintenance, that husband owned other property worth at least $5,000, and that husband, although not being engaged in any occupation at time of trial, had previously for a number of years been employed as manager of a dairy, justified finding that husband had ability to pay wife $60 per month for separate maintenance.

Appeal from Superior Court, Santa Clara County; Raymond McIntosh, Judge Assigned.

Action by Muriel K. Davis against Porter H. Davis for separate maintenance. From a judgment for plaintiff, defendant appeals.

Affirmed.

Lounibos & Lounibos, of Petaluma, and David M. Burnett and John M. Burnett, of San Jose, for appellant.

A. Brooks Berlin and Alvin A. Lobree, both of San Francisco, for respondent.

DOOLING, Justice pro tem.

This is an appeal by defendant husband from a judgment allowing the plaintiff wife the sum of $60 per month for separate maintenance. The husband pleaded in defense an agreement made and entered into between himself and his wife in March of 1936 wherein she agreed to waive all further claim upon him for support and maintenance. The court found as to this agreement that it was executed by plaintiff without sufficient consideration and was not voluntarily made by plaintiff, but that she was induced to sign said property settlement agreement by means of duress,

and undue influence exercised upon her, and fraud practiced upon her by said defendant.

The chief attack on appeal is upon this finding, appellant claiming that it finds no support in the evidence.

[1] The evidence shows that appellant husband left his wife about November 3, 1935 and left the State of California remaining outside the state until shortly before the execution of the agreement in question, and was not seen again by the wife until after its execution. During his absence from the state and commencing shortly after his departure he engaged in a course of conduct calculated to deprive his wife of all means of support and reduce her to such a necessitous condition that she might more readily agree to the agreement which the court found to be supported by insufficient consideration. About the time of his departure an agreement waiving all of her rights against defendant in consideration of the payment to her of $1,000 and some furniture was forwarded for her signature by her husband's attorney. This she refused to sign, although she received a letter from her husband's attorney advising her that unless she signed the agreement the funds in a joint account, which was the only source from which she could obtain money during her husband's absence from the state, would be withdrawn. The bulk of the account was withdrawn by the husband leaving only a trifling amount available to the wife. On November 25, 1935, the husband's attorney sent a letter to the wife's landlord that the husband would not longer be responsible for her rent. A similar notice was sent to the store from which she had theretofore purchased food on the credit of her husband and he likewise disclaimed liability for gas and electricity used in her apartment. The husband testified that most of these things were done by his direction. Having thus effectually reduced his wife to penury while he was outside the state, and she having in the meantime contracted bills for her necessary support, the agreement in question was presented to her for signature. By its terms she was to receive $750 in cash and $2,250 was to be placed in escrow in a designated bank for 30 days, during which time the escrow holder was to pay all bills theretofore contracted by her, and at the end of the escrow period to pay her the balance if any balance remained. As a result she received in cash a little more than $1,600. By the agreement she waived all rights of every kind against her husband or in his property.

[2] It should also be mentioned that the previous year the husband had filed suit for divorce and then left the state and that when a cross-complaint asking for support was served upon his attorneys the action was dismissed a few minutes before the cross-complaint was filed thereby defeating her attempt at that time to obtain support. Subsequently the parties became reconciled but the trial court was entitled to consider this prior conduct of the husband and the effect that the recollection of it might have on the mind of the wife in inducing her to sign the later agreement.

Section 158 of the Civil Code provides that in transactions between husband and wife they are subject "to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the title on trusts." Turning to that title we find that by section 2228 "a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

[3] Under the evidence above recited the court was justified in finding that the execution of the agreement by plaintiff was not binding on her. Contracts of this character are always subject to the close scrutiny of the courts. Moog v. Moog, 203 Cal. 406, 264 P. 490; Steinmetz v. Steinmetz, 67 Cal.App. 195, 227 P. 713; Loveren v. Loveren, 106 Cal. 509, 39 P. 801. The wife had the right to continued support from her husband. Clark v. Clark, 203 Cal. 441, 264 P. 761. This he deliberately deprived her of at the same time absenting himself from the state so that she could have no effective recourse against him. As a result her debts mounted to over $1,000 and she was deprived of both funds and credit. In this condition she signed the agreement, as she testified "paying the bills and a slight sum left over." Measuring the facts against the code provision that a trustee "may not obtain any advantage * * * by the slightest * * * adverse pressure of any kind" we cannot say that the finding attacked did not find support in the evidence.

[4-6] The wife was not required to tender back the amount which she received under the agreement and which was needed and used by her in the meantime for her necessary support (Locke Paddon v. Locke Paddon, 194 Cal. 73, 83, 227 P. 715), and when a contract obtained through abuse of confidential relations is pleaded defensively the plaintiff can always attack its validity. Estate of Cover, 188 Cal. 133, 140, 204 P. 583. Nor is she estopped to do so by the fact that she has used the funds in the meantime for her support. Locke Paddon v. Locke Paddon, supra; Estate of Cover, supra.

[7] The evidence was sufficient to justify the court in finding that defendant had the ability to pay $60 per month. He testified to receiving $13,000 from the sale of stock in a dairy a few months before the trial, to the ownership of other property worth at least $5,000 and while he testified that he was not engaged in any occupation at the time of the trial he had previously for a number of years been employed as the manager of a dairy.

The judgment appealed from is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.



49 Cal.App.2d 257

DUBBS et al. v. SWEETLAND et al.

Civ. 11790.

District Court of Appeal, First District, Division 2, California.

Jan. 22, 1942.

Automobiles ⇐245(77)

Evidence was sufficient to present question for jury as to whether plaintiff was guilty of contributory negligence, so as to be precluded from recovering for injury to her fingers which were caught between open door of automobile which she was entering and side of defendant's automobile.

Appeal from Superior Court Alameda County; Leon E. Gray, Judge.

Action by Clarence Dubbs and another against Nellie Sweetland and another for personal injuries sustained by one of the plaintiffs. From a judgment for defendants, the plaintiffs appeal.

Affirmed.

William H. Hollander and Nathan Kessler, both of Oakland, for appellants.

Weinmann, Quayle & Berry, of Oakland, for respondents.

NOURSE, Presiding Justice.

Plaintiffs sued for personal injuries to three fingers of the right hand of plaintiff Bernice Dubbs alleged to have occurred when the fingers were caught between the open door of the car which she was entering and the side of defendant's car. The cause was tried to a jury and defendants had a verdict. The defendant Eugene Sweetland, a minor, was operating the car with the consent of the owner, and we will refer to him hereafter as the defendant.

Both cars were parked in a public parking lot with a space of about one foot between them. Plaintiff entered on the right hand side of her car, opened the door and attempted to close it with three of her fingers on the outer rim of the door. As she was entering her car, the car of defendant moved forward and her fingers were caught between the door and the left side of defendant's car.

The appellants rest their appeal from the judgment on the statement that the evidence without conflict established defendant's negligence and the absence of contributory negligence on their part. They also complain of one of the instructions submitting to the jury the issue of contributory negligence on the ground that there was no evidence to support that plea.

The appeal does not present any debatable question of law. The evidence offered by appellants discloses that the parking lot was well lighted at the time, that Mrs. Dubbs was well aware of the narrow space between the two cars and might have observed that the defendant was seated in his car preparing to start forward, that she witnessed her husband and two sons entering the car before her, and that when she attempted to close the front door she grasped the outer rim with her fingers instead of the inside handle specially in-

stalled thereon for that purpose. From this evidence alone the jury might have inferred that she carelessly chose the dangerous method of closing the door instead of the safe one, which was available and more efficient.

The entire argument of appellants rests upon the theory that defendant was negligent and Mrs. Dubbs was not negligent as matters of law. But the evidence is conflicting upon both issues. As the evidence and inferences of contributory negligence supported the defendant's plea of that issue, the instruction on that subject was properly given.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.



49 Cal.App.2d 232

EXCHANGE BANK v. SCHOLZ et al.

Civ. 11839.

District Court of Appeal, First District, Division 2, California.

Jan. 21, 1942.

1. Assignments for benefit of creditors ⇐232
Bills and notes ⇐330

Where agreement creating trust for partners' creditors provided that, trustees, on payment of all claims, expenses and costs, should pay all moneys in their possession and reconvey all property held by them to trustors, in which event, or on expiration of one year, trust should terminate, trustees' indorsement and delivery to bank of note payable to one of partners and partners' assignment of mortgage securing note to bank, pursuant to agreement of bank, partners and trustees, were not invalid on ground that trustees could not give bank a good title without creditors' consent, and bank became "holder in due course" of such note.

See Words and Phrases, Permanent Edition, for all other definitions of "Holder in Due Course".

2. Assignments for benefit of creditors ⇐239

A transfer of note to bank by trustees for creditors of payee, indebted to bank, and his partner, pursuant to agreement of bank, partners and trustees, after termination of trust, was not governed by rule that trustee cannot deal with trust property for his own advantage because one of trustees was also a vice president of bank, and hence was not invalid, even if not made in ordinary course of business. Civ.Code, § 3133.

3. Bills and notes ⇐359

A bank's release of its claims against other assets of partners indebted to it than those mentioned in agreement for transfer to bank of note payable to one of partners and accounts receivable of their business, coupled with partners' antecedent debt, agreed to be satisfied pro tanto by liquidation of such note, constituted valuable "consideration" for negotiation of note.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

4. Bills and notes ⇐359

An antecedent debt is valuable "consideration" for negotiation of a promissory note.

5. Bills and notes ⇐330

The fact that indorsement of note to bank by trustees for creditors of payee and his partner, pursuant to agreement providing for satisfaction of payee's debt to bank pro tanto by liquidation of note, was "without recourse", did not prevent bank from becoming "holder in due course" of note.

6. Assignments for benefit of creditors ⇐232

The words "notes receivable excepted" in agreement that partners indebted to bank and trustees for their creditors should transfer to bank a certain note and mortgage, together with all accounts receivable of partners' business, "notes receivable excepted", did not exclude such note and mortgage.

7. Assignments for benefit of creditors ⇐232

A bank's agreement to proposal of partners who were its debtors that property described in prior agreement of bank, debtors thereof and trustees for their creditors for conveyance to bank of described realty, a note and mortgage, and accounts receivable of debtors' business for liquidation of such assets, should not be sold without giving debtors 45 days' written notice to enable them to secure better price, if possible, referred to parcels of realty transferred to bank, not to such note and mortgage, as mortgaged property could be sold only by court on foreclosure.

8. Mortgages ⇐245

The fact that note and mortgage, transferred to bank by debtors thereof and trustees for creditors under agreement that bank should liquidate them and other assets so transferred as rapidly as possible, were held in pledge did not prevent bank from bringing action to foreclose mortgage.

9. Pledges ⇐30(2)

A pledgee may collect any evidence of debt pledged to him when due. Civ.Code, § 3006.

10. Fraudulent conveyances ⇐137(2)

A transfer of note and mortgage securing it by payee to trustees for his creditors was not void under statute, declaring transfers of personalty, other than things in action, and liens thereon, other than mortgages, without immediate delivery thereof to transferee, void as fraudulent against transferor's creditors while he remains in possession. Civ.Code, § 3440.

11. Mortgages ⇐258

A claim that note, held by bank in due course, and mortgage securing it, were not what they seemed to be, but that deed to maker was in fact a mortgage, securing repayment to him of amounts advanced by him to payee by reason of agreement between them, was not available as defense in bank's action to foreclose mortgage, in absence of notice to bank of such claim when it took note.

12. Mortgages ⇐258

One executing note and mortgage securing it could not relieve himself of obligation thereon, so as to preclude rendition of deficiency judgment in foreclosure action, by agreement with mortgagees without consent of bank, to which mortgagees and trustees for their creditors transferred note and mortgage for satisfaction of their debt to bank pro tanto by liquidation of note. Civ. Code, § 1457.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by the Exchange Bank against Rudolph J. Scholz and others to foreclose a mortgage. Judgment for plaintiff, and defendants appeal.

Affirmed, with directions.

Dion R. Holm and Jack L. Blaine, both of San Francisco, for appellants.

Geary & Tauzer, of Santa Rosa, and A. Dal Thomson, of San Francisco, for respondent.

DOOLING, Justice pro tem.

This is an appeal from a judgment foreclosing a mortgage made to secure a promissory note and providing for a deficiency judgment against the maker of the note, defendant Rudolph J. Scholz.

The note in the principal sum of $6,000 and the mortgage were executed by defendant Rudolph J. Scholz in favor of defendant Edward F. Sophey on November 3, 1937. The note by its terms was payable two years after date.

The defendants Sophey, who were engaged in business as co-partners, on December 30, 1937, entered into an arrangement for the benefit of their creditors whereby they agreed to transfer to three trustees all of their assets. Pursuant to this agreement they endorsed and delivered the promissory note involved in this action to such trustees.

On March 1, 1929, the plaintiff Exchange Bank, the defendants Sophey and the three trustees of the trust for creditors above referred to entered into an agreement which provided that the defendants Sophey were indebted to the bank in the sum of $23,602.32, that defendants Sophey and the three trustees would convey to the bank certain described real property and would further transfer to the bank the note and mortgage here in suit, together with all accounts receivable of the business known as Sophey Bros., "notes receivable excepted," "it being the intention of the parties hereto that the first party (bank) will take the assets herein set forth and liquidate them as rapidly as possible."

On its part the bank agreed to pay the Sopheys the sum of $1,000, and to release and discharge any claim that it might have or assert against any and all assets of the Sopheys not mentioned in the agreement, and that such assets might be transferred to a corporation to be formed free from any claim of the bank.

Pursuant to this agreement the trustees endorsed the promissory note and delivered it to the bank and the Sopheys executed and delivered to the bank an assignment of the mortgage.

[1] At the outset appellants attack the transfer of the note and mortgage to the bank on the ground that the trustees for

creditors could not give good title to the bank without the creditors' consent. This argument overlooks the express provisions of the agreement by which the trust for creditors was created. That agreement contained the following provisions: "Fourth: This Trust shall be irrevocable for a period of One (1) year next after the execution of this Indenture, excepting however, that this Trust Agreement may be declared imperative (inoperative?) in the event all of said creditors' claims and all other claims be paid and discharged before the expiration of said One (1) year period. * * *

"Twelfth: It is further understood and agreed that upon the payment and discharge of all claims, charges and expenses * * * and the payment and discharge of all the claims of said creditors, together with any and all other costs * * * said Trustees shall pay over unto said Trustors all moneys in their possession, and reconvey unto said Trustors any and all real and/or personal property held by them, and then and in that event, and/or upon the expiration of said One (1) year period, this trust shall forever cease and terminate."

Under the plain terms of the agreement the trust was created for the period of one year and automatically terminated at the end of that period. The trustees had no further duty than to reconvey all the property held by them as trustees to the Sopheys. That being so it is immaterial that they endorsed and delivered the promissory note directly to the bank. They did so by the agreement and direction of the payee and owner of the promissory note. In legal effect the result was the same as if defendant Edward F. Sophey had himself delivered the note properly endorsed to the bank.

This conclusion disposes of a host of arguments based upon the theory that the bank did not become a holder in due course because of the lack of authority of the trustees to transfer the note to the bank, and the specific arguments based on this premise need not be specially noticed.

[2] One of the trustees, Williams, was also a vice president of the bank. It is urged by appellants that the transfer of the note is governed by the settled rule that a trustee cannot deal with the trust property for his own advantage or convey it to himself. What we have said likewise disposes of that contention. The trust for the creditors having terminated the only fiduciary duty owed by Williams was to the Sopheys. The transfer of the note to the bank was the voluntary and deliberate act of the Sopheys.

[3, 4] The negotiation of the note was for value. The bank's release of its claims against other assets of the Sopheys that they might otherwise have looked to for satisfaction of their debt standing alone would have been sufficient for that purpose. Coupled with this was the antecedent debt of the Sopheys to the bank in excess of $23,000 which by agreement was to be satisfied pro tanto by the "liquidation" of the note. It is the settled rule that an antecedent debt is valuable consideration for the negotiation of a promissory note. Adoph Ramish, Inc., v. Woodruff, 2 Cal. 2d 190, 203, 40 P.2d 509, 96 A.L.R. 1146, and cases there cited.

[5] The fact that the endorsement by the trustees to the bank was "without recourse" did not prevent the bank from becoming a holder in due course. 10 C.J.S., Bills and Notes, § 334, p. 836; Ross v. Title Guarantee, etc., Co., 136 Cal.App. 393, 29 P.2d 236.

The claim that the transfer of the note was not in the ordinary course of business, if tenable under the Negotiable Instrument Act (10 C.J.S. 791; Civil Code, sec. 3133), is based upon the claims that a trustee cannot deal with himself and that the trustees had no power to negotiate the note. These contentions have already been disposed of.

[6] The court did not err in finding that this promissory note and mortgage were not excluded by the language added to the agreement of March 1, 1929, "notes receivable excepted." These words were inserted in the provision providing for the transfer to the bank of accounts receivable. The entire paragraph providing for the transfer of this particular note and mortgage to the bank was left in the agreement untouched.

[7] The bank agreed to a proposal made by the Sopheys in a letter dated April 27, 1929, "that the property described in the agreement dated March 1, 1929, will not be sold without giving 45 days' written notice to Sophey Bros. for the purpose of enabling them to secure a better price, if possible." If this agreement was supported by any new consideration, it obviously referred to the parcels of real property trans-

ferred to the bank, and not to this note and mortgage. The property covered by the mortgage could not be sold by the bank, but only by a court on foreclosure, and the purpose expressed of enabling Sophey Bros. to get a better price if possible could only apply to sales of property which the bank had power to make. The bringing of the foreclosure action would itself give Sophey Bros. ample time to get a better price at the foreclosure sale, if they were in a position to do so.

[8, 9] If the note and mortgage were held in pledge that would not prevent the bank from bringing this action. The agreement under which they were transferred to the bank provided that the bank should take the assets described "and liquidate them as rapidly as possible." In any event a pledgee may collect any evidence of debt pledged to him when due. Civil Code, sec. 3006; Fernandez v. Tormey, 121 Cal. 515, 520, 53 P. 1119; Security-First National Bank v. Spring St. Properties, Inc., 20 Cal.App.2d 618, 67 P.2d 720.

[10] The transfer of the note and mortgage to the trustees was not void under Civil Code, section 3440. The section specifically excludes "thing in action" and the note and mortgage cannot under any stretch of the imagination be regarded as a part of Sophey Bros.' stock in trade.

[11] A large part of appellants' brief is taken up with the claim that the note and mortgage in question were not what they seemed to be, but by reason of an agreement between Scholz and Sophey the deed to Scholz was in fact a mortgage to him to secure the repayment to Scholz of the amounts advanced and paid by him to Sophey. The bank being a holder in due course would only be subject to this defense if it took with notice. Sophey testified that he advised Williams of the true effect of the note and mortgage before the transfer to the bank but Williams denied this. The court chose to believe Williams' testimony on this subject. The same may be said of payments claimed to have been made to Sophey. The bank credited all payments of which it had knowledge. 10 C.J.S., Bills and Notes, § 510, p. 1125.

[12] There is nothing in the point that because of any agreement between the Sopheys and Scholz or Sopheys' occupancy of the land a deficiency judgment should not have been given against Scholz. The obligation was Scholz's and he could not relieve himself of it without the bank's consent. Sec. 1457, Civil Code.

Appellant Scholz claims that he should have had judgment against the Sopheys on a cross-complaint. The record shows the cross-complaint was dismissed by Scholz during the trial. Despite the dismissal of this and another cross-complaint against the bank "without prejudice" the court made findings that their allegations were untrue. While the judgment is silent on these matters, appellant Scholz should not be prejudiced by allowing these findings to stand.

Many other claimed errors are briefly suggested by appellant. We have read the transcript with these claims in mind and find none of them well taken. It would expand this opinion to unreasonable length to deal with each of such claims seriatim.

The trial court is directed to strike from the findings those findings upon issues presented only by the cross-complaints of Rudolph J. Scholz which were dismissed. The judgment is affirmed, with costs on appeal to respondent Exchange Bank.

NOURSE, P. J., and STURTEVANT, J., concurred.



49 Cal.App.2d 243

PEOPLE v. HUNTER.

Cr. 1783.

District Court of Appeal, Third District, California.

Jan. 21, 1942.

1. Kidnapping ⇐5

Evidence identifying accused as perpetrator of offense of kidnapping was sufficient to support conviction.

2. Criminal law ⇐737(1)

The question of the identity of a defendant who is charged with a crime is ordinarily for the jury.

3. Criminal law ⇐1159(5)

Where there is substantial evidence to support the finding of a jury with respect

to the identity of a defendant, the verdict and judgment will not be disturbed on appeal.

4. Criminal law ⇐1159(2)

An appellate court may not interfere with the province of the jury and the trial court by reversing a judgment on the ground that the testimony of a prosecuting witness is inherently improbable, unless it is so clearly false and unbelievable as to leave no reasonable doubt in that regard.

5. Criminal law ⇐878(4)

Where accused was convicted of kidnapping only under counts charging him with kidnapping and rape arising out of the same affair upon testimony of prosecutrix, the verdict of acquittal on the charge of rape did not require an acquittal of the charge of kidnapping on the ground that such acquittal indicated that the jury did not believe prosecutrix' story with respect to the alleged crime of rape, and that it was inconsistent to hold that the jury could believe her story as to the charge of kidnapping.

6. Kidnapping ⇐4

Where prosecution for kidnapping involved transportation within the county only, and there was no claim that the offense came within those clauses of the statute defining kidnapping which required an allegation and proof of intent with which person is taken from one state or county to another, allegation and proof of intent or purpose of the defendant was not required. Pen.Code, § 207.

7. Criminal law ⇐1170½(5)
Witnesses ⇐277(4)

Where accused had denied guilt of kidnapping and asserted he had never seen prosecutrix, and that he might have been in another city at the alleged time of the commission of the offense, and district attorney asked him on cross-examination whether he was in the sheriff's office in county of the offense during the month in which the offense was committed, such question did not constitute prejudicial "misconduct" but was proper cross-examination.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

8. Criminal law ⇐1037(2), 1129(1)

The defendant "waived" his objection to alleged prejudicial nature of the statements by district attorney by failing to assign them as error and by neglecting to ask the court to instruct the jury to disregard them.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

9. Criminal law ⇐723(1), 1171(1)

In prosecution for kidnapping and rape, comparison of the defendant to a vulture by the district attorney in his closing argument was improper but did not constitute prejudicial "misconduct".

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Harold Hunter was convicted of kidnapping and he appeals.

Affirmed.

J. R. Thomas and Newell Rawles, both of Ukiah, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

THOMPSON, Acting Presiding Justice.

The defendant was convicted on two counts of an information charging him with kidnapping different young girls, under sixteen years of age, contrary to the provisions of section 207 of the Penal Code. In a third count he was charged with the crime of rape with relation to one of the girls. The jury acquitted him of the last-mentioned charge. From the judgment of conviction of the first two offenses and from the order denying a new trial he has appealed.

The appellant contends that the verdicts and judgment of conviction of the crimes of kidnaping are not supported by the evidence, that the identity of the defendant as the perpetrator of the first alleged crime was not established, and that the district attorney was guilty of prejudicial misconduct in calumnious references which he made regarding the defendant, in the course of the trial and in his argument to the jury.

The first count charges the defendant with forcibly seizing, without authority or right, a young girl on November 10, 1940, in Ukiah, Mendocino County, and carrying her to another part of the same county, against her will.

The second count accuses him of forcibly taking another young girl on July 1, 1941, without right or authority, from a point on the Redwood Highway near Ukiah, and transporting her to another part of the same county without her consent.

The information alleges no purpose or intent, on the part of the defendant, for kidnaping the girls. Although the jury acquitted the defendant of the actual commission of the crime of rape, as alleged in the third count, it is apparent that his purpose, in both instances, was to ravish the girls. The defendant had been enrolled with the Civilian Conservation Corps in that vicinity. He was discharged from that camp a few months prior to the date of the first alleged offense. He was twenty-three years of age. He was tall, slender and dark-complexioned. He was a total stranger to the girls, never having met either of them before the perpetration of the offenses charged. He came from Fort Bragg, but he was in and about Ukiah on both dates when he was charged with the offenses. He had been previously convicted of robbery.

[1] The first girl kidnaped was an intelligent high school student residing in Ukiah. She had a good reputation. About six o'clock on the evening of November 10, 1940, she started to walk along the roadway adjacent to the railroad track, from her residence on Perkins Street, a distance of several blocks, to the home of a young lady friend, on Norton Street. It was dusk, but it was not raining and she was able to see quite clearly. She observed a man following her on the opposite side of the road. There were no other pedestrians in sight. As she approached a bridge the defendant overtook her and attempted to engage her in conversation. He waited until an approaching automobile passed them, and then, without warning, he deliberately seized her and dragged her across the track behind a pile of railroad ties. She screamed and struggled to secure her release. He placed his hand over her mouth to prevent her from being heard. She was terribly frightened. He then attempted to kiss her while he continued to hold her by the wrist. After some scuffling she managed to jerk away and fled from his presence. She testified that he was a tall, dark-complexioned young man; that he had dark hair, and he wore a dark hat and a plaid woolen jacket. She positively identified him as he sat in the court room between two other strangers as the man who kidnaped her on that occasion. She also identified a plaid jacket which was taken by the sheriff from the defendant at the time of his arrest, and which was produced in court, as the one he wore at the time of the assault. It is true that a companion of the defendant, who worked with him in the C. C. C. camp and elsewhere, testified that he sold that jacket to the defendant in May, 1941, for the sum of fifty cents. But his evidence in that regard was conflicting and unsatisfactory. The jury was warranted in disbelieving his story. Another disinterested man testified that the defendant came to his restaurant in the vicinity of the place where the crime was committed at seven o'clock that same night and sat about for some time, and that he was then wearing a "woolen jacket."

The defendant testified that he was staying on the Guntley ranch, on the Low Gap Road, in Coyote Valley, near Ukiah, and that he often visited in that city. He would not swear that he was not in Ukiah on November 10, 1940, the date of the alleged assault. He did deny that he kidnaped the young girl as alleged, or that he had ever seen her until shortly before the trial of the case. He also denied that he owned or wore the plaid jacket before May, 1941, at which time he purchased it from his friend. Robert Grazini, who ran a restaurant in Coyote Valley, near Ukiah, testified that the defendant came into his restaurant about seven o'clock on the evening of November 10, 1940, and sat around there for some time and that he was then wearing a woolen jacket.

The young girl upon whom the defendant is charged in the second count of the indictment with making an attack on July 1, 1941, was only thirteen years of age. She was living with her parents in Leggett Valley on the Redwood Highway above Ukiah. She is also an intelligent girl, who was then attending the eighth grade of an elementary school. About two o'clock on the afternoon of that day, she left home in company with a young girl friend. They proceeded up the Redwood Highway for some distance to pick fruit in an orchard owned by Mr. Lavender. As they passed Terrill's Inn on the Redwood Highway the defendant accosted them, and without an invitation followed the girls to the Lavender orchard, where all three of them spent some time picking cherries. The girls then started to return southerly along the highway. The defendant accompanied them. When they reached the intersection of the Fort Bragg road, the defendant gave one of the girls fifteen cents with which to buy her a milk shake at Terrill's place some distance beyond that point. She went on her way. The defendant then detained the complaining witness, saying he wanted to talk with her.

After the other girl disappeared in the Terrill place, the defendant asked the prosecutrix to cross the roadway to the shelter of a shade tree, where they could talk, which she did. There was then no other person in sight. He at once seized her and violently kissed her, at the same time making improper proposals. She testified that she kicked, scratched, struggled and resisted his advances as best she could, but that he picked her up and carried her along an old roadway a distance of some sixty yards into a clump of bushes on a wooded hill. While doing so he held his hand over her mouth to prevent her from screaming. Upon arriving at that secluded spot, she said that he dropped her upon the ground, and overcoming her resistance, he tore her clothing and succeeded in having sexual intercourse with her. She claimed to have been frightened and that she was helpless to prevent the act. He then released her, and she fled from his presence down the roadway to the highway and thence to the Terrill Inn, where she found her girl friend waiting for her.

When she arrived at Terrill's Inn, she was weeping and disheveled. Her clothing was torn, a seam in her dress was ripped open, her belt was hanging down on one side and her face was inflamed. A welt and other red marks were visible on the right side of her face. She told her friend all about the affair and she corroborated the last-mentioned facts. Two other disinterested witnesses corroborated the evidence regarding the condition in which she returned home. Her mother said that when she returned her face was so inflamed that she at first thought she had the hives. Mr. Joseph Jones, a millhand who had previously worked with the defendant, testified that he told him about July 1st all about the sordid affair and boasted of his success. The defendant did not deny his presence with the girls on the highway and in the cherry orchard on that occasion. Indeed, he could not consistently refute those facts. But, naturally, he did deny that he carried her away by force, and he denied having intercourse with her. There is absolutely no question regarding his identity with respect to the last two offenses charged in the information.

There is ample evidence to support the verdicts and judgment of conviction on the kidnaping charges. The identity of the defendant was sufficiently established on both counts. The defendant does not deny that he was present at the time of the last offense. The first prosecuting witness recognized him as the man who kidnaped her on November 10th. It was then dusk, but she said that she plainly saw him. The defendant conforms to the description of the man she said attacked her on that occasion. She testified that he was a tall, dark-complexioned young man who wore a dark hat and a plaid jacket. She identified the defendant's jacket which was produced in court as the one he then wore. The method followed by the assailants of the two girls in seizing them by force and carrying them away with their hands held over the mouths of their victims, is similar. The defendant was in Ukiah the very day of the first offense. Both offenses were committed in the same vicinity and within a comparatively brief period of time. We have no doubt of the identity of the defendant as the perpetrator of both offenses.

[2, 3] The question of the identity of a defendant who is charged with a crime is ordinarily a problem for the determination of the jury. The credibility of witnesses and the weight to be given the evidence in that regard are peculiarly within the province of the jury. Where there is substantial evidence to support the finding of a jury with respect to the identity of a defendant, the verdict and judgment will not be disturbed on appeal. People v. Waller, 14 Cal.2d 693, 700, 96 P.2d 344; People v. Farrington, 213 Cal. 459, 2 P.2d 814; People v. Deal, 42 Cal.App.2d 33, 108 P.2d 103; People v. Denton, 22 Cal.App.2d 673, 72 P. 2d 191. Quoting with approval from the Farrington case, supra, it is said in that regard in People v. Waller, supra [14 Cal. 2d 693, 96 P.2d 348]: " 'The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial.' "

[4] We may not say, under the circumstances of this case, that the testimony of the prosecuting witnesses is inherently improbable. Indeed, their testimony appears to be inherently probable, when it is viewed in the light of the surrounding circumstances. An appellate court may not interfere with the province of the jury and the trial court by reversing a judgment on the ground that the testimony of a prosecuting

witness is inherently improbable, unless it is so clearly false and unbelievable as to leave no reasonable doubt in that regard. People v. Jefferson, 31 Cal.App.2d 562, 566, 88 P.2d 238.

[5, 6] It is true that the prosecuting witness testified to circumstances applicable to the third count which constitute rape. It is a fact that the jury nevertheless acquitted the defendant of that charge. The appellant argues that the verdict of acquittal on that charge indicates that the jury did not believe her story with respect to the alleged crime of rape, and that it is therefore inconsistent to hold that the jury could nevertheless believe her story insofar as it applies only to the charge of kidnaping the girl as a part of the same affair. This conclusion does not necessarily follow. The jury may have doubted whether one necessary element of the crime of rape, such as actual penetration occurred. We are not called upon to speculate on the reason or motive which prompted the jury to acquit the defendant of the crime of rape. For the purpose of this appeal it is our province, only, to determine whether there is sufficient evidence to support the alleged crimes of kidnaping. We are of the opinion the record contains ample evidence to support the verdicts and judgment of conviction of the crimes of kidnaping. It was not necessary to allege or prove the intent or purpose with which the defendant kidnaped the girls under the circumstances of this case. People v. Bruno, 49 Cal.App. 372, 193 P. 511; People v. Fernandes, 127 Cal.App. 45, 15 P.2d 172. It is true that section 207 of the Penal Code defines several different crimes of kidnaping, some of which do require allegations and proof of the intent or purpose with which a person is taken and transported from one state or county to another. But there is no contention that this case falls within those classes of kidnaping.

[7] The district attorney was not guilty of prejudicial misconduct in asking the defendant on cross-examination whether he was in the sheriff's office in Mendocino County in November, 1940. The defendant had denied that he was guilty of the crime of kidnaping at Ukiah on November 10, 1940. He denied that he had ever seen the girl. He evidently tried to create the impression that he was not in Ukiah on that date. It was an effort to establish an alibi. He had testified that he "might have been in Sacramento or some other place" on that date. It therefore constituted proper cross-examination to ask him, "Do you know whether or not you were in the sheriff's office in Mendocino County during the month of November, 1940?" We assume the question was asked in good faith, and that he might have been impeached if he falsely swore that he was not in that office during November, 1940.

[8, 9] Nor was it prejudicial misconduct for the district attorney to argue, in his closing address to the jury, that the defendant was "shown to be a person of a vicious personality," or that he was like a vulture, except that he was preying upon the bodies of young girls. No objection to those statements was made at the trial, and the court was not asked to instruct the jury to disregard them. The defendant waived his objection to the prejudicial nature of the challenged statements by failing to assign them as error and by neglecting to ask the court to instruct the jury to disregard them. People v. Swenson, 28 Cal.App.2d 636, 641, 83 P.2d 70; Rogers v. Foppiano, 23 Cal.App. 2d 87, 95, 72 P.2d 239. We do not approve of extravagant and opprobrious language in arguments to juries, especially in criminal cases. They frequently indicate the presence of passion and prejudice, or at least an excess of zeal. There should be an effort to confine arguments to the realm of sobriety, logic and reason. In the present case the comparison of the defendant to a vulture was inappropriate and we think improper, but it did not constitute prejudicial misconduct for the reason heretofore mentioned.

The judgment and the order are affirmed.

STEEL, J. pro tem., and TUTTLE, J., concurred.

SQUIRE, Superintendent of Banks of Ohio, v. MERRIAM.

Civ. 12710.

District Court of Appeal, Second District, Division 1, California.

Jan. 15, 1942.

Rehearing Denied Feb. 11, 1942.

Hearing Granted March 12, 1942.

1. Courts ⇐95(2)

Construction given by courts of a foreign state to its statutes will be recognized and given full effect in the courts of the forum.

2. Courts ⇐95(2)

Decision of Ohio District Court of Appeal would not change law of Ohio as stated by Supreme Court, the court of last resort of such state.

3. Limitation of actions ⇐58(5)

When Ohio bank failed, superintendent of banks in Ohio did not have exclusive authority to collect stockholders' liability, but an action therefor might be brought by creditors, and hence stockholders' liability was "created" at time of bank's failure within California statute of limitations, and action brought in California more than three years after failure to collect stockholders' liability was barred. Code Civ.Proc. § 359; Const. Ohio, art. 13, § 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Created".

4. Limitation of actions ⇐2(1)

States ⇐5½

Law as to limitation of actions of California, applied to action in California to enforce liability against stockholders of insolvent Ohio bank, and the application of California statute did not deny rights secured to Ohio superintendent of banks by "full faith and credit" clause of Federal Constitution. Code Civ.Proc. § 359; U.S.C.A.Const. art. 4, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Full Faith and Credit".

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by S. H. Squire, as Superintendent of Banks of the State of Ohio, against Cliffe U. Merriam to recover alleged stockholders' liability. From a judgment for plaintiff, defendant appeals.

Reversed.

Hill, Morgan & Bledsoe, of Los Angeles and Charles O. Parker, of Chicago, Ill., for appellant.

Mathes & Sheppard and Emrys Davis, all of Los Angeles, Thomas J. Herbert, Atty. Gen. of Ohio, E. S. Lindemann and A. O. Husband, Sp. Counsel to Atty. Gen., both of Cleveland, Ohio, and Gordon F. Hampton, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

The plaintiff brings this action, as Superintendent of Banks of the State of Ohio, to recover alleged stockholders' liability of the defendants. This is the familiar double liability of bank stockholders included in the National Bank Act, 12 U.S.C.A. § 21 et seq., and many state statutes patterned after it. No testimony was taken in the superior court, and the case was decided on an agreed statement of facts. Respondent concedes that these facts are substantially correct as set forth in appellant's opening brief. The defendant, Merriam, and a decedent, now represented by an administrator, were stockholders in a bank corporation existing under Ohio law. Judgment was for the plaintiff and against the defendant Merriam, and against the plaintiff and for the defendant administrator.

February 27, 1933, this bank failed and became insolvent. On that date the bank refused to pay on demand any greater amount than one per centum of any demand deposit or other matured obligation. No general deposits were received and no obligations which affected the liability of its stockholders were incurred after that date.

April 8, 1933, the Ohio superintendent of banks appointed a conservator for the bank.

June 15, 1933, the bank superintendent took possession of the bank for the purpose of liquidation.

July 11, 1933, the bank superintendent formally declared the bank to be insolvent, and determined to enforce the individual liability of the stockholders in the amount of one hundred per centum of the par value of the bank's stock.

July 30, 1934, the superintendent of banks determined it was necessary to levy a one

hundred per cent assessment on all stockholders.

August 1, 1934, the superintendent of banks notified stockholders thereof and demanded payment.

July 28, 1937, the bank superintendent filed his complaint in California.

This case has been consolidated for appeal with S. H. Squire, etc., v. Merriam et al., 121 P.2d 538. It is stated in respondent's brief, and not challenged by appellant, that the facts are parallel and the questions of law are identical. We have examined the agreed statement of facts in both cases and do not find mentioned therein the 1934 dates just referred to. The agreed facts recite also an agreement between the parties, which tolled the statute of limitations, so that, if it were essential, the date of filing the complaint would have to be deemed to have been June 15, 1936. Not being essential, we will in this opinion refer to the date the complaint was actually filed, July 28, 1937.

[1] The sole question presented to the lower court for determination, and to this court for review, is whether or not the plaintiff's cause of action is barred by section 359 of our Code of Civil Procedure.

This action having been brought in California, section 359 of our Code of Civil Procedure is the controlling section.

"* * * limitation runs in three years after 'the liability was created'." 6a Cal. Jur. 1026, and note 17, cases cited.

"It should be noted that the statute of limitations here involved is different from the ordinary statute of limitations in that it runs from the date 'upon which * * * the liability was created' instead of from the date upon which a cause of action to enforce that liability accrued to the appellant. Hunt v. Ward, 99 Cal. 612, 34 P. 335, 37 Am.St.Rep. 87. The Supreme Court in that case held that the statute had run, even though the plaintiff's cause of action to enforce the liability had accrued within three years, since the liability itself had been created more than three years before suit was filed. To the same effect are Wells v. Black, 117 Cal. 157, 163, 48 P. 1090, 37 L.R.A. 619, 59 Am.St.Rep. 162; Bank of San Luis Obispo v. Pacific Coast Steamship Co., 103 Cal. 594, 596, 37 P. 499; Chambers v. Farnham, 182 Cal. 191, 194 [196], 187 P. 732; Gardiner v. Royer, 167 Cal. 238, 139 P. 75; Coombes v. Getz, 217 Cal. 320, 18 P. 2d 939; Royal Trust Co. v. MacBean [168 Cal. 642, 144 P. 139], supra; Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 P. 939.

"We then must look to the laws of Maryland to determine the nature of respondent's obligation and the time when the stockholder's liability was created. People v. Goddard, 84 Cal.App. 382, 386, 258 P. 447. The rule is that the construction given by the courts of a foreign state to its statutes will be recognized and given full effect in the courts of the forum. Smith v. Shepler, 8 Cal.App.2d 717, 720, 48 P.2d 999; McManus v. Red Salmon Canning Co., 37 Cal.App. 133, 137, 173 P. 1112; 5 Cal.Jur., pp. 429, 430." Hospelhorn v. Van Dusen, 40 Cal.App.2d 257, 258, 104 P.2d 888, 889.

In the Hospelhorn case just cited, the superior court applied the law of the State of Maryland to the law of California as to limitation of the action, and held the cause of action was barred by section 359, Code of Civil Procedure. This judgment was affirmed by the District Court of Appeal.

In Royal Trust Co. v. MacBean, 168 Cal. 642, 144 P. 139, our Supreme Court determined the nature of the obligation by reference to the law of Canada, then applied our California statute of limitations and found that the cause of action was barred by the same Code section.

In Richardson v. Craig, 11 Cal.2d 131, 77 P.2d 1077, the provisions of the California Bank Act were applied by our Supreme Court to the same section, and the court again determined that the cause of action was barred by the statute.

In Broderick v. Kunde, 23 Cal.App.2d 587, 74 P.2d 333, the bank law of the State of New York was applied; the superior court determined that the cause of action was not barred, which was affirmed by the District Court of Appeal.

Therefore, in order to solve the problem now presented to us, we must look to the law of the State of Ohio to see whether or not the cause of action is barred by our statute of limitations. This determination must rest upon when the liability was created, using the word "created" in the technical sense defined in the California cases to which we have referred. And in so doing, we must take into consideration the statutes and the construction thereof which the courts of Ohio have given to them. Hospelhorn v. Van Dusen, supra, and cases there cited.

The law of the State of Ohio is as follows: "* * * stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Constitution of Ohio, Art. XIII, Sec. 3, Page's Ohio General Code, Vol. 11, p. 299.

"Stockholders of banks shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Page's Ohio General Code, Sec. 710-75, Vol. 1, p. 421.

By amendment, effective March 31, 1933, of the so-called Banking Code of Ohio, the superintendent of banks was given exclusive authority to bring and maintain the action. Fulton v. Wetzel, 47 Ohio App. 72, 190 N.E. 776. This amendment became effective after the failure of the bank in which the defendant in this case was a stockholder.

It is apparent that the essential inquiry which we must now make is whether or not, at the time of the failure of the bank, the law of the State of Ohio gave to its superintendent of banks exclusive power to collect the liability imposed upon bank stockholders by the Constitution and general laws of that state. And it is apparent that the answer to this inquiry is determinative of this case.

If, at the time in question, the power to sue for the double liability of bank stockholders was lodged exclusively in the Ohio Superintendent of Banks, as it is lodged in the California Superintendent of Banks by the California Bank Act, St.1931, p. 338, then the rule established by our Supreme Court in the case of Richardson v. Craig, supra, would apply. In that event, the liability was created when the Ohio Bank Superintendent levied the assessment. The date of the levy being July 30, 1934, and the date of filing the complaint in this action being July 28, 1937, there was an elapsed period of less than three years, and the cause of action is not barred.

But if, under the law of Ohio, creditors had the right to bring the action when the bank failed, then the liability was created at that time. See Royal Trust Co. v. MacBean, supra, 168 Cal. 642, 144 P. 139.

These critical dates are July 28, 1937, when the complaint was filed, and February 27, 1933, when the bank failed; an elapsed period of more than three years, and the cause of action is barred.

Applicable to this determinative point, we are cited the case of Snider v. United Banking & Trust Co., 124 Ohio St. 375, 178 N.E. 840, decided by the Ohio Supreme Court, December 9, 1931.

In this Ohio case a creditor brought suit against a stockholder of a defunct Ohio bank to enforce the double liability we are here considering. A demurrer was filed to the complaint on the ground that Ohio general laws gave to the superintendent of banks the exclusive right to maintain an action to enforce this double liability. The demurrer was overruled by the trial court and judgment entered against the defendant. This judgment was sustained by the Court of Appeal and the Supreme Court of the State of Ohio.

"Syllabus by the Court.

"1. Section 3 of article XIII of the Ohio Constitution creates an additional liability against stockholders of corporations authorized to receive money on deposit, for all contracts, debts, and engagements of such corporations. The liability thus created is complete and self-executing.

"2. The provisions of sections 710-75, 710-89, and 710-95, General Code, are regulatory and procedural, and neither augment nor diminish the constitutional rights of creditors.

"3. The right of the superintendent of banks to enforce such individual liability only applies where he has taken charge of the property and business of the corporation for the purposes of liquidation." Snider v. United Banking & Trust Co., supra.

In the course of that opinion the court says: "It is sufficient to say, in the present state of legislation, that the right of the superintendent of banks has not been made absolutely, and in terms, exclusive."

In an endeavor to avoid the rule in the Snider case, counsel for respondent have cited and have argued at length, from Feldman v. Standard Trust Bank of Cleveland, 1933, 46 Ohio App. 67, 187 N.E. 743, and Fulton v. Wetzel, 1934, 47 Ohio App. 72, 190 N.E. 776.

In analyzing these authorities, we must bear in mind that we are not now trying to determine what the present law of the State of Ohio may or may not be. What we are concerned to determine is what it was when this liability was created, having in view our California statute of limitations, and what we must remember is that if anyone had a right to sue on the liability when the bank failed, the liability was created at that time.

[2] With this criterion in mind, we have examined these cases, and we think it may fairly be said that they do not necessarily overrule or reverse the decision in the Snider case. Both cases hold that the Ohio Superintendent of Banks has the right to bring the action to enforce the double liability of bank stockholders as against a creditor, both parties appealing to the court for authority so to do. Neither case holds that at the time we now have under consideration, i. e., when the bank failed, a creditor did not have the right to sue in the Ohio courts to enforce his stockholders' liability. And if either case held the bank superintendent at the precise time here under review had the exclusive right to bring the action, being a decision of the Ohio District Court of Appeal, we think it would not change the law of Ohio as stated in the Snider case by the Supreme Court, the court of last resort of that state.

[3] We are convinced that at the time this liability was created the law of Ohio was that an action therefor might be brought by a creditor; that this liability of necessity became fixed, or "created," as our Code and our courts say, on the date when the bank failed and refused to pay its depositors. This date being February 27, 1933, and the action in California having been filed July 28, 1937, a period of more than three years elapsed before the commencement of the action. Therefore, under the terms of section 359 of our Code of Civil Procedure, the cause of action was barred, and the judgment of the lower court should have been for the defendant.

[4] Some part of the briefs on appeal has been devoted to a contention on the part of respondent that to hold this cause of action barred by the California statute of limitations would be to deny rights secured to him by the full faith and credit clause of our Federal Constitution, art 4, § 1. There is no merit to this contention. It has been too well settled in every jurisdiction in which the matter has come before the courts to require any citation of authority to the effect that the law as to limitations of actions of the state in which the action is brought applies in cases of this kind. This is the effect of the California cases to which we have referred in this opinion; and we do not think the cases cited by respondent change the rule in any respect.

The judgment is reversed.

YORK, P. J., and DORAN, J., concurred.



S. H. SQUIRE, as Superintendent of Banks of the State of Ohio, etc., Respondent, v. Cliffe U. MERRIAM, Appellant.

Civ. 12711.

District Court of Appeal, Second District, Division 1, California.

Jan. 15, 1942.

Rehearing Denied Feb. 11, 1942.

Hearing Granted March 12, 1942.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Hill, Morgan & Bledsoe, of Los Angeles, and Charles O. Parker, of Chicago, Ill., for appellant.

Mathes & Sheppard and Emrys Davis, all of Los Angeles, Thomas J. Herbert, Atty. Gen., of Ohio, E. S. Lindemann and A. O. Husband, Sp. Counsel to Atty. Gen., both of Cleveland, Ohio, and Gordon F. Hampton, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

This is a companion case to S. H. Squire, as Superintendent of Banks of the State of Ohio, in Charge of Liquidation of Business and Property of Guardian Trust Company, Plaintiff and Respondent, v. Cliffe U. Merriam, Defendant and Appellant, Civil No. 12710, 121 P.2d 534, this day decided.

Upon stipulation the two cases were consolidated for purposes of appeal, and briefs in one case were made applicable to the other.

For the reasons stated in S. H. Squire, as Superintendent of Banks of the State of

Ohio, in Charge of Liquidation of Business and Property of Guardian Trust Company, Plaintiff and Respondent, v. Cliffe U. Merriam, Civil No. 12710, supra, the judgment is reversed.

YORK, P. J., and DORAN, J., concurred.



STATE OF OHIO ex rel. SQUIRE, Superintendent of Banks, v. PORTER.

Civ. 12675.

District Court of Appeal, Second District, Division 1, California.

Jan. 15, 1942.

Rehearing Denied Feb. 11, 1942.

Hearing Granted March 12, 1942.

1. States ⇐5½

"Full faith and credit" clause of Federal Constitution does not deny right to any state to enact and enforce a reasonable statute of limitations as to cause of action presented to courts of the state. U.S.C.A.Const. art. 4, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Full Faith and Credit".

2. Action ⇐17
Limitation of actions ⇐2(1)

The law of place where action is brought governs as to remedy, regardless of law of place where obligation arose, and in absence of a statute of forum changing the rule, statutes of limitations of the place where the action is brought control. Code Civ.Proc. § 359.

3. Judgment ⇐822(1)

In applying the "full faith and credit" clause to judgments of a sister state, courts are not required to give greater faith and credit to such judgments than to those of the courts of the state. U.S.C.A.Const. art. 4, § 1.

4. Courts ⇐95(2)

In determining whether creditors had right to bring action against stockholders of Ohio bank when bank failed on February 27, 1933, so that cause of action would be "created" at that time under California three-year statute of limitations rather than at time when Ohio bank superintendent levied assessment, court was bound to follow decision of Supreme Court of Ohio rather than decisions of Ohio Court of Appeals. Code Civ.Proc. § 359.

5. Judgment ⇐815

In following ruling of Supreme Court of Ohio to effect that creditors of Ohio bank had right to bring action against stockholders for statutory liability when Ohio bank failed, and deciding that liability was created then and that action brought in California more than three years thereafter was barred under three-year statute of limitations, District Court of Appeal did not violate "full faith and credit" clause of United States Constitution. U.S.C.A.Const. art. 4, § 1; Code Civ.Proc. § 359.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by the State of Ohio, on the relation of S. H. Squire, Superintendent of Banks, against Clarence H. Porter to enforce alleged stockholders' liability. From a judgment for plaintiff, defendant appeals.

Reversed.

Meserve, Mumper & Hughes and Roy L. Herndon, all of Los Angeles, for appellant.

Mathes & Sheppard, of Los Angeles, Thomas J. Herbert, Atty. Gen. of Ohio, E. S. Lindemann and E. J. Halambeck, Sp. Counsel to Atty. Gen., both of Cleveland, Ohio, and Gordon F. Hampton, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

This is a companion case to S. H. Squire, as Superintendent of Banks of the State of Ohio, in Charge of the Liquidation of Business and Property of Guardian Trust Company, Plaintiff and Respondent, v. Cliffe U. Merriam, Defendant and Appellant, 121 P.2d 534, and S. H. Squire, as Superintendent of Banks of the State of Ohio, in Charge of Liquidation of Business and Property of Union Trust Company, Plaintiff and Respondent v. Cliffe U. Merriam, 121 P.2d 538, this day decided. What we have said in our main opinion applies with like effect to this case, because the bank failed February 27, 1933, and the complaint was filed May 29, 1936.

Also, what we have said relative to the application of the full faith and credit

clause of our Federal Constitution, art. 4, § 1, applies to this case. In this case the parties have argued this latter proposition at greater length than in the companion cases referred to, and evidently the trial court in its decision felt it was bound under the terms of the full faith and credit rule to render judgment for the plaintiff, notwithstanding the fact that the bank failed on the date above mentioned.

For this reason, we will amplify somewhat what we have heretofore said in respect to the full faith and credit rule as applied to these cases.

To state the cases here under review, is to demonstrate that the constitutional provision does not apply. The controlling factor is the date when the obligation was created. Having determined when the obligation was created, then we apply the time factor of our section 359, Code of Civil Procedure. In other words, the plaintiff in these cases brings with him his cause of action from the State of Ohio, and in the State of California we apply to that cause of action our statute of limitations.

[1] It cannot be seriously contended that the full faith and credit clause of the Federal Constitution denies the right to any state to enact and enforce a reasonable statute of limitations as to causes of action presented to the courts of that state. This is elementary law.

[2] It is equally elementary that the law of the place where an action is brought governs as to the remedy, regardless of the law where the obligation arose.

"It is a universal principle that the forum governs the limitation of actions within its borders and that laws controlling limitations are part of the law of every forum. Such laws, subject to exceptions which are discussed hereinafter, are universally held to affect the remedy; and therefore, in the absence of a statute of the forum changing the rule, the statutes of limitation of the place where the action is brought and the remedy is sought to be enforced, and not those of the place where the contract was made, the right in tort arose, or the plaintiff resides, or of the domicile of one or the other of the persons affected by the litigation, control in the event of a conflict of laws. In short, the *lex fori* determines the time within which a cause of action shall be enforced." 11 Am.Jur., p. 505. (Italics ours.)

[3] There is nothing in the full faith and credit clause which gives to judgments or laws of sister states greater force than our own laws and judgments. In applying the full faith and credit clause to judgments of sister states, we are not required to give greater faith and credit to said judgments than to those of the courts of this state. Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 333.

[4, 5] Respondent argues at length that, under the full faith and credit clause, our California courts must enforce the finding of the Ohio superintendent of banks in which he assessed the liability of the defendant stockholder. If the statute law of Ohio giving to the superintendent of banks this exclusive power had been in effect on the date this bank failed, we would then have to meet this question. This is not necessary because, under the facts in this case, the bank failed February 27, 1933, and the statute was amended March 31, 1933, for the first time giving the Ohio superintendent of banks this power.

Some decisions of the Ohio Court of Appeals state that before the statute was amended there was an exclusive power implied in the superintendent of banks to levy the assessment. As we have heretofore stated, the case of Snider v. United Banking & Trust Co., 124 Ohio St. 375, 178 N.E. 840, formulated the Ohio rule which it is our duty to follow in this case. In so following that rule of the Supreme Court of Ohio, we do not violate the full faith and credit clause of the Constitution of the United States.

The judgment is reversed.

YORK, P. J., and DORAN, J., concurred.

49 Cal.App.2d 251

In re CARTER'S ESTATE.

CARTER et al. v. CARTER.

Civ. 11951.

District Court of Appeal, First District, Division 1, California.

Jan. 22, 1942.

Hearing Denied March 19, 1942.

1. Wills ⇐77

A will "speaks" and takes effect from date of the death of the testator.

2. Wills ⇐481

The intention of a testator may be determined only as of the date of execution of the will.

3. Wills ⇐486

Generally, extrinsic facts are not admissible to explain provisions in a will.

4. Wills ⇐487(1)

If surrounding facts and circumstances may be considered in determining testator's intention, it is not the conditions existing at the time of probate, but rather those at the time of execution of the will, that may throw light on intent unless it is made plain by the terms of the will that the testator considered circumstances which in the ordinary course of events would probably occur.

5. Wills ⇐552(1)

If testatrix provided for her son without limitation, in event the son predeceased the testatrix the son's child would occupy the position of the son and take his share, pursuant to provision of Probate Code. Probate Code, § 90.

6. Descent and distribution ⇐47(1)

If there was a possibility of inheritance by testatrix' grandson under provision of Probate Code that, when an estate is devised to kindred of testator and devisee predeceases testator and leaves lineal descendants, such descendants shall take the estate by will in the same manner as the devisee would have done had he survived testator, the grandson would be barred from sharing in the estate under provision of Probate Code relating to pretermitted heirs. Probate Code, §§ 90, 92.

7. Descent and distribution ⇐47(1)

Where death of testatrix' son occurred after testatrix made her will which contained no direct reference to her grandchild who was the deceased son's child, and the will made specific bequests and provided that testatrix' other property was bequeathed to her three sons, whatever inheritance was bequeathed to the deceased son descended to the grandson, who therefore could not claim a share of the testatrix' estate as a pretermitted heir. Probate Code, §§ 90, 92.

8. Descent and distribution ⇐47(1)

Unless a testator omits to provide for a child or for the issue of a deceased child, such person may not inherit as a pretermitted heir under Probate Code, and the words "omits to provide" as used in the Code mean simply an omission to make a provision in the will and have no reference to pecuniary value of such provision. Probate Code, § 90.

See Words and Phrases, Permanent Edition, for all other definitions of "Omits to Provide".

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Proceeding in the matter of the estate of Mollie Carter, deceased. From portions of decree of settlement of final account and of final distribution, distributing to testatrix' daughter, Agnes M. Carter, all of the estate except that assigned by the daughter to other parties during probate, William A. Carter, Jr., and others appeal.

Affirmed.

Hearing denied; HOUSER, J., dissenting.

James O'Gara, Jr., of San Francisco, for appellants.

James R. Agee and James M. Carl, both of Oakland, for respondent.

WARD, Justice.

An appeal from portions of a decree of settlement of final account and of final distribution in the matter of the estate of Mollie Carter, deceased, distributing to her daughter Agnes Carter all of her estate except that assigned by the daughter to other parties, including appellant, during probate.

Mollie Carter died April 6, 1940, leaving a holographic will dated January 2, 1933. Her heirs at law included Agnes Carter, two sons, Thomas O. Carter and John J. Carter, and a grandson, William Arthur Carter, Jr., appellant, the minor son of William Arthur Carter, Sr., a predeceased son of the testatrix who died after the making of her will.

The will designated by name the daughter and the three sons, but contained no direct reference to appellant grandchild. It contained specific devises and bequests to the daughter and provided: "My other property I possess I give and bequeath to my three sons." Thereafter appear bequests of three hundred dollars each to two clergymen for religious purposes. Finally, one hundred dollars was directed to be paid to any member of the family who might contest the will. The record does not disclose what "other property I possess" may have existed at the time of the execution of the will. At the time of the testatrix's death, however, some seven years later, the estate comprised only the real and personal property devised and bequeathed to the daughter. The court found "that there is no other property in said estate." Nevertheless, the two surviving sons and the grandson, appellant herein, received under the decree of distribution certain real property assigned them by the daughter; likewise each clergyman received the specific sum designated in the will.

It is the contention of appellant that the portions of the decree of distribution appealed from deny to him the share of his grandmother's estate to which, under the provisions of section 90 of the Probate Code, he was entitled as a pretermitted heir. This section provides: "When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate." Section 91 of the Probate Code sets forth the manner and means by which a pretermitted heir may obtain an apportionment of the estate. Section 92 provides: "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place; except that when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, or is dead at the time the will is executed, but leaves lineal descendants surviving the testator, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator."

The historical background of the above sections will be found in Re Estate of Todd, 17 Cal.2d 270, 109 P.2d 913, where all of the property was bequeathed to the wife and the son of the testator, share and share alike, "or to the survivor of them." The son predeceased the testator; no settlement or advancement was made the grandchild; he was not mentioned in the will and it did not appear that the failure to mention him was intentional. The court there said (pages 275, 276 of 17 Cal.2d, page 916 of 109 P.2d): "In our opinion it was the testator's intention to substitute respondent Inez Todd as sole legatee under his will in the event of the death of his son, Addison Todd. This would preclude appellant from taking any portion of the estate under section 92 of the Probate Code. However, if appellant could under the terms of the will have succeeded to the share of the estate devised or bequeathed to his father under the provisions of said section 92, he would be barred from sharing in the estate as a pretermitted heir under the provisions of section 90 of said code." The case at bar presents a problem not present in the Todd case. The father herein was mentioned and "provided for" and under section 92 his son would "take the estate so given by the will in the same manner" as the father would have done had he survived the testator.

[1-4] In the Todd case the court determined the intention of the testator from the terms of the will. On the question of such interpretation, the document "speaks" and takes effect from the date of the death of the testator (In re Estate of Babb, 200 Cal. 252, 252 P. 1039), whose intent may be determined only as of the date of the execution of the instrument. In re Estate of Painter, 150 Cal. 498, 89 P. 98, 11 Ann.Cas. 760; In re Estate of McCurdy, 197 Cal. 276, 240 P. 498; In re Estate of Lawrence, 17 Cal.2d 1, 108 P.2d 893; Page on Wills, Lifetime Ed., vol. 2, p. 816. Ordinarily extrinsic facts are not admissible to explain provisions in a will, but if surrounding facts and circumstances may be considered, then it is not the conditions existing at the time of probate proceedings but rather those at the time of the execution of the will that may throw light upon the intent of the testator, unless it is made plain by the terms

of the instrument that such testator considered circumstances which in the ordinary course of events would probably occur.

[5] On the day the will was made the sons were living. Testatrix was not required to provide for appellant grandson at that time. It may be conceded that she fulfilled all the requirements of section 90 when she referred to her children in her will. The question arises: When the father of appellant died, was testatrix required to provide for the latter, or specifically disinherit him if she did not care to have him receive a pretermitted heir's share? In the Todd case, the court said, page 273 of 17 Cal.2d, page 915 of 109 P.2d: "We believe it is quite obvious that the legislature intended to change the law and the rule announced in the Barter case [In re Barter's Estate, 86 Cal. 441, 25 P. 15] to provide that if the issue of a testator's child is not provided for by the will, such issue shall succeed to a share of the estate by intestate succession the same as if no will had been made * * *." This language may not be construed to mean that it is absolutely necessary to rewrite a will in case of the death of a testator's child in order to provide for the child's lineal descendants if the latter are provided for under section 92. If the testatrix provided for the son without limitation, in the event he predeceased her his child would occupy the position of the parent and take under section 92. In re Estate of Walker, 196 Cal. 323, 237 P. 1070. It becomes important therefore in the present case to examine the provisions of the will, and if uncertainty appears therein to determine the intent of the testatrix.

[6] From the terms of the instrument it is clear that the testatrix desired primarily that "my dear and only daughter Agnes" be protected to the extent that if any member of the family should contest "against my wishes * * * I bequeath them One Hundred Dollars only." That the estate was in fact, or that testatrix believed at the time of the execution of the will that it was, in excess of the amount devised to her daughter, is apparent from the bequests to the clergyman and to any contestant of the will, which give color to the conclusion that the value of other property "I possess" was in fact something substantial, but assuming it to be only slight, in the sense that it may have been personal effects, etc., still it was a bequest to the father of appellant, to which the son would be entitled under section 92. If there was a possibility of inheritance under that section, appellant would be barred as a pretermitted heir from sharing in the estate under the provisions of section 90. In re Estate of Todd, supra.

[7] In view of the terms of the will bequeathing "other property I possess" to his father, it does not appear that the omission to include the grandson was intentional. There was no provision, as in the Estate of Todd, that the predeceased child's share should go to a specific survivor. Under the circumstances here, whatever inheritance was devised or bequeathed to the son of the testator descended to her grandson upon the death of his father, which precludes appellant's claim as a pretermitted heir under section 90. In re Estate of Todd, supra.

The difficulty in the present case is that on the closing of the estate there was nothing to distribute to the grandson, save what he received under assignment from testator's daughter, which he did not receive as a lineal descendant of a predeceased legatee. The test is not the value, nominal or otherwise, that one may receive, but rather whether, under the terms of the will, it would be proper to decree to appellant any right or interest, present or future. The decree provides: "To Thomas O. Carter, John J. Carter and William Arthur Carter, Jr., in equal shares, all property not now known or discovered which may belong to said estate, or in which said estate may have an interest."

[8] Under the provisions of section 90, unless a testator omits to provide for a child or for the issue of any deceased child, such person may not inherit as a pretermitted heir. "The words 'omits to provide' * * * mean simply an omission to make a provision in the will, and have no reference to the pecuniary value of such provision." In re Estate of Callaghan, 119 Cal. 571, 574, 51 P. 860, 861, 39 L.R.A. 689.

In view of the above conclusions, it is not necessary to consider other points raised by respondent. The portions of the decree of settlement of final account and of final distribution appealed from are affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

49 Cal.App.2d Supp. 739

PEOPLE v. JEMNEZ.

Cr. A. 1833.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 27, 1942.

1. Intoxicating liquors ⇐1

A citizen has no inherent right to engage in a business of selling alcoholic beverages.

2. Intoxicating liquors ⇐1

The governing authority may, in the exercise of the police power for the protection of public morals, health, and safety, grant the privilege of selling alcoholic beverages on such terms and conditions as the authority may determine.

3. Constitutional law ⇐88

The constitutional provision that no person shall, on account of sex, be disqualified from entering on or pursuing any lawful business, vocation or profession, is subject to such reasonable regulations as may be imposed in the exercise of police powers. Const. art. 20, § 18.

4. Constitutional law ⇐88
Intoxicating liquors ⇐15

The provision of the Alcoholic Beverage Control Act that every person who uses the services of a female in mixing alcoholic beverages on any premises used for sale of alcoholic beverages for consumption on the premises, or any female who renders such services on such premises, unless she is a licensee or the wife of a licensee, is guilty of a misdemeanor, does not violate the constitutional provision that no person shall, on account of sex, be disqualified from entering on or pursuing any lawful business, vocation or profession. Gen.Laws 1937, Act 3796, § 56.4; Const. art. 20, § 18.

5. Constitutional law ⇐206(2), 224
Intoxicating liquors ⇐15

The provision of the Alcoholic Beverage Control Act that every person who uses the services of a female in mixing alcoholic beverages on any premises used for sale of alcoholic beverages for consumption on the premises, or any female who renders such services on such premises, unless she is a licensee or the wife of a licensee, is guilty of a misdemeanor, is not unconstitutional on ground that it abridges the privileges and immunities of citizens and denies "equal protection of the law" to those whose employment it prohibits. Gen.Laws 1937, Act 3796, § 56.4.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of the Law".

6. Constitutional law ⇐88

A particular class of women has no constitutional right to be employed in a particular business when the effect of such employment would be detrimental to society.

7. Intoxicating liquors ⇐15

The provision of the Alcoholic Beverage Control Act that every person who uses the services of a female in mixing alcoholic beverages on any premises used for sale of alcoholic beverages for consumption on the premises, or any female who renders such services on such premises, unless she is a licensee or the wife of a licensee, is guilty of a misdemeanor, is not invalid on ground that it is unreasonable and arbitrary to impose a penalty on the "mixing" only of alcoholic beverages, when it might have gone further and have prohibited the serving of alcoholic beverages, since it is not necessary that a penal statute cover the entire legal permissible field in order to be valid. Gen.Laws 1937, Act 3796, § 56.4.

Appeal from Municipal Court of City of Los Angeles; C. Newell Carns, Judge.

Antonia Jemnez was charged with mixing alcoholic beverages at an on-sale licensee's place of business in violation of the Alcohol Beverage Control Act. From an order dismissing the action, the People of the State of California appeal.

Order reversed with directions to vacate order and overrule motion to dismiss.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and William J. D. Lane, Deputy City Atty., all of Los Angeles, for appellant.

Wyman G. Reynolds, of Los Angeles, for respondent.

FOX, Judge.

Defendant, a woman who was neither an on-sale licensee nor the wife of a man who held an on-sale license, was charged with mixing alcoholic beverages at an on-sale licensee's place of business, in violation

of section 56.4 of the Alcoholic Beverage Control Act. Act 3796, Deering's General Laws 1937. The pertinent portions of that section are as follows: "Every person who uses the services of a female in mixing alcoholic beverages * * * on any premises used for the sale of alcoholic beverages for consumption on the premises, or any female who renders such services on such premises, is guilty of a misdemeanor * * *.

"The provisions of this section shall not apply to the mixing of alcoholic beverages * * * by any on-sale licensee nor to the mixing of such beverages by the wife of any licensee on the premises for which her husband holds an on-sale license."

Defendant challenged the constitutionality of the section on the ground that it violates section 18 of Article XX, of the State Constitution, which provides that "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession." She further contends the section is unconstitutional in that it abridges the privileges and immunities of citizens and denies to those whose employment is prohibited equal protection of the laws; and, finally, that it is unreasonable and arbitrary to impose a penalty upon the "mixing" only of alcoholic beverages. Defendant's position was sustained and the complaint dismissed. The People have appealed from that ruling. In our opinion the Court was in error and the order must be reversed.

[1-4] It has long been uniformly held that there is no inherent right in a citizen to engage in the business of selling alcoholic beverages (Ritz v. Lightston, 1909, 10 Cal.App. 685, 689, 103 P. 363; State Board of Equalization v. Superior Court, 1935, 5 Cal.App.2d 374, 377, 42 P.2d 1076; Irvine v. State Board of Equalization, 1940, 40 Cal.App.2d 280, 284, 104 P.2d 847; Crowley v. Christensen, 1890, 137 U.S. 86, 11 S.Ct. 13, 34 L.Ed. 620), and that "The regulation of that business is governed by legal principles different from those which apply to what may be termed inherently lawful avocations." Martin v. Board of Supervisors, 1933, 135 Cal.App. 96, 101, 26 P.2d 843, 845. The governing authority may, therefore, in the exercise of the police power for the protection of the public morals, health and safety, grant the privilege of selling alcoholic beverages upon such terms and conditions as it may determine. See Ritz v. Lightston, supra, at page 688, of 10 Cal.App., 103 P. 363, quoting from Crowley v. Christensen, supra. In recognition of these principles our Supreme Court has held in Ex parte Hayes, 1893, 98 Cal. 555, 33 P. 337, 338, 20 L.R.A. 701, that the above quoted constitutional provision (§ 18 of Art. XX) "does not * * * operate as a limitation upon the power of the state * * * to prescribe the conditions upon which the business of retailing intoxicating liquors shall be permitted to be carried on, or in regulating the manner in which such business shall be conducted." The ordinance under attack in this case and which was sustained by the Court provided, among other things, that no license should be granted to sell intoxicating liquors in any place where women were employed to wait on the patrons. That one who formerly employed women to wait on the trade was thereby shown to be unfit to have a liquor license was held in Foster v. Police Commissioners, 1894, 102 Cal. 483, 37 P. 763, 41 Am.St.Rep. 194. The only case out of line with these decisions is that of In re Maguire, 1881, 57 Cal. 604, 40 Am.Rep. 125. But that case cannot now, in view of these subsequent decisions, be regarded as representing the law of this state. See Adams v. Cronin, 1902, 29 Colo. 488, 69 P. 590, 63 L.R.A. 61 for discussion to the effect that the Maguire case was overruled by the Hayes and Foster cases. The decision in the Hayes case is supported by the further reason that this constitutional provision, like all other constitutional guaranties, "is subject to such reasonable regulations as may be imposed in the exercise of police powers." Matter of Application of Miller, 1912, 162 Cal. 687, 692, 124 P. 427, 428.

[5] The argument that the section forbidding women employees to mix drinks abridges the privileges and immunities of citizens and denies equal protection of the laws to those whose employment is prohibited, overlooks two fundamental propositions: (1) that the business here involved is one of privilege and not of right; and (2) that the classification of women with respect to mixing drinks is reasonable. When these two propositions are established, as we believe they are in this case, the force of the argument vanishes. See In re Considine, C.C., 1897, 83 F. 157; People v. Case, 1908, 153 Mich. 98, 116 N.W. 558, 18 L.R.A.,N.S., 657; City of

Hoboken v. Goodman, 1902, 68 N.J.L. 217, 51 A. 1092.

[6] Furthermore, a particular class of women has no constitutional right to be employed in a particular business when the effect of such employment would be detrimental to society. The section of the Alcoholic Beverage Control Act under consideration divides women into three different classes with respect to the privilege of mixing drinks in a place having an on-sale license, and gives the privilege to two of these groups while denying it to the third. It seems to us that there is a fair and substantial basis for the classification. As to the group of women who are licensees, the Board of Equalization has direct supervision over them with the power to revoke or suspend their licenses, so it is not reasonable to assume that such a licensee is going to do anything improper and thus lose her license and business. As to the wife of a licensee, she is more nearly in the position of a licensee than in that of an employee and her presence may fairly be considered to be a restraint upon impropriety. A mere employee would not have the same incentive to prevent improprieties that either a licensee or the wife of a licensee would naturally have. Furthermore, the legislature may well have concluded that it would be an unwholesome influence upon the women themselves, the general public, and upon our young people, to permit women generally to act as bartenders. The precise classification here involved was approved in City of Hoboken v. Goodman, supra.

[7] The final argument that the section is invalid on the ground that it is unreasonable and arbitrary to impose a penalty upon the "mixing" only of alcoholic beverages is without merit. The fact that the section might have gone further and prohibited women employees from serving as well as mixing drinks does not render it invalid. It is not necessary for a penal statute to cover the entire legally permissible field in order to be valid. Farmers' & Merchants' Bank v. Federal Reserve Bank, 1922, 262 U.S. 649, 43 S.Ct. 651, 67 L.Ed. 1157, 1164, 30 A.L.R. 635; James-Dickinson Farm Mortg. Co. v. Harry, 1927, 273 U.S. 119, 47 S.Ct. 308, 71 L.Ed. 569, 574; Matter of Application of Miller, supra, 162 Cal. pages 697, 698, 124 P. 427.

The order is reversed, with directions to the trial court to vacate its order dismissing the complaint and to overrule the motion to dismiss the same.

BISHOP, Acting P. J., and VICKERS, J., pro tem., concur.



49 Cal.App.2d Supp. 743

BASCH et al. v. TIDE WATER ASSOCIATED OIL CO.

No. 1439.

Appellate Department, Superior Court, City and County of San Francisco, California.

Feb. 6, 1942.

1. Vendor and purchaser ⇐226(1)

The absence of notice of a prior title or interest is an essential requirement in order that one may be regarded as a "bona fide purchaser".

See Words and Phrases, Permanent Edition, for all other definitions of "Bona Fide Purchaser".

2. Vendor and purchaser ⇐239(1)

One who, as a bona fide purchaser, purchases realty, is protected against claims and interests of third persons.

3. Vendor and purchaser ⇐220

The doctrine of "bona fide purchaser" is peculiarly available for purposes of defense, and the defense can be maintained only in favor of a title, though it may be defective, which a bona fide purchaser has, and it is not available for the purpose of creating a title.

4. Vendor and purchaser ⇐220

Affirmative relief will only be granted a bona fide purchaser where there has been fraud, or what equity regards as fraud, on the part of the person holding prior title or interest, and against whom the affirmative relief is granted.

Appeal from Municipal Court, City and County of San Francisco.

On rehearing.

Former opinion modified.

For former opinion see 117 P.2d 956.

Belli & Leahy, by M. Leahy, all of San Francisco, for respondents.

W. F. Kiessig and Edmund D. Buckley, both of San Francisco, for appellant.

McWILLIAMS, Judge.

The court granted a re-hearing in this case for the purpose of giving further consideration to the doctrine laid down in Smith v. Yule, 31 Cal. 180, 89 Am.Dec. 167, and the other cases, which under varying circumstances, have followed and applied the principle of that case.[1] The consideration that we have given to the subject following the re-hearing has led us to the conclusion that our original judgment of reversal was correct. The doctrine of the Yule case, supra, and of the cases that have followed it, has been stated as follows: "In order that possession by one other than the vendor of real property may constitute or establish notice to subsequent purchasers it must be hostile to and inconsistent with the record title. If the apparent possession is consistent with the record title, it is presumed to be referable thereto, and the purchaser need make no further inquiry, but may rely on the record title." 25 Cal.Jur. p. 840.

On the basis of this doctrine respondents argue that, as bona fide purchasers, they were not bound by the supplemental agreement between appellant and its lessor. Of that supplemental agreement which modified the lease in the matter of the rent to be paid, respondents concededly knew nothing at the time they purchased the property. Hence, they argue, they may enforce the provisions of the original lease and exact the rent provided for therein. In considering the situation it must be borne in mind that respondents do not contend that they are seeking to enforce the terms of the actual agreement that existed between appellant and its lessor at the time that respondents bought the property. They, impliedly at least, consider that the supplemental agreement would prevail as between the parties to it. Nor do they claim that any estoppel exists against appellant which will preclude appellant from invoking the terms of the supplemental agreement. Instead they contend in effect that since they were bona fide purchasers, having bought the property without notice of the supplemental agreement they are in a position to enforce the terms of the original lease regardless of the fact of its subsequent modification. That contention, in our opinion, overlooks the true nature of the doctrines of notice and of bona fide purchaser.

[1-3] The absence of notice is an essential requirement in order that one may be regarded as a bona fide purchaser. As a bona fide purchaser one who buys property is *protected against* the claims and interests of third persons. Boone v. Chiles, 35 U.S. 177, 210, 10 Pet. 177, 9 L.Ed. 388, cited and followed in Eversdon v. Mayhew, 65 Cal. 163, 167, 3 P. 641. As stated in the Idaho case of Ewald v. Hufton, 31 Idaho 373, 173 P. 247, 248: "The doctrine of bona fide purchaser is peculiarly available for purposes of defense. * * * This defense can be maintained only in favor of a title, though it may be defective, which a bona fide purchaser has, and it is not available for the purpose of creating a title." To the same effect, see Manistique Lumber Co. v. Lovejoy, 55 Mich. 189, 20 N.W. 899, and cases therein cited. Also see 66 Cor.Jur. pp. 1189, 1190. As has at times been said by the courts the doctrine constitutes a shield and not a sword.

It is upon this theory, namely, that the doctrine constitutes a defense to a bona fide purchaser of property, that most of our California cases have been decided. Thus in the Yule case, supra, it was held that the plaintiff who sued to quiet title could not prevail and judgment in her favor was reversed because the defendant had been shown to be a bona fide purchaser. Although the plaintiff was in possession of the property purchased by the defendant at the time of such purchase the court held that since her possession was consistent with the record title, defendant was not put on inquiry and hence he was to be regarded as a bona fide purchaser with all the rights pertaining to such purchaser. To the same effect were the holdings of the Supreme Court in the cases of Schumacher v. Truman, 134 Cal. 430, 66 P. 591; and Aden v. City of Vallejo, 139 Cal. 165, 72 P. 905.

[4] It is true that in certain of our California cases the plaintiff has prevailed in actions in which he sought affirmative relief. But those cases come within recognized exceptions to the general rule. As stated by Mr. Pomeroy (Equity Jurisprudence, 5th Ed., Sec. 779): "The peculiar theory upon which equity acts

[1] For the facts in the instant case, see our prior opinion reported in 48 Cal.App.2d, Supp., —, 117 P.2d 956.

towards a bona fide purchaser seems of necessity to imply that he should be a defendant. There are a few special circumstances, however, in which the theory, consistently followed out, requires that he should be aided by affirmative relief. When these circumstances are carefully examined, it will be found that the fraud, or what equity regards as fraud, of the party holding the prior title or interest, and against whom the affirmative relief is granted, is usually, if not always, the ground upon which the court interposes on behalf of the subsequent bona fide purchaser."

Thus in the case of Garber v. Gianella, 98 Cal. 527, 33 P. 458, the plaintiff prevailed as a bona fide purchaser over the defendant who claimed a leasehold interest in the property involved. The circumstances shown, said the court, estopped the defendant from asserting his interest since he had had every opportunity to give the plaintiff notice of his lease and had failed so to do. Affirmative relief has also, at times, been extended to a bona fide purchaser in a suit to remove a cloud from his title in a situation where the cloud constituted an apparent lien, which in reality was inoperative against the purchaser. See Pomeroy's Equity Jurisprudence, 5th Ed., Sec. 783.

Respondents do not bring themselves within any of the exceptions to the general rule. In the absence of any contractual liability resting on appellant to pay the rent sued for, and in the absence of other circumstances justifying the granting to respondents the relief they ask against appellant we remain of the opinion that the lower court erred in rendering judgment in favor of respondents. Of course, it does not follow from our holding in this case that if respondents were defrauded in the transaction through misrepresentation or failure to disclose the true state of the property sold they are without remedy. But the question as to the rights that respondents might have against their vendor is not before us.

Our former opinion will stand except for the closing paragraph which is ordered stricken therefrom.

GRIFFIN, P. J., and FOLEY, J., concurred.

WILES v. STATE PERSONNEL BOARD et al.

Sac. 5490.

Supreme Court of California.

Feb. 2, 1942.

Rehearing Denied March 2, 1942.

1. Officers ⇐11

The object and purpose of probationary period is to supplement work of civil service examiners in passing on qualifications and eligibility of probationer.

2. Officers ⇐69

During probationary period, appointive power can observe conduct and capacity of probationer, and, if in opinion of appointive power probationer is not fitted to discharge duties of position, probationer can be discharged by summary method provided in Civil Service Act before probationer acquires permanent civil service status. St. 1937, p. 2100, § 122.

3. Officers ⇐11

The hospitalization of civil service employee did not extend six months' probationary period, where employee continued to do his work at hospital under direct supervision of appointive power.

4. Officers ⇐11

That civil service employee, who was hospitalized during probationary period, received disability compensation while in hospital, was insufficient to show that employee did not perform such services while in hospital, so that time spent in hospital would not be included in determining termination of probationary period, where record was not clear whether compensation was for partial or total disability.

5. Officers ⇐11

The acceptance of compensation by civil service employee during period that he was hospitalized did not "estop" employee from asserting that while in hospital he performed such services that period of hospitalization did not extend his probationary period.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

6. Officers ⇐69

A letter rejecting civil service employee, dated February 9, 1939, and served on employee on February 10, 1939, and stating that "effective March 4, 1939", employee's services "will be terminated", and that employee would be allowed his accumulated vacation from February 10, 1939, to March 3, 1939, did not have the effect of rejecting employee before termination of his probationary period on February 12, 1939, and hence he became "permanent employee" subject to dismissal only by procedure provided in Civil Service Act. St.1937, pp. 2100, 2102, 2106, §§ 122, 150, 173.

See Words and Phrases, Permanent Edition, for all other definitions of "Permanent Employee".

7. Officers ⇐94

The provision in Civil Service Act relating to vacations and rules of personnel board established thereunder becomes a part of contract of employment of civil service employee, and, after the time of service required, the vacation period or the money equivalent thereof becomes a right under the terms of employment, and employee at time of his dismissal can claim a sum equivalent to accumulated vacation time due him. St. 1937, p. 2102, § 150.

8. Officers ⇐72(1)

A civil service probationer is entitled to have the statutory procedure for dismissal strictly followed. St.1937, pp. 2100, 2106, §§ 122, 173.

9. Officers ⇐72(1)

Where procedure for dismissal of civil service employee required employee's rejection within six months' probationary period and such procedure was not followed, mere intent to dismiss within probationary period was not sufficient, and dismissal was not effected where rejection was not accomplished within such period.

10. Officers ⇐99

Any remuneration received from employment obtained by civil service employee subsequent to his wrongful discharge must be deducted from salary due him for period during which he was discharged.

EDMONDS, J., GIBSON, C. J., and TRAYNOR, J., dissenting.

In Bank.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Mandamus proceeding by Elmer J. Wiles against the State Personnel Board and others, to require the defendants to reinstate the petitioner to the permanent position of personnel record officer of the California National Guard, and to pay his salary. From a judgment denying the

writ of mandamus, the petitioner appeals.

Reversed, and writ of mandate ordered to be issued.

For prior opinion, see 111 P.2d 928.

Rehearing denied; GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

Albert E. Sheets and Anthony J. Kennedy, both of Sacramento, for appellant.

Earl Warren, Atty. Gen., and Wilmer W. Morse and Bayard Rhone, Deputies Atty. Gen., for respondents.

CURTIS, Justice.

Petitioner has appealed from a judgment of the trial court refusing to grant a writ of mandamus to require respondents to reinstate him to the permanent position of Personnel Record Officer of the California National Guard, with full and permanent civil service status therein, and to pay his fixed salary of $140 per month from March 4, 1939.

On March 1, 1938, petitioner received a temporary appointment to the position in question. On August 13, 1938, after qualifying by examination, he was appointed to the permanent position. This appointment was subject to a probationary period of six months under rule nine, section 1, of the Rules and Regulations of the State Personnel Board. On September 11, 1938, while engaged in the performance of the duties of his position, petitioner sustained a back injury, which cause his hospitalization from that date to October 24, 1938. Upon the advice and at the direction of his superiors, petitioner continued to perform a part of his official duties while he was confined in the hospital. During this period petitioner did not receive his salary but was paid disability compensation from the State Compensation Insurance Fund. After dismissal from the hospital petitioner continued to perform the duties of his position until February 10, 1939. On that date the new Adjutant General, who had taken office on January 4, 1939, served petitioner with a letter dated February 9, 1939, advising him that his services would be terminated on March 4, 1939. This letter contained the reasons for rejection, as required by section 122 of the State Civil Service Act, St.1937, p. 2100, and a copy was sent to the Personnel Board and received by it on February 11, 1939. A Report of Separation and a Report of Performance were filed with the Personnel Board on February 20, 1939. Neither of these reports was served on petitioner. Petitioner was paid up to and including the 3rd day of March, 1939, although he was prohibited from performing the duties of his position from February 10, 1939.

On this appeal it is contended that there was no rejection of the services of petitioner within the probationary period, and further, that the appointing authority did not comply with the statutory method of dismissal.

The probationary period began on August 13, 1938. Without interruption that period of probationary service normally would have been terminated on February 12, 1939. There was, however, a six-week period in which petitioner was hospitalized. Therefore, the first question to be determined is whether the date of termination of the probationary period was extended to March 20, 1939, because of the period of hospitalization.

[1, 2] The object and purpose of a probationary period is to supplement the work of the civil service examiners in passing on the qualifications and eligibility of the probationer. During such period the appointive power is given the opportunity to observe the conduct and capacity of the probationer, and if, in the opinion of that power, the probationer is not fitted to discharge the duties of the position, then he may be discharged by the summary method provided for in the Civil Service Act before he acquires permanent civil service status. See Neuwald v. Brock, 12 Cal.2d 662, 670, 86 P.2d 1047; Note, 131 A.L.R. 383.

In the instant case the record discloses that petitioner's superiors, General Morehead, who was at that time the Adjutant General, and Colonel Arndt, the executive officer of the National Guard, came to visit petitioner in the hospital soon after the accident and made arrangements whereby he was to carry on the duties of his office. During the period petitioner kept in daily contact with his office by telephone and in this way continued to supervise the work being done in the office. Office correspondence was brought out to petitioner by messenger service. Some dictation was given by petitioner at the hospital relative to office matters, and other work was written out in longhand by petitioner, sent to the office, typed and returned to petitioner for his

signature. An electric adding machine was furnished petitioner so that he could continue to audit current accounts. General Morehead and Colonel Arndt came to the hospital frequently and General Morehead testified that petitioner performed the duties of his office satisfactorily. The trial court found "that it is true that during the period of said confinement at said hospital petitioner as said Personnel Record Officer and as ordered and directed by and acting under the supervision of the adjutant general of the State of California, performed part but not all of his duties."

[3] From these facts it is clear that the purposes and objects of the probationary period were fulfilled during the time petitioner was in the hospital. Under such circumstances that time should not be deducted from the probationary service. This conclusion should not be interpreted to mean that in every case the probationary period terminates after six months' elapsed time from the date of appointment. It is possible, as urged by respondents, that a situation might arise in which a probationer because of illness would be forced to sever all relations with his office and duties a few days after his appointment. If such absence continued for a period of six months, the purpose of the probationary period would be defeated if that period were held to be terminated after six months' actual elapsed time from the date of appointment. In such a situation the time spent away from the position should not be included in determining the termination of the probationary period. However, as previously shown, petitioner here continued to do his work under direct supervision of the appointive power during his absence from the office. His work while in the hospital met the approval of General Morehead, the adjutant general, who immediately upon petitioner's recovery from his injury continued him in the position to which he had been appointed. It thus appears that full opportunity to observe petitioner's conduct during his entire probationary period was afforded his superiors.

[4] The fact that petitioner did not receive his salary but received disability compensation during the period of hospitalization is not necessarily determinative of the question of whether he performed services during that period. The record is not entirely clear on the question of compensation. There is evidence and, in fact, the attorney for petitioner stipulated that "he [petitioner] received compensation," but the attorney stated that he didn't know whether it was for total disability. Petitioner himself, in answer to a question as to whether he received compensation for total disability, stated that he didn't know. Respondents didn't introduce any documentary evidence of a rating or an award by the Industrial Accident Commission. There being no evidence that the commission had determined after a hearing that petitioner was totally disabled, the trial court was free to find that petitioner had performed some of the duties of his position while he was in the hospital. The court did so find, and this finding is supported by undisputed evidence.

[5] Respondents also contend that petitioner, having accepted compensation, is estopped from asserting that he performed the duties of his position during the period of hospitalization. Here again, the contention is based on the assumption that petitioner knowingly accepted compensation for total disability. As previously stated, this assumption is not supported by the evidence. If a claim were now being made for salary for the time spent in the hospital, respondents might properly plead estoppel, but here petitioner is simply asserting that he performed sufficient of the duties of his position while in the hospital to include that time as a part of his probationary service. Under such circumstances and keeping in mind the purpose of the probationary period, there appears to be no place for an estoppel argument.

Our conclusion that the time spent in the hospital should not be deducted from the period of probationary service in no way conflicts with any statements made in the case of Ballf v. Civil Service Commission, 43 Cal.App.2d 211, 110 P.2d 478, cited by respondents. The principal statement in that case relied on by respondents is the following, at page 216, of 43 Cal. App.2d, at page 480 of 110 P.2d: "The unequivocal language used in section 148 [a section of the Charter of the City of San Francisco similar to Section 118 of the State Civil Service Act and the rules adopted thereunder] shows, however, that actual service, rather than constructive, is required." Such statement has no application to the instant situation, for here there is no question of constructive

service, but, as previously discussed, petitioner performed the actual duties of his position during the period of hospitalization.

[6] Having concluded that the period of probationary service terminated on February 12, 1939, the question remains whether petitioner was properly rejected on or before that date. The letter of rejection dated February 9, 1939, and served on petitioner on February 10, 1939, opened with the sentence "*Effective March 4, 1939,* your services as Personnel Officer, California National Guard, *will be terminated.*" [Italics added.] The reasons for termination were then stated and the letter concluded with the following sentence: "You will be allowed your accumulated vacation from February 10th to March 3, 1939, inclusive." Petitioner argues that this notice of rejection, although given before the termination of the probationary service on February 12, 1939, was not made effective until after that date or on March 4, 1939, and that therefore he became a permanent employee, subject to dismissal only by the procedure provided for under section 173 of the Civil Service Act, which procedure was admittedly not followed.

In view of the italicized portion of the opening sentence, there would seem to be little that could be said in opposition to petitioner's contention. However, respondents contend and the trial court concluded that petitioner was rejected on February 9, 1939. In support of this contention and conclusion respondents refer to rule thirteen, section 1, of the Rules and Regulations of the State Personnel Board, which provides, in part, that after six months of continuous service a civil service employee is entitled to a vacation on the basis of one and one-quarter working days for each month or major portion of a month of service up to the first of January next following the completion of such six months of service, and thereafter a vacation of fifteen working days per year. Under this rule it is claimed that petitioner, having commenced work on a temporary basis on March 1, 1938, was entitled to fifteen days' vacation time. Reference is then made to the last sentence of the letter of rejection, which stated: "You will be allowed your accumulated vacation from February 10th to March 3, 1939, inclusive." It is then argued that the rejection was effective immediately, i. e., on February 9, 1939, but that it, of necessity, had to be phrased in the future tense because of the accumulated vacation period. Petitioner challenges the number of days' vacation to which respondents assert he was entitled; however, that issue need not be decided here. Regardless of the accumulated vacation time, the fact is that petitioner's services were not terminated until after February 12, 1939, the final day of the probationary period. The notice of rejection on February 9, 1939, did not state: "Your services *are* terminated." It stated: "Effective March 4, 1939, your services * * * will be terminated." The roster card listed the date of dismissal as March 4, 1939. The Report of Separation stated March 4, 1939, as the date of separation from service. Petitioner was paid salary upon pay rolls on which he was certified as holding his position under civil service until March 4, 1939. No amount of argument can change the future tense to the present tense so that the rejection may be deemed to have been made prior to the termination of the probationary period. If notice of a future dismissal within the six months' probationary period were all that was required under section 122 of the Civil Service Act, then the probationary status could be extended indefinitely.

[7] Assuming that petitioner did have some vacation time coming, such fact would not have prevented a present rejection on February 10, 1939. The question of a probationer's right to accumulated vacation time on dismissal is not directly before us on this appeal because petitioner is not claiming that he was deprived of any vacation time. However, it might be observed in this regard that there seems to be no reason why a state employee at the time of his dismissal could not properly claim a sum equivalent to the accumulated vacation time due him. Section 150 of the Civil Service Act and the rules of the Personnel Board established thereunder become a part of the contract of employment, and after the time of service required, the vacation period or the money equivalent thereof becomes a right under the terms of his employment.

[8, 9] It may be true that respondent Farrell intended an immediate rejection on February 9, 1939, but, as previously pointed out, there was no such rejection accomplished by the notice given. A civil service probationer is entitled to have the statutory procedure for dismissal strictly

followed. Brown v. State Personnel Board, 43 Cal.App.2d 70, 110 P.2d 497; Nilsson v. State Personnel Board, 25 Cal. App.2d 699, 78 P.2d 467. The procedure here required rejection within the six months' probationary period. This procedure was not followed and the mere intent to dismiss within the period was not sufficient. A rejection not having been accomplished within the probationary period, no dismissal was effected. Brown v. State Personnel Board, supra; Kelly v. State Personnel Board, 31 Cal.App.2d 443, 88 P.2d 264. Therefore, the trial court erred in refusing to issue the writ of mandate ordering petitioner's reinstatement.

[10] Petitioner has asked for his accrued salary from March 4, 1939. The record fails to disclose what other employment, if any, petitioner has engaged in subsequent to that date. If he has had some gainful employment, it is only equitable and just that any remuneration received from such employment be deducted from the accrued salary due him. See Kelly v. State Personnel Board, supra.

For the foregoing reasons the judgment and order appealed from are reversed and the trial court is ordered to issue its writ of mandate requiring the reinstatement of petitioner with accrued salary from March 4, 1939, less any sums received by petitioner as salary from employment subsequent to that date. What sums, if any, petitioner has received should be determined by further appropriate proceedings in the trial court.

SHENK, HOUSER, and CARTER, JJ., concurred.

EDMONDS, Justice (dissenting).

I agree that the petitioner's period of probationary service terminated on February 12, 1939, but, as I read the record, legally effective action was taken before that date to dismiss him from the civil service.

The letter of rejection is dated February 9, 1939, and was served on him the following day. At that time there had accumulated to the petitioner's credit a vacation of 15 working days. Sec. 150, Civil Service Act. In dismissing him, the adjutant general recognized his right to these days under the terms of the statute and a rule of the State Personnel Board, based upon it, which provides: "When an employee is separated from the service and has not been granted his vacation, he shall be entitled to unused portions of vacation accumulated from the previous year and to vacation on the basis of one and one-quarter days for each month or portion of a month of service from the first of the calendar year until the date of his separation, but not to exceed thirty working days." Sec. 4, rule 13.

The petitioner relies entirely upon the fact that the letter of dismissal fixes March 4th as the effective date of the termination of his services. But the letter, read in its entirety, clearly evidences the adjutant general's present intention on February 9th, within the probationary period, to discharge the petitioner. He stated that during the probationary period the petitioner "failed to carry the responsibilities and duties prescribed for this position" and that he found it necessary to take action "for the good of the service." But as the petitioner was then entitled to some vacation days, the termination date, so far as the petitioner's right to salary is concerned, was placed at the expiration of that vacation allowance. Under these circumstances, in my opinion, the adjutant general rejected the petitioner as an employee within the probationary period by notice, which included the reasons therefor, served and filed within that time.

The statute provides that a probationer may be rejected during the probationary period. It does not require that, in the event of a rejection, all relations between the probationer and the State are at that moment ended. There are certain incidents to his employment which may carry over. For example, there is no requirement that the employee be paid his accrued salary to the date of the rejection as a condition precedent to the rejection becoming effective. Failure to hand him his salary warrant with the notice of rejection would not invalidate the rejection. Similarly, accumulated vacation time is one of those incidents, which like unpaid salary, carries over, and the fact that a probationer may have accumulated vacation time to his credit at the end of the probationary period should not be held to affect the rejection if made during the statutory period and in accordance with the requirements laid down.

For these reasons, I believe the judgment should be affirmed.

GIBSON, C. J., and TRAYNOR, J., concurred.

19 Cal.2d 324

In re BOGGS' ESTATE.

KING et al. v. BOGGS.

L. A. 17567.

Supreme Court of California.

Feb. 2, 1942.

1. Appeal and error ⇐989

The Supreme Court cannot make further inquiry with respect to findings of the trial court than to ascertain if there is any evidence of a substantial character which supports the findings, and if such is found, the findings must stand regardless of what evidence there may be opposed to findings.

2. Appeal and error ⇐1010(1)

As against positive and direct evidence of a fact found by trial court, a mere conclusion or general statement is not sufficient to meet the definition of "substantial evidence" so as to justify an appellate court in disturbing the finding.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantial Evidence".

3. Executors and administrators ⇐59

Where executors of estate of decedent's judgment creditor filed objections to first account current of decedent's executrix, evidence did not support finding that decedent was solvent at the time of transferring property to his daughter.

4. Insolvency ⇐24

"Insolvency", in its popular and general sense, is used to denominate the insufficiency of the entire property and assets of an individual to pay his debts.

See Words and Phrases, Permanent Edition, for all other definitions of "Insolvency".

5. Fraudulent conveyances ⇐298(1)

Under statute providing that any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, is fraudulent and void as to existing creditors, the concurrence of insolvency and a want of consideration furnish conclusive evidence of an intent to defraud existing creditors. Civ. Code, § 3442.

6. Executors and administrators ⇐59

Where executors of estate of decedent's judgment creditor filed objections to first account current of decedent's executrix, evidence did not support finding that there was consideration for transfers of property by decedent to his daughter, which transfers were made while decedent was insolvent, on theory that an agreement existed between decedent and daughter whereby decedent was to convey to daughter all property coming into his hands in consideration of daughter's acts in pledging shares of stock as security for decedent's loans from a bank.

7. Executors and administrators ⇐59

Evidence justified conclusion that transfers of property by insolvent judgment debtor to his daughter subsequent to a certain date were without consideration and that transfers were fraudulent and void as to existing creditors, and hence such property should have been included in accounting by debtor's executrix, who was the daughter, of assets of debtor's estate. Civ.Code § 3442.

8. Executors and administrators ⇐131

An assignee to which an insolvent judgment debtor assigned a lease as security for an indebtedness had no right to rent collected after expiration of lease from tenant who held over upon same terms as were in lease, and assignee was without authority to enter into an agreement with debtor's executrix respecting a division of such rent.

9. Executors and administrators ⇐115

Where monthly rental received from leased property covered property, part of which belonged to decedent's estate and part to decedent's executrix, individually, and rental was for the property as a whole, a division of the rent as between executrix, individually, and estate could only be made by executrix and estate, provided it was competent for such parties to enter into an agreement of apportionment.

10. Executors and administrators ⇐91

An executrix holds the property of her testator's estate as a "trustee".

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee".

11. Executors and administrators ⇐115

An executrix will not be permitted to deal with herself as an individual in any transaction concerning the property of her testator's estate. Civ.Code § 2230.

12. Trusts ⇐231(1)

Courts will not permit any investigation into the fairness of a transaction whereby a trustee deals with trust property in his individual capacity, or allow the trustee to

show that the dealing was for best interest of beneficiary.

13. Executors and administrators ⇐115

The fairness of an executrix' apportionment between herself, individually, and decedent's estate of rent received from property, part of which belonged to estate and part to executrix, individually, could not be inquired into in proceedings wherein executors of estate of decedent's judgment creditor filed objections to executrix' first account current.

14. Executors and administrators ⇐115

An apportionment between executrix, individually, and decedent's estate of rent received from property, part of which belonged to estate and part to executrix, individually, could not be sustained, where apportionment was made by executrix, and it was beyond the power of a court to approve such a contract or transaction. Civ. Code § 2230.

15. Executors and administrators ⇐115

The illegality of an agreement between an executrix and the assignee of a lease, which had been assigned by decedent as security for an indebtedness, respecting division of income derived from leased property after tenant, upon expiration of lease, held over upon same terms as were in lease did not deprive executrix of the right to a reasonable rental for furniture, which was owned by executrix, individually, and which was in leased house, but executrix was bound to account for entire income derived from leased premises since date of expiration of lease, less reasonable rental value of furniture during such period.

16. Executors and administrators ⇐66

Realty owned by decedent and which was subject to a deed of trust executed by decedent as security for an indebtedness was properly included in inventory of decedent's estate and in executrix' first account current as an "asset" of estate, notwithstanding that realty was encumbered, and it was immaterial whether realty was ever in actual possession of executrix, where there was no contention that executrix did not have knowledge of it. Probate Code § 600.

See Words and Phrases, Permanent Edition, for all other definitions of "Asset".

17. Executors and administrators ⇐111(6), 496(1)

The mere inclusion of encumbered property either in inventory of decedent's estate or in executrix' first account current, or in both, did not control probate court's action in fixing fees of executrix and her attorney.

18. Executors and administrators ⇐111(6), 496(1)

Whether the fees of an executrix and her attorney as fixed by probate court should be based upon actual value of decedent's property or upon value of property less encumbrances thereon depends upon other considerations than the mere listing of property in executrix' first account current.

19. Executors and administrators ⇐510(8)

The question of fees of an executrix and her attorney was not before Supreme Court on appeal from order settling executrix' first account current where probate court had made no order allowing fees to either executrix or attorney.

20. Courts ⇐99(1)

A refusal by probate court to strike out from executrix' first account current encumbered realty belonging to decedent's estate would have no effect upon the court's future action when the matter of fixing fees of executrix and her attorney came before the court.

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Proceedings in the matter of the estate of Paul N. Boggs, deceased, wherein Elizabeth B. Boggs, as executrix, etc., filed her first account current to which Joseph I. King and others, as executors, etc., filed objections. From an order settling the first account current of the executrix, Joseph I. King and others, as executors, etc., appeal.

Reversed with directions.

For prior opinion, see 112 P.2d 961.

Joseph I. King, of Los Angeles, for appellants.

Brooks Gifford and L. M. Reed, both of Pasadena, for respondent.

CURTIS, Justice.

This is an appeal from an order of the superior court sitting in probate settling the first account current of the executrix of the last will and testament of Paul N. Boggs, deceased.

The facts essential to a clear understanding of the points presented here for determination are briefly as follows:

With money borrowed from the Farmers and Merchants National Bank of Los Angeles Paul N. Boggs, on August 21, 1928, purchased through the bank 254 shares of National Supply Company preferred stock. By direction of Mr. Boggs these certificates were transferred to the name of his daughter, Elizabeth B. Boggs, and she signed a collateral agreement pledging this stock with the bank as security for the loan to her father. On March 7, 1929, the same bank bought 500 shares of Union Oil Associates stock for the account of Mr. Boggs, who gave the bank his note for $24,362.50 to cover the purchase price. On March 31, 1929, 200 shares of the National Supply Company preferred stock held by the bank and standing in the name of Elizabeth B. Boggs were called, and Mr. Boggs requested the bank to apply the proceeds against the purchase of the 500 shares of Union Oil Associates stock and to have the certificates for the latter stock transferred to the name of his daughter. This was done, and Miss Boggs again signed a collateral pledge agreement covering the stock so transferred to her name.

About February 15, 1933, Paul N. Boggs resigned his position as vice-president of the Union Oil Company of California. On February 17, 1933, he transferred to his daughter $7,283.24, and a few months later he transferred to her 460 shares of stock of the Union Oil Company of California and an additional $3,700 in cash. Thereafter he transferred to her his equity in a piece of real property located at 1010 Selby Avenue, Los Angeles, and he permitted her to receive and retain as her own the rents from a piece of property located at 674 South New Hampshire Street, Los Angeles, and also from premises at 1015 North Roxbury Drive, Beverly Hills. On October 1, 1936, and just prior to his death, Paul N. Boggs leased this last-named piece of property for the term of one year at a monthly rental of $320, and he assigned the lease to the Farmers and Merchants National Bank as security for its loans to him. The bank also held a trust deed covering this property. As it undoubtedly had the right to do under the assignment of the one-year lease, the bank collected the rent, $125 of which it applied in reduction of Mr. Boggs' indebtedness and the balance, or $195, it paid to respondent for furniture she owned at the premises so leased.

Among Paul N. Boggs' creditors was Sarah Louise Clark, appellants' testatrix, to whom Mr. Boggs owed $35,000 on a note secured by a mortgage on the property located at 674 South New Hampshire Street, and also $8,500 on an unsecured promissory note. In April, 1934, Mrs. Clark accepted a deed to this mortgaged property in satisfaction of the $35,000 note, but Mr. Boggs still owed her $8,500, plus interest from August 5, 1933, on the unsecured promissory note. Mrs. Clark died on September 8, 1934. In February, 1935, the executors of her will brought an action against Paul N. Boggs on the unsecured promissory note, and on June 18, 1936, they obtained a judgment against him for $10,180.25, plus interest. Prior to the rendition of this judgment said executors commenced an action against Paul N. Boggs and his daughter, Elizabeth B. Boggs, attacking the aforementioned transfers made by him to his daughter after February 15, 1933, as fraudulent and void, all of such transfers having been made, so the executors claimed, at a time when Mr. Boggs was insolvent. Mr. Boggs died on October 20, 1936, a few days before this latter action was scheduled to go to trial. Elizabeth B. Boggs qualified as executrix of her father's will, and thereafter she filed her first account current, to which the executors of Mrs. Clark's will, appellants herein, filed objections.

In ordering the account approved the probate judge made the following findings: That Paul N. Boggs was solvent at all times at which the questioned transfers were made by him to his daughter, Elizabeth B. Boggs; that there was an agreement between Elizabeth B. Boggs and her father to the effect that he should transfer to her such property as might come into his hands in consideration of her signing the collateral agreements with the Farmers and Merchants National Bank, pledging the National Supply Company preferred stock and the Union Oil Associates stock as security for his loans from the bank; and that the transfers of property to her by him subsequent to February 15, 1933, were made on account of this agreement.

Appellants' objections to the settlement of the account involve the following matters:

1. The failure of respondent Elizabeth B. Boggs to list as assets of her father's estate the property transferred to her by him subsequent to February 15, 1933.

2. The retention by respondent of the sum of $195 per month as rental for the furniture which she owned and which was located in the house at 1015 North Roxbury Drive, for which property the monthly rental of $320 was collected.

3. The inclusion by respondent in her account as an asset of the estate real property which was subject to a deed of trust in favor of the Farmers and Merchants National Bank of Los Angeles.

[1, 2] Appellants' first objection is predicated upon their claim that the transfers in question were fraudulent and void because they were made at a time when Paul N. Boggs was insolvent and they were not supported by a valuable consideration. In this connection appellants attack the aforementioned findings, and each of them, as being unsupported by the evidence. Fundamental in our consideration of the merits of this contention of appellants are the following well established legal principles relating to the question of conclusiveness of the findings of the trial court: The rule of law governing appellate procedure precludes this court from making further inquiry than to ascertain if there is any evidence of a substantial character which supports the finding, and if such be found, the finding should stand regardless of what evidence there might be opposed to the finding. However, there still remains the necessity that there be some support in the record for the finding, and that as against the positive and direct evidence of a fact a mere conclusion or general statement will not be sufficient to meet the definition of substantial or any evidence. 2 Cal.Jur. 918, et seq.

[3, 4] The finding that Paul N. Boggs was solvent at the time of the questioned transfers to his daughter, respondent herein, is wholly unsupported by the evidence. The record indisputably shows that during this entire period his liabilities exceeded the fair market value of his assets, and respondent so admits. It discloses that all of these transfers were made by Paul N. Boggs to his daughter after his income from the Union Oil Company had stopped by reason of his resignation therefrom on February 15, 1933; that he had then no present prospect of ever satisfying his obligations in full; that in December, 1933, a few months after Paul N. Boggs had transferred to his daughter the aforementioned cash and 460 shares of stock of the Union Oil Company of California, he wrote to appellants' testatrix suggesting that since he was without income and was unable to make any payments due her on the $35,000 promissory note she held against him, she take in satisfaction of this indebtedness the property located at 674 South New Hampshire Street, mortgaged as security for this obligation and valued at that time at $18,000; that because of these admitted financial difficulties of Paul N. Boggs, Mrs. Clark in April, 1934, accepted this offer and the property was accordingly deeded to her; that in January, 1935, Paul N. Boggs stated in a written memorandum that all collateral of any value owned by him was held by the Farmers and Merchants National Bank of Los Angeles; that all of Paul N. Boggs' assets, consisting principally of realty and stocks and having an accurately determinable though fluctuating value, were at all times between February 15, 1933, and the time of his death, October 20, 1936, substantially less than the total amount of his liabilities; and that the deficiency as of the last-mentioned date, appearing in the first account current filed by the respondent as executrix, was approximately $70,000. Insolvency, in its popular and general sense, is used to denominate the insufficiency of the entire property and assets of an individual to pay his debts. Cain v. Richmond, 126 Cal.App. 254, 259, 14 P.2d 546. Measured by this definition, the uncontradicted evidence above recited relative to Paul N. Boggs' financial status demonstrates clearly that he was not solvent during the period under consideration.

[5] At the time the transfers in question were made the law provided that any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, was fraudulent and void as to existing creditors. Civil Code, § 3442. By virtue of this enactment the concurrence of insolvency and a want of consideration furnished conclusive evidence of an intent to defraud existing creditors. 12 Cal.Jur. pp. 1018-1019, § 60, and cases there cited. Accordingly, if the questioned transfers were made by way of gift, they are subject to attack as fraudulent, but if they were made for a valuable consideration and in partial satisfaction of Paul N. Boggs' obligation to respondent, as the probate court found, they are valid and must be sustained.

[6, 7] Examination of the record reveals that there is a total lack of evidence therein to support the finding of the court that an agreement existed between Paul N. Boggs and his daughter, Elizabeth B. Boggs, to the effect that he would convey to her all property coming into his hands in consideration of her pledging the shares of the National Supply Company preferred stock and the shares of the Union Oil Associates stock as security for his loans from the Farmers and Merchants National Bank. This finding of consideration presumably was based upon the theory that Paul N. Boggs' transfer of the 254 shares of National Supply Company stock to his daughter on August 21, 1928, was a valid completed gift, subject to the bank's lien by virtue of the pledge agreement executed by respondent; that respondent's act in allowing Paul N. Boggs to have the proceeds realized from the sale of 200 shares of this National Supply Company stock, called as of March 31, 1929, applied against the 500 shares of Union Oil Associates stock he had purchased through the bank on March 7, 1929, constituted consideration for the transfer of this latter stock to respondent's name on March 31, 1929, and in pursuance of this arrangement respondent signed the collateral pledge agreement covering this Union Oil Associates stock; and that all further transfers by Paul N. Boggs to his daughter, respondent herein, were made in consideration of her having pledged her stock, originally the gift of her father, as security for his indebtedness to the bank. This theory, however, is not sustained by the evidence. The record shows no more than that Paul N. Boggs, wishing on each of these occasions to give his daughter the stock purchased by him with money borrowed from the bank, had the stock transferred to her name on the aforementioned dates, and she, in recognition of the terms on which these gifts to her were made, executed the two collateral agreements necessary to secure her father's loans. The argument now advanced by respondent, that at the time she signed these agreements Paul N. Boggs, in consideration therefor, promised to transfer to her either the original pledged shares of stock, free of any lien, or other property of equal value, is not even substantiated by the most favorable interpretation possible of her own testimony at the hearing before the probate court. On direct examination of respondent, her counsel, apparently for the purpose of showing the connection between the transactions of 1928 and 1929 and the transfers made subsequent to February 15, 1933, asked respondent what, if anything, was ever said between her father and herself about the pledged stock, and she answered that "daddy regretted that because of his not having yet shaped his affairs to the point where he wished, that he could not have secured both my mother and me more than he had." This response does indicate that Paul N. Boggs was naturally concerned over his inability to provide for his family in the way he desired, but it certainly does not permit the inference that Paul N. Boggs promised at the time his daughter executed the pledge agreements in 1928 and 1929, that he in return would make to her future transfers of all property coming into his hands. The record clearly shows that when the 200 shares of National Supply Company stock were called, the bank had a prior right to all of the proceeds and, in fact, applied them on Paul N. Boggs' indebtedness to it. Then Paul N. Boggs, under the same conditions as governed the prior transfer to his daughter, made to respondent a substitute gift, namely, the 500 shares of Union Oil Associates stock, and as part of the terms of that gift she signed the pledge agreement to the bank to secure her father's loans. Under these circumstances the conclusion is inescapable that all of the transfers made by Paul N. Boggs to his daughter subsequent to February 15, 1933, were without consideration, and since the undisputed evidence discloses that at all times from this last-mentioned date to the day of his death Paul N. Boggs, the donor, was insolvent, the transfers in question must be declared fraudulent and void as to his existing creditors, of whom appellants' testatrix was one. Accordingly, such property must be included in the respondent's accounting of the assets of Paul N. Boggs' estate.

Appellants' second objection is directed against the probate court's approval of that part of respondent's account dealing with the apportionment of the monthly rental received for the property located at 1015 North Roxbury Drive. As above stated, Paul N. Boggs on October 1, 1936, a few weeks prior to his death, leased these premises for the period of one year for the sum of $320 per month, and as further security for his indebtedness, he assigned this lease to the Farmers and Merchants

National Bank, already the holder of a deed of trust on the real property at this location. The lease contained no provision relative to the division of the rental received for the dwelling house and the furniture subject to its terms. During this year the bank collected the monthly rental of $320, of which sum it retained $125 and the balance, or $195, it paid to respondent, who owned the furniture at the leased premises. As the rent for these premises for this year had all been assigned to the bank, the estate of Paul N. Boggs had no claim to any of it. It is therefore not involved in the present controversy. However, at the expiration of this lease and after September 30, 1937, the tenant continued to hold over upon the same terms as were contained in his prior lease of this property. As under the previous arrangement relative to the handling of the income derived from these premises and during the entire time covered by respondent's first account now before this court, the bank continued to collect the rent of $320 per month, of which amount it paid to respondent $195 and it kept $125. With reference to these monthly rental collections, respondent's account as executrix shows that she charged herself only with the sum of $125, the portion retained by the bank, and that she gave herself a credit in like amount. The remaining $195 received from the bank each month respondent appropriated to her own use. It is appellants' contention that even though respondent did own the furniture in the house at 1015 North Roxbury Drive, it was, nevertheless, her duty to account for the full amount of the rent collected from the tenant of this property since September 30, 1937, the day the lease assigned to the bank expired.

[8, 9] From these facts it is plain that the bank had no right to any of the rent it collected subsequent to this last-mentioned date, and that it likewise was without authority to enter into any agreement with respondent respecting a division or apportionment of such amount. As the monthly rental covered property part of which belonged to the estate and part to respondent individually, and as it was for the property as a whole, the division of that sum as between the two several owners of the rented property could only be made by the owners, provided it was legal and competent for such parties to enter into such an agreement of apportionment.

[10-12] It is well settled that an executrix holds the property of her testator's estate as a trustee. In re Heydenfeldt's Estate, 117 Cal. 551, 49 P. 713; Firebaugh v. Burbank, 121 Cal. 186, 53 P. 560. It is equally well settled that an executrix will not be permitted to deal with herself as an individual in any transaction concerning the trust property. Civil Code, § 2230. In Davis v. Rock Creek L., F. & M. Co., 55 Cal. 359, at page 364, 36 Am.Rep. 40, it is said: "The law, for wise reasons, will not permit one who acts in a fiduciary capacity thus to deal with himself in his individual capacity." The following cases are to the same effect: Wickersham v. Crittenden, 93 Cal. 17, 29, 28 P. 788; Sims v. Petaluma Gas Light Co., 131 Cal. 656, 659, 63 P. 1011; Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 191, 135 P. 496; In re Estate of Parker, 200 Cal. 132, 139, 251 P. 907, 49 A.L.R. 1025. In Wickersham v. Crittenden, supra, 93 Cal. at page 29, 28 P. at page 790, it is further stated in respect to a transaction wherein a trustee sought to deal with trust property: "Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary." This language is quoted with approval in the case of Pacific Vinegar & Pickle Works v. Smith, 145 Cal. 352, 365, 78 P. 550, 104 Am. St.Rep. 42.

[13] While under these authorities the fairness of the apportionment here in controversy cannot be made the subject of inquiry in this action, it might not be amiss to mention the fact that the assessed value of the real property at 1015 North Roxbury Drive was $17,260 and that of the furniture at the same location was $3,000. Furthermore, the statement of the Farmers and Merchants National Bank as contained in the record shows that for some months prior to October 1, 1936, the bank collected $280 per month as rental for these premises and during this time paid to Elizabeth B. Boggs the sum of $80 per month, but after October 1, 1936, the bank received $320 per month as rent for the same property and paid to Elizabeth B. Boggs the sum of $195 per month.

[14] Under the above line of decision the apportionment of the rent by respondent between herself individually and the estate of her father, she being the executrix of his will, cannot be sustained. It is beyond the power of the court to approve

such a contract or transaction. 6 Cal.Jur. 150; Union Collection Co. v. Buckman, 150 Cal. 159, 88 P. 708, 9 L.R.A.,N.S., 568, 119 Am.St.Rep. 164, 11 Ann.Cas. 609; Eymann v. Wright, 177 Cal. 144, 169 P. 1037; Haley v. Bloomquist, 204 Cal. 253, 268 P. 365; Takeuchi v. Schmuck, 206 Cal. 782, 276 P. 345.

[15] However, while the challenged agreement or understanding between respondent and the bank respecting the division of the income derived from this property is illegal for the foregoing reasons, it does not follow that respondent should be deprived of a reasonable rental for her furniture during the period of time since September 30, 1937, the expiration date of the aforementioned assignment of the rentals to the bank. Accordingly, respondent should account for the entire income derived from these premises since September 30, 1937, less the reasonable rental value of her furniture during this period. It appears from the record that no claim was made before the probate court that the sum of $195 or any other amount was a reasonable rental for this furniture, and the court's approval of respondent's right to retain the amount of $195 per month as rental for her furniture was based entirely and solely upon the agreement made by respondent ostensibly with the bank but actually with herself. As this agreement was illegal, respondent, as above stated, is not entitled to take advantage of its terms. However, the illegality of the agreement in no way affects her right to receive a reasonable rental for her property, and a further hearing of this matter should be had in the probate court for the purpose of determining the reasonable rental value of her furniture for the period mentioned.

[16] Appellants' third and final objection, charging that the probate court erred in permitting the respondent as executrix to include in her account as an asset of the estate certain encumbered real property, is without merit. The fact that the premises known as 1015 North Roxbury Drive, Beverly Hills, and two parcels of land are subject to a deed of trust placed thereon by the decedent Paul N. Boggs in favor of the Farmers and Merchants National Bank as security for his indebtedness to the bank and for which debt the bank has filed its claim against the estate, does not preclude this property from being an asset of the estate. This property subject to said encumbrance was the property of Paul N. Boggs at the date of his death, at which time it became a part of "the estate of the decedent." It was properly included in the inventory of his estate returned by the executrix in compliance with section 600 of the Probate Code, which requires an executor or administrator to file an inventory and appraisement of the estate of his decedent which has come to his possession or knowledge. Whether or not this property was ever in the actual possession of the executrix is immaterial here, for there is no contention that she did not have knowledge of it. Assuming it was the duty of the executrix in rendering her correct account, to list therein all property of the estate undisposed of at the date thereof, the encumbered, as well as the unencumbered, property of the estate was rightly included in the list of property then in her hands.

[17, 18] Appellants' objection to the inclusion of this encumbered property in the executrix' first account no doubt was made upon the theory that for the purpose of fixing the fees of the executrix and those of her attorney, the probate court should not include this property in its determination of the value of the estate. The mere inclusion of encumbered property, however, either in the inventory or in the account, or in both, would not control the action of the probate court in fixing such fees. Whether the fees thus fixed should be based upon the actual value of the property or its value less encumbrances thereon would depend upon other considerations than the mere listing of the property in the account. In re Estate of Lampman, 15 Cal.2d 212, 100 P.2d 488.

[19, 20] The first account current in this estate was filed on November 24, 1937. An appeal from the order of settlement was taken by the present appellants, and the order, with one exception not necessary to mention at this time, was reversed on the ground [among others] that the probate court erred in allowing the sum of $1,000 to each the executrix and her attorney on account of their fees in said estate. The court held that said allowances were excessive. In re Estate of Boggs, 33 Cal.App. 2d 30, 90 P.2d 814. After the decision in that appeal became final, said first account current again came before the probate court for settlement, and the present appeal was taken from the order settling the same at the second hearing. The probate court made no order allowing fees to either

the executrix or her attorney at this second hearing, so the question of their fees is not before this court on this appeal. The probate court, however, refused to strike from the account the encumbered real property belonging to the estate. But this action of the court can have no effect upon its future action when the matter of fixing the fees of the executrix and those of her attorney comes before it. Appellants' last contention cannot be sustained.

For the foregoing reasons the order approving the first account current is reversed, with directions to the probate court to settle the account in accordance with the views herein expressed.

GIBSON, C. J., and SHENK, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.



19 Cal.2d 336

MEYBERG v. SUPERIOR COURT OF LOS ANGELES COUNTY (four cases).

L. A. 18010–18013.

Supreme Court of California.

Feb. 2, 1942.

Rehearing Denied March 2, 1942.

1. Contempt ⇐67

The payment under protest of fines imposed for contempt did not preclude consideration, on certiorari, of question whether court had exceeded its jurisdiction in making orders holding petitioners in contempt and imposing fines. Code Civ.Proc. § 1074.

2. Corporations ⇐201

Where election of officers of corporation had not taken place when stockholder commenced suit to enjoin unwarranted interference with right to vote stock at election, stockholder was not confined to remedy under statute relating to contested elections of officers of corporation, but could maintain injunction suit. Civ.Code, §§ 315, 316.

3. Corporations ⇐201

Courts of equity have power to protect voting rights of stockholders as incident of property ownership, and may restrain unlawful interference with stockholder's right to vote stock owned by him. Civ.Code, § 316.

4. Injunction ⇐230(1), 231

Where it was not shown that court had not acquired jurisdiction of subject matter of injunction suit and of parties thereto, any defensive matter interposed to create factual issues was not a subject for investigation in proceedings for contempt for violation of restraining order, or in certiorari proceeding to review contempt orders. Code Civ.Proc. § 1222.

5. Contempt ⇐67

In absence of any showing that court has exceeded its jurisdiction, orders in contempt proceedings are conclusive on certiorari. Code Civ.Proc. § 1222.

6. Corporations ⇐665(3)

An order restraining interference with stockholder's right to vote certain stock pending hearing on his right to injunction was not an unwarranted interference with internal affairs of a foreign corporation, but was proper as an exercise of court's power to protect an asserted property right. Civ. Code, §§ 316, 320a.

7. Injunction ⇐219

Where contempt proceedings were instituted because of violation of order restraining interference with stockholder's right to vote certain stock, any question of stock ownership was a matter for adjudication in injunction suit, rather than in contempt proceeding or in certiorari proceeding to review contempt orders.

8. Injunction ⇐230(4)

A charging affidavit showing that stockholder was permitted to vote only 2475 shares of stock in election of directors of corporation, whereas restraining order forbade interference with his alleged right to vote 2500 shares, was sufficient to support judgment in contempt.

9. Injunction ⇐219

A restraining order forbidding certain parties, "pending the ownership by plaintiff" of certain stock of corporation, from preventing plaintiff from voting such stock was not so uncertain that prevention of right to vote such stock could not be punished as contempt, where parties who were charged with contempt conceded that plaintiff was record owner of stock.

10. Injunction ⇐231

In contempt proceeding for violation of order restraining interference with stockholder's right to vote stock, whether certain other stockholders, who voted by proxy at meeting at which restraining order was allegedly violated, should be purged of contempt charge by reason of their asserted attempt to comply with restraining order in instructions to their proxies was for trial court.

11. Injunction ⇐225

Where court enjoined interference with voting of 2500 shares of stock by certain stockholder, such stockholder elected to vote 2475 shares himself at election of directors and 25 by proxy, and no objection had previously been made to votes cast by proxy, persons charged with violating injunction by counting only 2475 shares could not defend on ground that stockholder in fact voted only 2475 shares, notwithstanding statute providing that proxy shall be suspended if stockholder elects to be present and vote stock in person. Civ.Code, § 321.

In Bank.

Leonard J. Meyberg, Mitchell S. Meyberg, Lorraine K. Meyberg and James Meyberg were found guilty of contempt, and they bring certiorari.

Affirmed.

Prior opinions, 113 P.2d 473, 474.

Mitchell S. Meyberg, in pro. per., of Los Angeles, R. K. Gandy, of Santa Monica, and R. B. Turnbull and P. M. Joseph, both of Los Angeles, for petitioners.

J. H. O'Connor, County Counsel, and Douglas DeCoster, Deputy County Counsel, both of Los Angeles, for respondent.

SHENK, Justice.

Mitchell S. Meyberg, Leonard J. Meyberg, Lorraine K. Meyberg, and James Meyberg separately petitioned for the writ of certiorari to review orders of the respondent court holding them in contempt of court. Fines imposed by the orders were paid under protest.

[1] The payment of the fines under protest does not preclude a consideration of the question whether the respondent court has committed an excess of jurisdiction in making the orders presented for review. Hume v. Superior Court, 17 Cal.2d 506, 110 P.2d 669. The several petitions are consolidated for determination of the questions involved.

Leonard J. Meyberg and Lorraine K. Meyberg are husband and wife. Mitchell S. Meyberg is the father of Leonard and James.

One Lazare M. Kauffman and Lorraine K. Meyberg are brother and sister. Their father, Leon Kauffman, procured the organization of a family corporation known as Leon, Inc. Upon the death of their parents, Lazare and Lorraine each received by decree of distribution 2250 shares of the corporate stock. Each also claimed a gift of 250 shares from the father in his lifetime. Lorraine transferred to her husband, Leonard, 250 of her shares. A controversy arose as to the validity of the issue to Lazare Kauffman of the entire 250 shares claimed to have been given to him by his father, the contention of the Meybergs being that Kauffman owned 2475 shares and the Meybergs 2525 shares. A list of stockholders was prepared by Secretary Lorraine K. Meyberg in anticipation of the annual stockholders' meeting of January 15, 1941, showing stockholdings in accordance with the Meyberg claims. Kauffman did not attend that meeting. The meeting showed attendance by Mitchell S. Meyberg and James Meyberg as proxies for Lorraine and Leonard Meyberg. The by-laws of the corporation required the representation of fifty-one per cent of the issued and outstanding stock to constitute a quorum. Because of the asserted absence of a quorum the meeting was adjourned to January 27, 1941.

On January 24, 1941, Lazare Kauffman commenced an action against Lorraine and Leonard Meyberg to obtain a declaration of his right to vote 2500 shares of the stock of Leon, Inc. In that action the respondent court issued an order requiring the defendants to appear on February 3, 1941, and show cause why they should not be restrained during the pendency of the action (1) from permitting more than 5000 shares of stock to be voted in person or by proxy at any meeting of the stockholders of the corporation; (2) from voting in person or by proxy more than 2500 shares; and (3) from directly or indirectly interfering or in any way obstructing the plaintiff from voting in person or by proxy 2500 shares of the stock; and enjoining any of said acts pending the hearing on the order to

show cause. The order was dated January 24, 1941, and was duly served upon the defendants prior to the time of the adjourned meeting.

At the adjourned meeting on January 27, 1941, Kauffman was present in person, and Mitchell and James Meyberg were present as proxies of Lorraine and Leonard Meyberg. The temporary restraining order was read at the meeting. Kauffman was president of the corporation, but James Meyberg presided under a claimed appointment as chairman made at the January 15th meeting. Three questions were voted on prior to the election of directors. A motion to adjourn the meeting indefinitely was defeated by the Kauffman vote of 2500 shares in its favor and the Meybergs' vote of 2500 shares in opposition. The chairman's announcement was that the motion "not having received a majority vote of the shares present is defeated." A motion to adjourn to February 5, 1941, a date subsequent to the return date of the order to show cause in the Kauffman action likewise resulted in a tie vote. The chairman announced that the motion "having received 2500 shares, which is not a majority of the shares present, is defeated." A motion that the voting on the election of directors be conducted on a non-cumulative basis was "unanimously carried by 5000 shares," 2500 of those shares having been voted by Kauffman and 2500 by the Meybergs.

The board of directors consisted of three members. Kauffman cast 1250 votes for himself and 1250 for one David Pokross. The Meybergs cast 1250 for Leonard and 1250 for Lorraine. The inspector of election (Mitchell S. Meyberg, so appointed at the January 15th meeting) declared however that inasmuch as it had been discovered that 50 shares had not been authoritatively issued to Kauffman, only 1225 votes would be counted in favor of David Pokross. A meeting of the newly elected directors immediately followed, attended by Lorraine and Leonard Meyberg, at which Leonard was elected president of the corporation and Lorraine secretary-treasurer.

The failure to permit Kauffman to vote the full 2500 shares in the election of directors was the basis for holding the petitioners in contempt of the court's temporary restraining order and for the imposition of the fines paid under protest. Any merit in the differences between Kauffman and the Meybergs is not a matter for investigation and consideration in this proceeding. The only question presented here is whether the respondent court regularly pursued its authority in the contempt proceeding, which is the proceeding here under review. Code of Civil Procedure, sec. 1074.

The record in the contempt proceeding shows that the contempt order was based on the charging affidavit of Kauffman and the answering affidavit of each of the four defendants in the contempt proceeding, and that all the defendants were present at the hearing.

It is obvious that the only portion of the restraining order which could be said to have been violated was that portion which enjoined defendants from "directly or indirectly interfering or in any way obstructing plaintiff from voting in person or by proxy 2500 shares of said stock at any meeting of the stockholders of said corporation."

[2-5] The first contention of the petitioners is that the complaint in the action for an injunction does not state facts sufficient to constitute a cause of action; that the restraining order issued is for that reason a nullity, and that the contempt order based on a violation of the alleged void restraining order was in excess of the respondent court's jurisdiction. In other words, the petitioners contend that the complaint in the Kauffman action shows that no justiciable controversy exists between the parties and that the plaintiff's remedy, if any, is pursuant to the provisions of section 315 of the Civil Code relating to contested elections of officers of a corporation citing Fritz v. Superior Court, 18 Cal.App.2d 232, 63 P.2d 872. However, no election had taken place which was the subject of contest at the time the action was commenced by the plaintiff Kauffman. In that action Kauffman sought to enjoin an alleged unwarranted interference with his right to vote certain shares of stock. Involved in the issues in that action was the question of the plaintiff's ownership of the shares. Courts of equity have power to protect the voting rights of shareholders as an incident of property ownership. Lord v. Equitable Life Assurance Society, 194 N. Y. 212, 87 N.E. 443, 22 L.R.A.,N.S., 420; Harvey v. Harvey, 7 Cir., 290 F. 653; 14 Cor.Jur. pp. 898, 903; 18 C.J.S., Corporations, § 548, and cases cited. Section 316

of the Civil Code by implication recognizes this equitable remedy by providing that "Shares, the voting of which at said meeting has been enjoined * * * shall not be counted to make up a quorum for said meeting." If a court of equity has the power to enjoin the voting of stock it also has the power to restrain unlawful interference with a stockholder's right to vote stock owned by him. There was no showing in the contempt proceeding that the court in the Kauffman action did not acquire jurisdiction of the subject matter and of the parties, and any defensive matter interposed to create factual issues is not a subject for investigation in the contempt proceeding, or in this proceeding. In the absence of any showing that the court exceeded its jurisdiction the orders in contempt proceedings are conclusive. Sec. 1222, Code Civ.Proc.; People v. Latimer, 160 Cal. 716, 117 P. 1051; Paddon v. Superior Court, 65 Cal.App. 34, 223 P. 91.

[6, 7] It is also contended that the restraining order was an unwarranted interference with the internal affairs of a foreign corporation and an attempt to direct or control the election of directors thereof. As noted, the court in fact did not attempt to remove any officer or director or suspend the exercise of any corporate function or official privilege of any officer of the corporation. The order restraining any interference with the plaintiff's right to vote certain shares of stock pending a hearing on his right to an injunction is an exercise of the court's power to protect an asserted property right of the plaintiff and is not an unwarranted interference with the internal affairs of Leon, Inc. The case of Southern Sierras Power Co. v. Railroad Commission, 205 Cal. 479, 271 P. 747, affords no support for the petitioners' contention. In that case it was held under the facts there involved, that a direction to permit the issuance of certain stock would be an unwarranted interference with the internal affairs of the corporation. The petitioners also rely on Royal Consolidated Mining Co. v. Royal Consolidated Mines Co., Ltd., 157 Cal. 737, 757, 110 P. 123, 132, 137 Am.St.Rep. 165, and the general rule therein stated "that the test of the right to vote as a stockholder at corporate meetings is the ownership of shares, as disclosed by the proper record books of the corporation," and the provisions of section 320a of the Civil Code to the effect that "only persons in whose names shares entitled to vote stand on the stock records of the corporation" on the day specified therein are entitled to vote at meetings of stockholders. The application of that rule and code provision does not call for annulment of the contempt orders, here under review. Any question of stock ownership is a matter for adjudication in the action for the injunction. The petitioners have not shown any invalidity in the restraining order.

[8-10] There is no merit in the contention that the plaintiff's charging affidavit did not allege sufficient facts to support a judgment in contempt. The facts there averred clearly showed that the plaintiff was permitted to vote only 2475 shares for the directors of the corporation when the restraining order forbade any interference with his alleged right to vote 2500 shares, until the issues in the action were adjudicated. In that connection the petitioners also claim that an uncertainty existed in the language of the restraining order pursuant to which it is contended that the conduct of the defendants could not be said to have been contumacious. The petitioners refer to certain language in the order which we have italicized in the following quotation: "Pending the hearing on this order to show cause, you and each of you are, pending any increase in the authorized capital of said corporation, *and pending the ownership by plaintiff, Lazare M. Kauffman of 2500 shares of the stock of said corporation,* restrained and enjoined as follows, * * * (3) From directly or indirectly interfering or in any way obstructing plaintiff from voting in person or by proxy 2500 shares of said stock at any meeting of the stockholders of said corporation." The petitioners state that they construed this language "to mean that if the records of the corporation showed that plaintiff was entitled to vote 2500 shares, such right must not be interfered with." There is no such ambiguity in the language as would make the order void as a matter of law. The language imposing the restraint, namely, the paragraph numbered "(3)", clearly required that the defendants refrain from interfering with the voting of 2500 shares by the plaintiff. The evidence before the court in the contempt proceeding showed that the petitioners so understood the order and that they by their conduct con-

ceded that the plaintiff was the record owner of 2500 shares of stock, (1) when it was declared, at the meeting of January 15, 1941, that a quorum was not represented at the meeting; (2) when the plaintiff was permitted to vote 2500 shares on the question of postponement, first indefinitely and then to a specified date; and (3) when he was permitted to vote 2500 shares on the question whether the voting for directors would be on a cumulative or non-cumulative basis. Consistent with the petitioners' contention that the stockholders' meeting was conducted on the theory that the plaintiff was entitled to vote only in accordance with his stock ownership as shown by the stock records, then, for the purposes of the contempt proceeding at least, they must be deemed by such conduct to have conceded that the stock records showed ownership in the plaintiff to the extent of the 2500 shares specified in the order. This conceded ownership would not cease or change at the moment the matter of election of directors was announced. Furthermore there was no evidence that the petitioners misunderstood the language of the restraining order. The petitioners Lorraine and Leonard Meyberg now assert, and they also alleged in their return to the order to show cause in the contempt proceeding, that they instructed their proxies to obey the order and, specifically, to permit the plaintiff to vote 2500 shares at the postponed stockholders' meeting. The proxies obeyed their instructions and the temporary restraining order only in so far as the restraint on voting the Meyberg stock was concerned. The respondent court was the judge of whether Leonard and Lorraine Meyberg should be purged of the charge by reason of their asserted attempt to comply with the court's order in their instructions to their proxies. The fact that they accepted the election of directors as participated in by their proxies and thereupon, as such directors, elected themselves sole officers of the corporation indicates an intentional disregard of the court's order.

[11] The petitioners also urge that Kauffman in fact voted only 2475 shares in the election of the directors because his proxy voted the remaining 25 shares. They refer to section 321 of the Civil Code providing that the powers of the proxy shall be suspended "if the person or persons executing such proxy shall be present at the meeting and elect to vote in person." A complete answer to the contention is that Kauffman, although present at the meeting, did not elect to vote in person the shares represented by his proxy. His proxy had voted on previous questions submitted to the meeting as well as on the matter of election of directors, and without any objection raised to the counting of the votes on the previously submitted questions.

The petitioners have failed to show that the respondent court exceeded its authority in the contempt proceeding or that they are otherwise entitled to an annulment of the orders complained of.

The orders are affirmed.

CURTIS, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.



19 Cal.2d 388

ERRECA v. WESTERN STATES LIFE INS. CO. et al.

Sac. 5473.

Supreme Court of California.

Feb. 3, 1942.

1. Insurance ⇐516

Under a policy providing benefits for occupational disability, the coverage is limited to duties of a particular occupation and insured is protected as a particular workman, and, notwithstanding his ability to perform the work of other occupations, insured is entitled to disability benefits upon proof that he is totally and permanently disabled from transacting duties pertaining to a defined occupation, generally the employment in which he is engaged at time the policy is written.

2. Insurance ⇐516

A "nonoccupational" or "general disability policy" of insurance indemnifies against total and permanent disability which prevents insured from performing the work of any occupation, and he is insured as a man, not as a particular workman, and may recover only upon proof that he is disabled

from engaging in any gainful occupation or work.

See Words and Phrases, Permanent Edition, for all other definitions of "Nonoccupational Policy" and "General Disability Policy".

3. Insurance ⇐516

"Total disability" exists within the meaning of the term "any occupation" as contained in a general disability clause in a policy providing for disability benefits, whenever insured is incapacitated from following any substantial or remunerative occupation for which he is fitted or qualified, mentally or physically, and by which he is able to earn a livelihood.

See Words and Phrases, Permanent Edition, for all other definitions of "Any Occupation" and "Total Disability".

4. Insurance ⇐516

Where life policy providing for benefits in case of total and permanent disability defined total disability as meaning whenever insured became wholly disabled by bodily injury or disease so that he was prevented thereby from engaging in any occupation or performing any work for remuneration or profit, the policy was a "nonoccupational policy", and where insured who was injured by accident, although a farm executive, had had little formal education and was not qualified for any other occupation and probably could not prepare himself for other remunerative employment because of age and experience, insured was "totally disabled" within policy if no longer able to pursue occupation of farmer or farm supervisor.

See Words and Phrases, Permanent Edition, for all other definitions of "Totally Disabled".

5. Insurance ⇐516

The term "total disability" in a policy providing for disability benefits does not signify an absolute state of helplessness but means such a disability as renders insured unable to perform substantial and material acts necessary to prosecution of a business or occupation in customary way, and recovery is not precluded because insured is able to perform sporadic tasks or give attention to simple or inconsequential details incident to conduct of business.

6. Insurance ⇐516

An insured is not "totally disabled" within meaning of a policy providing for benefits in event of total disability if insured is physically and mentally capable of performing a substantial portion of work connected with his employment, and insured is not entitled to benefits because he is rendered unable to transact one or more of the duties incidental to his business.

7. Insurance ⇐665(5)

Evidence that insured, a farmer who had taken active part in management of his farms, could no longer perform manual labor after sustaining injuries and was unable to supervise indispensable farm operations warranted finding that insured was "totally and permanently disabled" within life policy, notwithstanding that insured made automobile trips to his farms and carried on business negotiations respecting farm operations.

See Words and Phrases, Permanent Edition, for all other definitions of "Totally and Permanently Disabled".

8. Insurance ⇐516

The magnitude of insured's enterprise and his income therefrom were not to be considered in determining whether insured was totally disabled from performing remunerative work within meaning of life policy providing for benefits in case of total and permanent disability and defining total disability.

9. Insurance ⇐516

"Disability insurance" is designed to provide a substitute for earnings when, because of bodily injury or disease, the insured is deprived of capacity to earn his living, and such insurance does not insure against loss of income.

See Words and Phrases, Permanent Edition, for all other definitions of "Disability Insurance".

10. Insurance ⇐668(11)

The question of what amounts to total disability within an insurance policy providing for benefits in case of total and permanent disability is a "question of fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

11. Appeal and error ⇐1010(1)

Where the trial court's finding is supported by substantial evidence, it will not be disturbed upon appeal.

12. Insurance ⇐549

The statutory provision that an insurer shall have the right and opportunity to ex-

amine insured's person when and so often as insurer may reasonably require is a reasonable requirement, and the right to periodically examine insured for proof of continued disability under a policy providing for disability benefits is a condition to future liability of insurer, providing the policy so recites. St.1935, p. 647, § 10339.

13. Insurance ⇐549

A denial of liability by insurer on a disability benefit policy is not a "waiver" of insurer's right to a physical examination of insured where it is based upon a report of insured's physician submitted in connection with claim for benefits, and insurer's right to examination survives insurer's denial of liability regardless of basis thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

14. Insurance ⇐516

A "disability insurance" policy constitutes a "continuing contract" for periodic installment payments depending upon insured's continued disability, and insured has no cause of action, nor insurer any liability, except for benefits which have accrued.

See Words and Phrases, Permanent Edition, for all other definitions of "Continuing Contract".

15. Insurance ⇐237, 549, 666

Since insurer's liability for future benefits under a disability policy is contingent upon existence of total disability at that time, insurer's refusal to pay benefits for any reason does not entitle insured to treat entire contract as repudiated and ask for future benefits upon a theory of "anticipatory breach", and hence, irrespective of the position it has taken concerning its liability for accrued benefits, an insurer may request a physical examination of insured under policy provision to determine its accruing and future liability.

See Words and Phrases, Permanent Edition, for all other definitions of "Anticipatory Breach".

16. Insurance ⇐549

That insurer under life policy containing disability benefit provisions and providing that insured's disability should be presumed to be permanent when it had continued for three months had paid disability benefits to insured for five months did not entitle insured to further benefits after insured refused to submit to physical examination as provided by policy.

17. Insurance ⇐516

Under a clause in a disability benefit policy giving a presumption of permanence to a disability which has continued for a specified length of time, such as three months, the presumption relates only to permanency and not to totality of disability, and the conclusive presumption of permanency applies only so long as total disability exists, and the clause is not to be construed as meaning that a three months' disability is forever presumed to be a permanent and total one.

18. Insurance ⇐516

Under life policy providing for disability benefits, a clause providing that insured's disability should be presumed to be permanent when it had continued for three months did not prevent insurer from disputing totality of disability after expiration of three months.

19. Insurance ⇐549

Where insured had refused to comply with insurer's demands for a physical examination in accordance with provisions of life policy from June 22, 1939, to time of trial of action to recover disability benefits under policy, and evidence supported finding that insured was totally disabled within policy from September 2, 1938, which was date when insurer made last payment of benefits, to June 22, 1939, insured could recover only benefits accruing between September 2, 1938, and date of refusal of examination.

CARTER and CURTIS, JJ., dissenting.

Appeal from Superior Court, Merced County; J. D. Garibaldi, Judge.

Action by Martin Erreca against the Western States Life Insurance Company and another to recover disability benefits under an insurance policy. From a judgment for plaintiff, defendants appeal.

Reversed with directions.

Prior opinion, 112 P.2d 344.

C. Ray Robinson, of Merced, Downey, Brand & Seymour and Frederic R. Pierce, all of Sacramento, and M. M. Doyle, of San Francisco, for appellants.

Pillsbury, Madison & Sutro, Marshall P. Madison, Eugene M. Prince, M. D. L. Fuller, James W. Archer, F. Eldred Boland, Knight, Boland & Riordan, Livingston & Livingston, McCutchen, Olney, Mannon

& Greene, F. V. Keesling, and Keesling, Wayland & Eliot, all of San Francisco, as amici curiae, on behalf of appellants.

D. Oliver Germino, of Los Banos, George G. Murry, of Gustine, and F. M. Ostrander, of Merced, for respondent.

EDMONDS, Justice.

Martin Erreca, the respondent, holds a policy of life insurance, which includes provisions for disability benefits, issued to him by Western States Life Insurance Company, the obligations of which have been assumed by California-Western States Life Insurance Company. These companies have appealed from a judgment against them for $2,300, asserting that he has not been disabled within the meaning of the contract.

Under the terms of the policy the respondent, in the event of his total and permanent disability prior to his sixtieth birthday, is entitled to the sum of $200 a month for one year, and the sum of $100 a month thereafter during the continuance of such disability. Total disability is defined to mean "whenever the insured becomes wholly disabled by bodily injury or disease so that he is prevented thereby from engaging in any occupation, or performing any work whatsoever for remuneration or profit. * * *" In his application for insurance, respondent stated that his occupation is "farmer engaged in grain and stock."

The policy was written in 1923. On February 2, 1938, respondent was thrown from a horse and sustained a multiple fracture of his right leg. Several ligaments of the knee were also torn. He was taken to the hospital where he was required to remain for almost two months. During his stay there he suffered a pulmonary embolism, better known as a blood clot in the lung. Upon his release from the hospital, he returned to his home where he remained in bed for several weeks. Thereafter, he required crutches for several weeks. During this period, varicose veins appeared in his leg. Open lesions and ruptured varicose ulcers developed, requiring him to keep his legs constantly bandaged. At the time of the trial, his fracture had completely healed, but there was a permanent instability in his knee. He is able to walk with the use of a cane, but, according to his testimony, only to a limited extent. He testified that, because of the varicose veins and ulcers, any extended walking brings about a swelling in his legs, causing him extreme pain. There is evidence that as a result of this forced inactivity, his weight has increased from 200 to 240 pounds, and he suffers a shortness of breath and quick heart action.

Upon his discharge from the hospital, the respondent filed with the California-Western States Life Insurance Company, which will be referred to as the insurer, proofs of his disability upon which payments were made for five months. On October 26, 1938, the company notified him that, according to the report of his physician his disability was partial only and not such as "wholly prevents you from carrying on any work whatsoever for remuneration or profit," and that it would make no further payments to him. The respondent then commenced this suit, seeking to recover disability benefits from October 2, 1938, to and including January 2, 1940. His right to them depends upon whether or not he has sustained injuries which bring him within the terms of the policy and has complied with its terms.

Resolving all of the conflicting testimony in favor of the respondent, the facts concerning his business affairs and his physical condition, as of the time of the trial, may be fairly summarized as follows: when the accident occurred, he was a man 58 years of age, who during his entire active lifetime has engaged in grain and stock farming. He owns, leases and personally operates grain ranches in Merced County containing an aggregate area of 7,000 acres. He also owns a dairy ranch which is managed by a partner and from which he derives an income of $150 a week. Prior to the accident, he enjoyed good health and was in excellent physical condition.

In his "Preliminary Notice of Disability" he stated that his principal duties, before his injury, were "supervisory." However, that is a very general classification of activities which covered a wide range.

As a ranch executive, he negotiated and made leases of land. In connection with his farm operations he made annual arrangements for crop financing, signed notes and mortgages, and bought livestock and supplies. Requiring even more experience and judgment, he determined the time for the planting, harvesting and selling of his crops.

He also acted as a ranch superintendent and personally managed and supervised the farm work. He directed the plowing of

his land and the planting, cultivating, irrigating and harvesting of the crops. To properly supervise these operations, he was compelled to engage in activities requiring physical exertion. For example, in order to determine whether the land was ready for planting, he would walk over it and by means of a digging instrument, test the ground for moisture. He followed behind the plows on foot to see that the proper depth was attained. During planting, he directed the even distribution of seed by walking over the land and inspecting it behind the seeder. He would then dig in the land to see how deep the seed was penetrating. To ascertain whether the grain was ready for harvesting, he would make an examination of the land; and after harvesting commenced, he walked behind the harvester to see that the grain was being properly threshed. In directing the performance of the work, he rode horseback; at times he traveled to the more remote ranches in an automobile.

But he did manual labor also. He operated plows, drove tractors, repaired fences, buildings and farm machinery. The evidence shows that, at times, he aided in the construction of levees and ditches. Unquestionably he has been a farmer who not only overlooked no detail in the conduct of his operations but also worked with his men when the occasion required.

Since his injury, he can stand upon his feet for brief periods only. Although he can take short walks around the yard, he must use a cane. The circulation in his leg has been so obstructed that his leg is "half-dead," and he has frequently been confined to bed. He can no longer ride a horse.

In his present condition, he can perform no manual labor whatsoever. He is unable to walk over plowed ground, or to bend down upon his hands and knees and examine the soil. He cannot direct the plowing, planting, cultivating or harvesting of his land as he did before. He is able to drive an automobile and frequently rides to his farms, but he cannot approach the scene of the farm work, inspect the land, and directly superintend the conduct of the farming. In short, he can engage in no activity requiring any form of physical exertion. However, the accident has in no way impaired his mental faculties. He is able to negotiate leases, arrange finances for crops, buy supplies, and participate in the selling of his grain. Respondent's physician, Dr. Hillyer, testified that in his opinion respondent "could perform all the secretarial work connected with the farm."

As a result of his disability, respondent has abandoned his management and control of his ranches to his son who is now acting as the sole overseer. Occasionally, he has conferred with his son regarding certain transactions incident to the operation of the farms, such as the kind of crops to be planted and the time and price for the selling of such crops. He has participated in the negotiation of certain leases, has signed notes, negotiated loans, talked to grain buyers, and has attended to the buying of hogs. The actual conduct and control of farm operations, however, has been completely left in the hands of his son.

Upon this evidence, the trial court found that the respondent, as of the date of trial, was totally and permanently disabled within the meaning of the policy. Both insurance companies challenge that finding as unsupported by the evidence. They also contend that respondent waived any right to disability payments by refusing to submit to a medical examination as required by the policy.

[1] Much confusion exists among the authorities because of the failure of courts to distinguish between policies which insure against general or non-occupational disability and those which provide benefits for occupational disability. Under the latter type of policy, the coverage is limited to the duties of a particular occupation, and the insured is protected as a particular workman. Notwithstanding his ability to perform the work of other occupations, he is entitled to disability benefits upon proof that he is totally and permanently disabled from transacting the duties pertaining to a defined occupation generally the employment in which he is engaged at the time the policy is written. Typical of the phraseology used in this type of policy are the words "total disability exists where the injuries disable the insured from performing any and every kind of duty pertaining to his occupation." Because the risk insured against by the occupational disability policy is specific, the premium is ordinarily high.

[2] On the other hand, a non-occupational or general disability policy of insurance indemnifies against total and permanent disability which prevents the insured from performing the work of any occu-

pation. He is insured as a man, not as a particular workman, and may recover only upon proof that he is disabled from engaging in any gainful occupation or work. This type of coverage is usually included as an adjunct to life insurance entitling the insured to waiver of premiums and to benefit payments in the event of his total disability. Since the risk is incidental to the life policy and is comparatively remote, the premium is ordinarily low. As contrasted with the wording of an occupational clause, a general disability clause defines total disability to mean "whenever the insured is wholly incapacitated from performing any work whatsoever for remuneration or profit."

Courts have not been in entire agreement as to the construction to be accorded the general disability clause. Some have refused to differentiate such insurance from the occupational type and permit the insured to recover disability benefits whenever he becomes wholly disabled from engaging in the vocation which he was following at the time of the accident even though there be other lines of employment in which he is qualified to engage unhampered by his disability. Foglesong v. Modern Brotherhood, 121 Mo.App. 548, 97 S.W. 240; Equitable Life Assur. Soc. v. Merlock, 253 Ky. 189, 69 S.W.2d 12; Metropolitan Life Ins. Co. v. Blue, 222 Ala. 665, 133 So. 707, 79 A.L.R. 852; Neill v. Order of United Friends, 149 N.Y. 430, 44 N.E. 145, 52 Am.St.Rep. 738; 24 A.L.R. 203, 206–209; 79 A.L.R. 857, 862–865; 98 A.L.R. 789, 798–803. The effect of these decisions is to enlarge the insurer's liability to that which it assumes under a non-occupational policy.

[3] Other decisions are based upon a strict and literal construction of the policy in which little regard is had for the capabilities and qualifications of the insured, and he is permitted to recover only upon proof that he is physically disabled from engaging in any employment for wage or profit. Garms v. Travelers' Ins. Co., 242 App.Div. 230, 273 N.Y.S. 39; Cooper v. Metropolitan Life Ins. Co., 317 Pa. 405, 177 A. 43; see cases collected in A.L.R. notes cited above. But some courts, including those of California, recognizing the harshness of this rule, have chosen a qualified or intermediate position. They have held that total disability exists, within the meaning of the term "any occupation" as contained in a general disability clause, whenever the insured is incapacitated from following any substantial or remunerative occupation for which he is fitted or qualified, mentally or physically, and by which he is able to earn a livelihood. Wright v. Prudential Ins. Co., 27 Cal.App. 2d 195, 80 P.2d 752; Hill v. New York Life Ins. Co., 38 Cal.App.2d 627, 101 P.2d 752; Prudential Ins. Co. v. Harris, 254 Ky. 23, 70 S.W.2d 949; Prudential Ins. Co. v. South, 179 Ga. 653, 177 S.E. 499, 98 A.L.R. 781; Nickolopulos v. Equitable Life Assur. Soc., 113 N.J.L. 450, 174 A. 759; Waldman v. Mutual Life Ins. Co., 252 App.Div. 448, 299 N.Y.S. 490; 98 A.L.R. 789, 798–803. "The authorities supporting this rule define total disability which prevents the insured from engaging in any occupation or performing any work for compensation as a disability which prevents his working with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage in view of his station and physical and mental capacity." Hurwit v. Prudential Ins. Co. of America, 45 Cal.App.2d 74, 113 P.2d 691, 695.

This construction of the words "any occupation" is based upon the theory that it is unreasonable to deprive an uneducated laborer, disabled from performing any manual work, of the benefits of his policy, because he might notwithstanding those disabilities, with training and study, pursue a profession at some future date, or become an accountant or a banker. And it would be equally unreasonable to hold that a doctor, lawyer, or business executive is not totally disabled from engaging in "any occupation" or from performing "any work" because he is able to run a news stand or work as a day laborer.

Moreover, unlike the liberal interpretation which arbitrarily and unqualifiedly defines the term "any occupation" to mean the usual employment of the insured, this intermediate view does not impose upon the insurer a liability which it did not agree to assume. The insurer may reasonably be said to have contemplated that the insured would be totally disabled within the meaning of the policy if he were wholly incapacitated from conducting his ordinary employment, or such other employment as he might fairly be expected to follow in view of his station in life and his circumstances and capabilities. Under this construction, "any occupation" may mean the insured's usual occupation only if he

is for any reason unfit to perform the duties pertaining to any other type of business or employment.

[4] The policy of insurance issued to respondent is clearly a non-occupational policy. He is not insured as a farmer or farm operator, for the disability clause explicitly conditions appellants' liability upon a total disability which prevents him "from engaging in any occupation, or performing any work whatsoever for remuneration or profit. * * *" Nevertheless, and although respondent is a shrewd farm executive and a successful grain operator, the testimony discloses that he has had little formal education and is neither trained nor qualified for any other occupation. And because of his age and experience in life, he probably could not prepare himself for other remunerative employment. Accordingly, the respondent must be deemed to be totally disabled if he is no longer able to pursue the occupation of farmer or farm supervisor. The insurer has in fact treated the issue as such in its briefs.

[5, 6] According to overwhelming authority, the term "total disability" does not signify an absolute state of helplessness but means such a disability as renders the insured unable to perform the substantial and material acts necessary to the prosecution of a business or occupation in the usual or customary way. Recovery is not precluded under a total disability provision because the insured is able to perform sporadic tasks, or give attention to simple or inconsequential details incident to the conduct of business. Fitzgerald v. Globe Indemnity Co., 84 Cal.App. 689, 258 P. 458; Wright v. Prudential Ins. Co., supra; Hill v. New York Life Ins. Co., 38 Cal.App.2d 627, 101 P.2d 752; Hurwit v. Prudential Ins. Co., supra; Ætna Life Ins. Co. v. Phifer, 160 Ark. 98, 254 S.W. 335; Sherman v. Continental Casualty Co., 103 Cal. App. 518, 284 P. 946; Lobdill v. Laboring Men's Mut. Aid Ass'n, 69 Minn. 14, 71 N.W. 696, 38 L.R.A. 537, 65 Am.St.Rep. 542; Young v. Travelers' Ins. Co., 80 Me. 244, 13 A. 896; Prudential Life Ins. Co. v. South, supra; 24 A.L.R. 203; 79 A.L.R. 857; 98 A.L.R. 789; Couch, Cyclopedia of Insurance Law, vol. 7, sec. 1670. Conversely, the insured is not totally disabled if he is physically and mentally capable of performing a substantial portion of the work connected with his employment. He is not entitled to benefits because he is rendered unable to transact one or more of the duties incidental to his business. Dietlin v. Missouri State Life Ins. Co., 126 Cal. App. 15, 14 P.2d 331, 15 P.2d 188; Dietlin v. General American Life Ins. Co., 4 Cal. 2d 336, 49 P.2d 590; Martin v. Postal Union Life Ins. Co., 31 Cal.App.2d 329, 87 P.2d 897.

[7] Applying these principles to the case at bar, the evidence amply supports the finding of the trial court that the respondent, as of the time of trial, is totally and permanently disabled. Admittedly, he can no longer do manual labor of any sort. Nor can he supervise and manage farm operations as he did before. There is evidence, consisting of the testimony of another farm operator, that successful grain farming cannot be properly conducted by the farmer from the doorstep of his home or from his automobile, but on the contrary, requires his personal direction at the scene of the farm work. Because of respondent's inability to walk over plowed or wet ground, or to bend down upon his hands and knees, he can no longer inspect his land nor supervise the many indispensable farm operations in progress, such as the plowing, planting, cultivating and harvesting. The insurer lays great emphasis upon the respondent's frequent trips to his ranches in his automobile, but the record does not show any accomplishments by these visits other than the satisfaction of his curiosity as owner or lessor. Furthermore, the evidence shows that the fields are not accessible to an automobile and the respondent therefore cannot approach the scene of farm operations and properly supervise the work in the required manner as above described. Secretarial work in connection with farm operations is unimportant.

[8, 9] The insurer also stresses the magnitude of the respondent's enterprise and his income therefrom. Such matters have no proper place in the determination of whether respondent is totally disabled from performing remunerative work. Disability insurance is designed to provide a substitute for earnings when, because of bodily injury or disease, the insured is deprived of the capacity to earn his living. Martin v. Postal Union Life Ins. Co., supra. It does not insure against loss of income. The respondent receives his income from his ranches as an owner or lessor; his labor contributes nothing toward it. The contention of the insurer would lead to the strange conclusion that a bedridden mer-

chant is not totally disabled from performing gainful work because he receives a substantial income from a business, the management of which he has been forced to abandon to others.

[10, 11] True, since his injury, the respondent has negotiated loans and leases, signed notes and mortgages, talked with grain buyers, participated in the buying of supplies, and occasionally talked with his son concerning farm operations. Although such activities are neither trivial nor inconsequential, they are the type of duties that are infrequently and intermittently performed and cannot be said to constitute the substantial and material acts of the occupation of farming. In its final analysis, the question of what amounts to total disability is one of fact (Sherman v. Continental Casualty Co., supra; Ives v. Prudential Ins. Co., 12 Cal.App.2d 306, 55 P.2d 273), and where, as here, the finding of the trial court is supported by substantial evidence, it will not be disturbed upon appeal.

The authorities relied upon by appellants are factually distinguishable from the instant case. In Dietlin v. Missouri State Life Ins. Co., supra, the insured, a plastering contractor, fell from a scaffolding and permanently injured his foot. After the accident, the insured was able to perform every duty pertaining to his occupation except that he was unable to climb scaffolds and ladders. The principal duties of his occupation, as described in his application for insurance, consisted of "Office, Estimating and Supervising Duties." [126 Cal.App. 15, 14 P.2d 333.] In denying recovery of benefits for total disability, the court reasoned that the climbing of scaffolds did not constitute a substantial portion of his duties. Unlike respondent, he was still able to perform the managerial and supervisorial activities connected with his business.

In Missouri State Life Ins. Co. v. Snow, 185 Ark. 335, 47 S.W.2d 600, the insured was a farm operator who suffered a hip injury which disabled him from performing manual labor. He farmed through tenants, however, and his injury in no way prevented him from supervising farm operations. Moreover, he conducted a country store, waited upon customers, purchased goods and attended to all material acts essential to the prosecution of a mercantile business. The insured in Ætna Life Ins. Co. v. Person, 188 Ark. 864, 67 S.W.2d 1007, was a farm operator, who contracted an arrested case of tuberculosis. Despite his ailment, he was able to manage his various farms in his usual and customary manner. Furthermore, the evidence showed him to be a highly educated man who, during the period in which he was assertedly disabled, secured a license to practice law and actually participated in the handling of litigation. In each of the cited cases, benefits for total dsiability were refused. The facts of those cases and the present one compel entirely different determinations.

The cases of Azevedo v. Mutual Life Ins. Co. of New York, 308 Mass. 216, 31 N.E.2d 559, 561; Fricke v. Mutual Life Ins. Co. of New York, 152 Kan. 525, 106 P.2d 677; New York Life Ins. Co. v. Stoner, 8 Cir., 109 F.2d 874; and Mutual Life Ins. Co. of New York v. King,[1] Tenn. App., decided December 10, 1940, are also factually different from the present one. In each of them, recovery for total disability benefits was denied a farm operator who, although incapacitated from engaging in manual tasks, was able to, and did, manage, supervise and direct the operation of his farms and attend to all the business in connection with them. The evidence in this case shows that the respondent is unable to inspect his lands, direct the labor in progress or perform any other essential supervisory functions.

A case strikingly similar to the one at bar is Mutual Life Ins. Co. of New York v. Dowdle, 189 Ark. 296, 71 S.W.2d 691, 693. There, the insured was a manager of three ranches, one of which he owned. Prior to the accident, he gave these farms active and efficient management, riding horseback to them and walking over the land. He sustained a fractured coccyx, a bad case of fallen arches, and like respondent, suffered from varicose veins. After these injuries, he was no longer able to give any detailed attention to farm management, although he performed certain of his former duties such as preparing mortgages, signing contracts, and attending to his banking. He could not stand for any length of time or walk any considerable distance. Again, like respondent, he drove to the farms but he did not leave his car as "[he could] not walk about the farm as its proper supervision required that he do." The court, distinguishing Ætna Life Ins. Co. v. Person, supra, affirmed a judgment based upon a

[1] No opinion for publication.

verdict finding him totally and permanently disabled.

To the same effect is Manuel v. Metropolitan Life Ins. Co., La.App., 139 So. 548. There the insured was a farmer who owned and personally supervised a farm of some 300 acres. He was afflicted with pulmonary tuberculosis, affecting both lungs and requiring him to remain in bed a part of the time. As a result, he abandoned the management of his farm to tenants. Occasionally, he rode horseback over his fields to examine his crops. He consulted with officers at the bank about his business matters and held conferences with his tenants concerning the crops grown on his place. In affirming a judgment for the insured, the court held that he was totally disabled from performing any work or engaging in any business for profit. In other cases, the insured farmer recovered benefits for total and permanent disability under a policy having a clause similar to that now under consideration, although the evidence showed that he was able to perform unimportant work incidental to his occupation. Fitzgerald v. Globe Indemnity Co. of New York supra; Fogleson v. Modern Brotherhood, supra; National Life & Acc. Ins. Co. v. Bradley, 245 Ky. 311, 53 S.W.2d 701; Davis v. Midland Casualty Co., 190 Ill.App. 338.

The second question for decision concerns the insurer's contention that the respondent is not entitled to disability benefits because he refused to submit to a medical examination. This defense is based upon the following provision of the policy: "The Company may from time to time demand due proof of such continued disability, and any medical adviser of the Company shall be allowed to examine the person of the Insured in respect to any alleged permanent total disability, in the manner and at such times as the medical adviser may require but not oftener than once a year after such disability has continued for two full years. Upon failure to furnish such proof, or if it appears that the Insured is no longer wholly disabled as aforesaid, no further premiums shall be waived nor income payments made."

Following the presentation of proofs of disability, which included reports made by the insured's physicians, the company commenced payments on May 2, 1938, and made five consecutive monthly payments of $200. Because of information received by it in September, to the effect that respondent was actually engaged in supervising his farms, no payment was made on October 2d. Shortly after, the insured submitted to the company a report made by one of his physicians under date of October 20th stating that he was "permanently partially disabled"; able to "partially supervise" but unable to perform actual labor. The company then wrote him: "Since your total disability actually ceased some time ago, we must now advise you that the income payment of $200, made to you as of September 2, 1938, on the assumption that your total disability was then continuing must be the last on account of your present claim for totally disabling benefits in accordance with the terms of your policy."

The insured made no reply to this letter until March 31, 1939, when his attorney wrote to the insurer claiming disability benefits for him and threatening legal action. The insurer's answer was that, in its opinion, his disability was partial only but it would be "most pleased to receive proof thereof." Forms for submitting proof of disability were enclosed. Other correspondence followed, and on May 24th, the respondent submitted a medical report by Dr. Hillyer to the effect that he was totally disabled. The respondent also indicated his willingness to submit to an examination by the insurer's physicians.

Accepting this offer, the insurer wrote to the respondent on June 5th, requesting him to report to three named doctors in San Francisco one week later. On June 7th, respondent's attorney by telegraph informed the insurer that it was "impossible for Erreca to keep appointments, letter follows." On June 21st, the insurer acknowledged the receipt of the telegram and stated that it had not received the letter referred to. It also requested him to arrange an appointment for a physical examination by their physicians in San Francisco. In reply to this letter, the respondent flatly refused to submit to any examination. The insurer's answer is dated June 23d. It requested the respondent to furnish a sworn statement as to his disability and reaffirmed the demand for a physical examination.

[12] "The insurer shall have the right and opportunity to examine the person of the insured when and so often as it may reasonably require * * *". Sec. 10339, Ins. Code, St. 1935, p. 647. Such a requirement is a reasonable one and the right periodically to examine the insured for proof of continued disability is a condition

to the future liability of the insurer provided the policy so recites. Mobley v. New York Life Ins. Co., 295 U.S. 632, 55 S.Ct. 876, 79 L.Ed. 1621, 99 A.L.R. 1166; Wood v. Industrial Life & Health Ins. Co., 223 Ala. 345, 135 So. 583; Daste v. First National Life, Health & Acc. Ins. Co., 14 La. App. 565, 130 So. 572; Rocci v. Massachusetts Acc. Co., 226 Mass. 545, 116 N.E. 477; Tompkins v. Pacific Mut. Life Ins. Co., 53 W.Va. 479, 44 S.E. 439, 62 L.R.A. 489, 97 Am.St.Rep. 1006; 33 C.J.20. An analogous provision of a fire insurance policy concerning an examination of the insured under oath has also been upheld. Hickman v. London Assur. Corp., 184 Cal. 524, 195 P. 45, 18 A.L.R. 742; Bergeron v. Employers' Fire Ins. Co., 115 Cal.App. 672, 2 P.2d 453.

[13] The respondent takes the position that the right of the insurer to a physical examination does not exist, or is waived, where it has previously denied liability under the policy. But denial of liability, however, is not a waiver of the right to a physical examination where it is based upon a report of the insured's physician submitted in connection with the claim for benefits. Moreover, the right of the insurer survives its denial of liability regardless of the basis thereof.

[14, 15] To hold otherwise would mean that once an insurer has refused to pay disability benefits, the insured is forever relieved of all future obligation to furnish proof of continued disability or to submit to reasonable requests for physical examination, notwithstanding the fact that the liability of the company under the express terms of the policy depends upon the insured's continued disability. A contrary conclusion is compelled by the very nature of disability insurance. Such a policy constitutes a continuing contract for periodic installment payments depending upon the insured's continued disability, and he has no cause of action, nor the insurer any liability, except for benefits which have accrued. Because the insurer's liability for future benefits is contingent upon the existence of total disability at that time, its refusal to pay benefits for any reason does not entitle the insured to treat the entire contract as repudiated and ask for future benefits upon a theory of anticipatory breach. Brix v. People's Mutual Life Ins. Co., 2 Cal.2d 446, 41 P.2d 537; Cobb v. Pacific Mutual Life Ins. Co., 4 Cal.2d 565, 51 P.2d 84; New York Life Ins. Co. v. Viglas, 297 U.S. 672, 56 S.Ct. 615, 80 L.Ed. 971. As the refusal to pay is not a breach of the contract as to future unmatured benefits, the policy, including the provision for continued proof of disability and physical examination, remains in force as to all such accruing or future benefits. Accordingly, irrespective of the position it has taken concerning its liability for accrued benefits, an insurance company may nevertheless request a physical examination under the policy provision to determine its accruing and future liability. Eller v. Guthrie, 226 Iowa 467, 284 N.W. 412.

[16] In attempting to avoid the effect of his refusal to submit to examination, the insured argues that the provision of the policy in that regard is inconsistent with the preceding paragraph of the policy which provides: "Under this contract disability shall be presumed to be permanent when it is present and after the insured has been continuously so disabled for not less than three months." According to the respondent, this provision of the policy creates a conclusive presumption that a three months' disability is total and permanent, and where, as here, the insurer has paid disability compensation for five consecutive months, the presumption comes into play, making it wholly immaterial whether or not he refused to submit to a physical examination. He invokes the principle that conflicting and uncertain provisions must be resolved most strongly against the insurer and in favor of the insured. This contention is wholly unsound.

In a literal sense no one knows whether disability is permanent until the death of the insured, and a disability which at the outset appears to be of lasting and indefinite duration may be in fact otherwise. Accordingly, in many cases it was held that the insured's probable physical recovery from a totally disabling illness defeated his claim for total and permanent disability benefits, and in others it was held that the recovery of the insured disentitled him to benefits for the period in which he was totally disabled. Ginell v. Prudential Ins. Co., 237 N.Y. 554, 143 N.E. 740. See, also, many authorities cited in Job v. Equitable Life Ins. Co., 133 Cal.App.Supp. 791, 22 P. 2d 607.

[17] To obviate the difficulties of proving "permanence," and to prevent the insurer from recovering amounts previously paid upon the ground that a total disability was not permanent, as well as to give ad-

ditional protection to the insured by according him benefits for a stipulated period of total disability despite a subsequent recovery, insurance companies commonly insert a provision in the policy giving a presumption of permanence to a disability which has continued for a specified length of time. This presumption relates only to the permanency and not to the totality, of the disability.

[18] In Dietlin v. Missouri State Life Ins. Co., supra, the presumption was held to be conclusive, and the court refused to accept evidence for the purpose of showing that a total disability of three months' duration had terminated so as to deprive the insured of benefits for such period and any further period during which the disability continued to be total. And as stated in 110 A.L.R. 631, "* * * a disability which has lasted for the requisite period of time to render it presumably permanent within the meaning of the policy is nonetheless permanent, although it has since terminated; and that consequently an insured who has suffered such disability may, even after the termination thereof, recover benefits therefor as for permanent disability, *for the period during which it actually lasted.*" In other words, the conclusive presumption of permanency applies only so long as total disability exists; the clause is not to be construed as meaning that a three months' disability is forever presumed a permanent and total one. The respondent's interpretation would require that a disability which was total for three months must be conclusively presumed to continue to be total and the insured entitled to benefits for the remainder of his life, even though in fact he completely recovered from his ailment. Under that interpretation an insured, upon proof of three months' total disability, would have a life annuity. Since the clause providing for the presumption of permanency does not prevent the insurer from disputing the totality of the disability, it is entirely consistent with the provision reserving to the insurer the right to insist upon periodic physical examination of the insured.

[19] The finding of the trial court that the respondent did not refuse to submit to a physical examination was unquestionably based upon an erroneous construction of the terms of the policy, for the uncontradicted evidence is directly to the contrary. The record shows that, continuously from June 22, 1939, to the time of trial the insured refused to comply with the company's demands, made in accordance with the provisions of the policy, and he is therefore not entitled to judgment in this action for disability benefits subsequent to June 2, 1939. But as the evidence supports the finding that he was totally disabled from September 2, 1938, when the company made its last payment, to the date of refusal of a physical examination, the respondent is entitled to judgment for benefits during this period.

The judgment is therefore reversed with directions to enter judgment for the respondent for the sum of $1,600 as the amount of disability benefits to which he is entitled under the provisions of the policy to June 2, 1939. This judgment shall not be a bar to an action to recover any amounts which may be due on account of disability payments accruing under the policy subsequent to June 2, 1939.

GIBSON, C. J., and SHENK, HOUSER, and TRAYNOR, JJ., concurred.

CARTER, Justice.

I dissent. I concur in that portion of the majority opinion which holds that plaintiff is totally and permanently disabled and therefore entitled to disability payments under the policy, but I dissent from that portion of said opinion determining that the insured was not entitled to disability payments after the insured's refusal of the insurer's demand that he submit to a medical examination. As set forth in the opinion, the clause in the policy on that subject reads: "The Company may from time to time demand *due* proof of *such continued* disability, and any medical adviser of the Company shall be allowed to examine the person of the Insured in respect to any alleged permanent total disability, in the manner and at such times as the medical adviser may require but not oftener than once a year after such disability has continued for two full years. Upon failure to furnish *such* proof, or if it appears that the Insured is no longer wholly disabled as aforesaid, no further premiums shall be waived nor income payments made."

There are several reasons why that clause should not debar plaintiff from obtaining payments during the period following his refusal to submit to a medical examination by the insurer's physician. In the first place, it will be noted that

the clause provides for two things the insurer may do with respect to demanding evidence of disability, to-wit: (1) The company may demand *due proof* of *continued* disability; (2) have the insured examined by the insurer's medical adviser. These two things are separate and distinct. They are divided by a comma, and are not the same. "Due proof" might well consist of a medical report by the insured's own physician. While the second provision is for a specific kind of proof, that is, examination by the insurer's physician. Turning then to the latter part of the provision here in question which specifies what the *penalty* is for a violation thereof, we find it states that upon failure to furnish *such* proof, no further payments shall be made. The word "such," manifestly refers to "due proof" rather than an examination by the insurer's physician. This is apparent when we consider that the penalty arises for failure to "furnish" the proof. It could hardly be said that the insured was furnishing the proof by submitting to an examination. Here the insured did furnish proofs consisting of his physician's report. The payments could not therefore be stopped for any failure in that respect. There is no clause authorizing the discontinuance of payments for failure to submit to a medical examination, therefore the insurer had no authority to discontinue the payments. This interpretation of the clause in the policy is entirely appropriate when we give heed to two fundamental rules, namely, that a policy of insurance is to be construed most strongly against the insurer and in favor of the insured and that an interpretation which will avoid a forfeiture is to be adopted when possible.

Secondly, the insurer had breached the contract at the time of the refusal to submit to an examination. Under those circumstances the insurer should not be permitted to assert nonliability for the failure to so submit. Its right to insist upon an examination should be confined to those instances where it is performing the contract, making the payments. The case is not dissimilar from a clause in fire insurance policies which provides that the insured must submit to an examination under oath before he may recover for a loss. It is held that that provision is waived by the insurer when he denies all liability under the policy. State v. Becker, 336 Mo. 59, 77 S.W.2d 100.

Third, it should be remembered that the insurer was not prejudiced or injured in any way by the failure of the insured to submit to the examination. He was examined by the insurer prior to the trial and therefore the insurer was not prevented from obtaining evidence with respect to the insured's physical condition. Even after the insurer obtained a report from its own physician as to insured's physical condition, it still denied liability. The trial court found against the insurer on this point and this court has sustained the finding of the trial court on the issue of total disability. Therefore, even if the insured had submitted to the insurer's request for an examination by the latter's physician, the insurer would still have refused disability payments as it still contends that insured is not totally disabled.

In my opinion the judgment should be affirmed.

CURTIS, Justice (dissenting).

I am unable to agree with that portion of the majority opinion which holds that during the period of time just prior to the rendition of the judgment the plaintiff was totally disabled and therefore entitled to receive disability payments during said period of time. From the evidence in the record it must be assumed that this condition is permanent, and therefore the effect of the opinion, if permitted to become the final decision of this court, will entitle the plaintiff to receive total disability payments during the remainder of his life.

The majority opinion adopts the definition of total disability given in Hurwit v. Prudential Ins. Co. of America, 45 Cal. App.2d 74, 81, 113 P.2d 691, 695, which holds that total disability is "a disability which prevents his [the insured's] working with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage in view of his station and physical and mental capacity." I am in accord with this definition of the term "total disability," but does the evidence in this case by any reasonable interpretation show that the condition of the insured during the time in question prevented his working with reasonable continuity in his customary occupation? It is conceded by the majority opinion that while in his then condition

plaintiff could perform no manual labor, his mental faculties were unimpaired. He was able to drive an automobile and frequently drove to his farms. He was able to negotiate leases, arrange finances for crops, buy supplies, and participate in selling his grain. As stated by his physician, he "could perform all the secretarial work connected with the farm." Since his accident he has participated in the negotiation of leases, has signed notes, negotiated loans, talked to grain buyers, and has attended to the buying of crops. While the actual conduct and control of farm operations has been left in the hands of his son, he held conferences with his son regarding the transactions incident to the actual operation of the farms, such as the kind of crops to be planted and the time and price for the selling of such crops.

With this undisputed evidence before us, can it be said that the plaintiff was totally disabled? Total disability, as we have seen, is defined as a condition which prevents the insured from working with reasonable continuity in his customary occupation. The above evidence shows that during the entire period covered by his present claim, the plaintiff has worked continuously in his customary occupation. It is true that he has not performed all the duties required of that occupation, but it is equally true that he has performed at least some of said duties. Moreover, it cannot be disputed that he has performed not only a substantial part of such duties, but a most important part of those duties.

The present case cannot be distinguished from the case of Dietlin v. General American Life Ins. Co., 4 Cal.2d 336, 49 P.2d 590. That case holds that where the insured's duties are twofold, as were the duties of the plaintiff in this case, and the injury prevented him from performing one class of such duties but did not render him unable to perform another and substantial part of such duties, such injury is not total, and the insured is not entitled to recover under a policy of insurance providing for benefits in case of total disability. The conclusion of the court in that case is contained in the following paragraph of the decision, 4 Cal. 2d at page 345, 49 P.2d at page 595:

"There is no contention that it is necessary that appellant be helpless and unable to perform any of his daily duties, to constitute total disability. However, where he is disabled only from performing one or more of those duties, and is able to perform others, he is only partially disabled. It was so held on the former appeal * * *, where it was said: 'Although the evidence was sufficient to show that after November 22, 1929, he was disabled from performing "one or more important daily duties pertaining to his occupation," such disability was clearly a partial disability and not a total disability as defined in the policy as he was not disabled from performing "any and every duty pertaining to his occupation."'"

While I do not contend that the rule announced in the majority opinion requires that the disability, in order to be total, must render the insured incapable of performing "any and every duty pertaining to his occupation," it does seem both logical and reasonable to hold that when the insured is able to perform not only a substantial, but the most important part of his former duties, he is not and cannot be totally disabled. While as a result of his injury, the plaintiff was prevented from performing any physical duties required in carrying on his farm operations, his mental faculties were unimpaired, and with the assistance of his son, who after his father's injury performed the physical work, he operated his extensive farming ventures to the same extent as before his injury.

A recent case decided by the Supreme Judicial Court of Massachusetts is very much in point. In that case the policy of insurance was practically the same as that carried by the plaintiff in the present case at the time of the injury. The insured was a farmer and with the assistance of three employees, he performed all the work upon the farm. After his injury he employed a fourth. Due to his injury he was unable to perform any manual labor about his farm. The case was decided upon an agreed state of facts. The conclusion of the court was as follows: "Upon the agreed facts it is plain that the insured is unable to perform the manual labor he had previously done, and that the restriction of his activities in this respect is due to the impairment of his right arm and hand. The record does not disclose that this impairment is accompanied by any pain or suffering. His disability has not been shown to come within the terms of the policy. Indeed his disability has not prevented him from continuously supervising and managing the

operations of his dairy and farm as a means of a livelihood. [Citing numerous authorities.]" Azevedo v. Mutual Life Ins. Co. of New York, 308 Mass. 216, 219, 220, 31 N.E.2d 559, 561.

I think that both reason and the authorities impel a reversal of the judgment.



19 Cal.2d 368

WRIGHT v. BEST.

Sac. 5393.

Supreme Court of California.

Feb. 3, 1942.

1. Waters and water courses ⇐77

In action to enjoin pollution of stream and for damages, allegation that plaintiff and her predecessors in interest owned a right in the waters of Rock Creek acquired in 1852 by diversion and continuous use upon a named ranch for irrigation and domestic purposes was sufficient averment of the ultimate fact of ownership of water right.

2. Waters and water courses ⇐77

In action to enjoin pollution of stream and for damages wherein plaintiff alleged ownership of water right in certain stream, quantity of water to which the water right attached was not material, since substantial pollution would destroy the usefulness of even a small amount of water.

3. Waters and water courses ⇐77

In action to enjoin pollution of stream and for damages, where plaintiff by records and corroborating testimony unopposed by contrary evidence proved ownership of a water right acquired by appropriation and preserved by beneficial use and which by successive conveyances had become appurtenant to a ranch, finding that plaintiff did not own water rights claimed by her was unsupported by evidence.

4. Waters and water courses ⇐77

In action to enjoin pollution of stream and for damages where defendant mine owner admittedly dumped great quantities of sand, clay, gravel and mill tailings into stream, varying from 16,000 tons to 40,000 tons annually, and there was evidence that water could not be used either for drinking or irrigation purposes and would clog up pipe lines and ditches and would cause percolation to cease, and only evidence to the contrary was that turbidity of stream was such that fish and plant life could exist in it, waters of stream were substantially polluted and rendered unfit for reasonable household and irrigation uses and finding to contrary was unsupported by evidence.

5. Waters and water courses ⇐75, 76

As against upper owners with inferior rights of user, an appropriator of waters of a stream is entitled to have the water at his point of diversion preserved in its natural state of purity, and any use which corrupts the water so as to essentially impair its usefulness for the purposes to which he originally devoted it is an invasion of his rights, and entitles him to both injunctive and legal relief.

6. Evidence ⇐230(2), 265(17)

Where water right owner's predecessor in title granted to mine owner's predecessor in title perpetual right to pollute stream if and when $3,000 was paid, testimony concerning declarations of water right owner's predecessor in title that he had received $3,000 from defendant's predecessor in title which declarations were made before he parted with his title to property were admissible and binding upon water right owner in action against mine owner for pollution of stream, either as "declarations against interest" or as in the nature of vicarious admissions. Code Civ.Proc. §§ 1849, 1853.

See Words and Phrases, Permanent Edition, for all other definitions of "Declaration Against Interest".

7. Evidence ⇐265(18)

Where mine owner defendant based right to pollute stream on contract whereby water right owner's predecessor in title granted to mine owner's predecessor in title perpetual right to pollute stream if and when $3,000 was paid, testimony that some 50 years before water right owner's predecessor in interest declared to witnesses that he had received the $3,000, in the absence of any showing to the contrary, sustained finding that entire consideration of $3,000 was paid.

8. Appeal and error ⇐994(3), 1012(1) Witnesses ⇐311, 313

In action for pollution of stream, wherein mine owner claimed right to pollute stream under contract whereby water right

owner's predecessor in title granted mine owner's predecessor in title perpetual right to pollute stream if $3,000 were paid, and witnesses testified that 50 years before, water right owner's predecessor told them that he received the consideration, that one of the witnesses was small boy at time of purported declaration and that the other witness' testimony contained inconsistencies indicating faulty memory, did not go to the admissibility or sufficiency of the evidence, but rather to weight of evidence and credibility of witnesses which was for trier of fact.

9. Appeal and error ⇐994(3), 1012(1)

The weight of testimony and the credibility of witnesses are matters wholly within the exclusive province of the trier of facts whose determination will not be disturbed by reviewing court.

10. Waters and water courses ⇐64

Where water appropriator granted to mining company the right to deposit tailings from any of its mines forever in stream from which appropriator diverted water, and it was provided that grant should be binding and available to the successors in interest of both parties, parties intended to create a "perpetual right", and did not intend to make a personal contract in the nature of a "covenant not to sue", the force of which would automatically cease upon conveyance by either of them of property to which contract related.

See Words and Phrases, Permanent Edition, for all other definitions of "Covenant Not to Sue" and "Perpetual Right".

11. Waters and water courses ⇐64

A grant for a consideration of perpetual right to pollute a stream by appropriator of water from stream to mining company did not constitute a "sale of quality of water" where sale of quality was not contemplated and mining company acquired no interest in quality of water but was merely given right to corrupt the quality of water theretofore enjoyed by the appropriator and since quality of water unlike quantity is not subject of sale.

See Words and Phrases, Permanent Edition, for all other definitions of "Sale of Quality of Water".

12. Waters and water courses ⇐153

The transferee of an appropriative water right becomes vested with the right as such.

13. Waters and water courses ⇐151

An appropriative water right is lost by nonbeneficial user for five consecutive years. Civ.Code, § 1411.

14. Waters and water courses ⇐151

Where appropriator of water from stream granted to mining company perpetual right to pollute stream, even if grant could be considered as sale of the element of quality of appropriated water, successor in interest of mining company lost right to element of quality by nonbeneficial user for five consecutive years. Civ.Code, § 1411.

15. Easements ⇐1

An "easement" involves primarily the privilege of doing a certain act on or to the detriment of another's property.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement".

16. Easements ⇐3(1)

To create an "appurtenant easement" two tenements are necessary, a dominant one in favor of which the obligation exists, and a servient one upon which the obligation rests.

See Words and Phrases, Permanent Edition, for all other definitions of "Appurtenant Easement".

17. Waters and water courses ⇐154(1)

Where only right sought by mining company was the right to discharge mine tailings into stream, their ultimate place of deposit being of no interest to it, and it was not intended that a grant of perpetual right to pollute a stream by nonriparian appropriator of water from stream to mining company should be regarded as one to deposit mine tailings upon nonriparian lands of appropriator which would have prevented the appropriator from lawfully closing diversion ditch leading to his land, grant of perpetual right to pollute stream did not create an "easement" in the nonriparian lands of the appropriator, since the granted privilege involved no use of the land or restriction of its use.

18. Waters and water courses ⇐153

A water right owner was the owner of an appropriative right severable and alienable from the land to which it was appurtenant.

19. Waters and water courses ⇐153

A riparian right is inseparably annexed to the adjacent riparian land as part and

parcel of it and any grant by the riparian owner which affects his water right necessarily burdens his land, and creates an "easement" in the land, but such result does not follow where a nonriparian owner makes a grant which affects an appropriative water right enjoyed by him.

20. Waters and water courses ⇐154(1)

Where nonriparian appropriator of water from stream for a consideration granted perpetual right to pollute stream to mining company, right intended by the agreement was an easement annexed to the appropriative water right enjoyed by appropriator which would permit the waters of the stream to be used as a conduit to carry off the debris therein deposited from the claims of the mining company.

21. Nuisance ⇐11

A prescriptive right to pollute a water course may be acquired as against lower riparian users and their successors in interest provided the deterioration in quality is not so great as to constitute a public nuisance.

22. Waters and water courses ⇐154(1)

The statute enumerating servitudes which may be attached to land does not purport to enumerate all the burdens which may be attached to land for the benefit of other property and does not prevent an easement of pollution from attaching to a water right. Civ.Code, § 801.

23. Waters and water courses ⇐127, 153

An appropriative water right is a "corporeal hereditament" and constitutes an "interest in realty" and it can therefore appropriately serve as a servient estate to which an easement may be annexed. Civ.Code, § 801.

See Words and Phrases, Permanent Edition, for all other definitions of "Corporeal Hereditament" and "Interest in Realty".

24. Waters and water courses ⇐154(1)

The creation of an easement attached to appropriative water right by a grant for consideration of perpetual right to pollute a stream by appropriative water user to mining company was not violative of "public policy" in the absence of showing that pollution from mining operations was so extensive as to amount to a public nuisance.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

25. Waters and water courses ⇐154(1)

Where grant for valuable consideration of perpetual right to pollute a stream by appropriator of water from stream to mining company clearly expressed intention to create an easement attached to an appropriative water right binding upon assignees who acquired that right with notice actual or constructive, court would construe the grant accordingly.

26. Evidence ⇐460(4)

Where easement attached to appropriative water right was created by grant of perpetual right to pollute a stream by appropriator of water from stream to mining company but grant failed to describe specifically the property or claims intended to be benefited and stated only that the grant extended to "any of its mines" or "any mine owned or operated by it", evidence of claims owned and operated by mining company at time of execution of the agreement was properly admitted to establish dominant tenement.

27. Easements ⇐3(1)

An intended easement will never be construed as personal when it may fairly be construed as appurtenant to some other estate.

28. Easements ⇐36(2)

Where deed does not expressly declare easement to be appurtenant or the language of the deed is ambiguous and it does not clearly appear whether easement was intended to be in gross or appurtenant to land, evidence aliunde the document is admissible to determine the nature of the easement and to establish a dominant tenement.

29. Easements ⇐36(2)

Where it appears from grant that an appurtenant easement was clearly intended but dominant tenement is not specifically described, evidence aliunde the document is admissible to establish the dominant tenement.

30. Waters and water courses ⇐154(1)

Where grant of perpetual right to pollute a stream by appropriator of water from stream to mining company created an easement attached to an appropriative water right, but failed to describe specifically the property or claims intended to be benefited, stating only that the grant extended to "any of its mines" or "any mine owned or operated by it", easement was "appurtenant" to mining claims shown to have been owned and operated by the mining company at the time of the execution of the agreement but not to

claims subsequently acquired by mining company or its successors in title where such intention did not clearly appear.

See Words and Phrases, Permanent Edition, for all other definitions of "Appurtenant".

31. Easements ⇐12(3)

In order to create an easement appurtenant to property to be acquired in the future, parties must express their intention in such manner as to admit of no doubt.

32. Waters and water courses ⇐154(1)

Where easement attached to an appropriative water right was created by grant of perpetual right to pollute a stream by appropriator of water to mining company and property or claims intended to be benefited were not described and grant stated that it extended to "any of its mines" or "any mine owned or operated by it" agreement did not contemplate the creation of a right to pollute the stream from mining properties acquired by mining company's successor in interest through an independent chain of title. Civ. Code, § 806.

33. Waters and water courses ⇐77

In appropriative water right owner's action against mine owner for injunction and damages for pollution of stream, finding that water right owner had supply of water from another source sufficient for her needs was not supported by evidence disclosing that agreement under which she acquired water from another source expressly limited her use of it to domestic and culinary purposes, and she acquired no right to divert water for purposes of irrigation.

34. Waters and water courses ⇐75

In appropriative water right owner's action against mine owner for injunction and damages for pollution of stream, that water right owner enjoyed a supply of pure and wholesome water from another source could be urged in mitigation of damages but not as a complete bar to action for injunction and damages.

35. Waters and water courses ⇐75

In appropriative water right owner's action against mine owner for injunction and damages for pollution of stream, that plaintiff's predecessor in title conveyed to another mining company conducting operations on stream above plaintiff's ranch, the right to pollute the stream was not a bar to injunctive relief where evidence failed to show any pollution by such other company, and showed that defendant had discharged tremendous quantities of tailings into the stream.

36. Injunction ⇐23

Under the equitable doctrine of "balancing of the conveniences" a court of equity may deny injunctive relief and relegate plaintiff to his remedy at law if plaintiff is merely seeking to protect a technical and unsubstantial right and the issuance of the injunction will bring no actual advantage and would result in unusual hardship to the defendant or the public.

See Words and Phrases, Permanent Edition, for all other definitions of "Balancing of the Conveniences".

37. Waters and water courses ⇐75

Where three-fourths of the land for which water was appropriated was productive and particularly suitable for raising of fruits and grains, and appropriator did not enjoy adequate supply of water from another source, and evidence failed to show that appropriator would not gain protection by an injunction restraining mine owner from polluting the stream, and failed to show that stream was the only place where mine owner could dispose of tailings, and the value of mine owner's properties, the number of persons employed by him, and that continuance of mining operations was of vital interest to the county was not shown, water appropriator would not be denied an injunction restraining mine owner from polluting the stream on equitable principle of "balancing of the conveniences".

38. Injunction ⇐23

The courts are reluctant in applying the doctrine of "balancing of the conveniences" where act complained of is in its incidents wilfully tortious, except where injunction to restrain nuisance will produce some great public mischief.

In Bank.

Appeal from Superior Court, Sierra County; Raymond McIntosh, Judge.

Action to enjoin pollution of a stream and for damages by Marie A. Wright against C. L. Best. From a judgment for the defendant, plaintiff appeals.

Reversed.

Gilford G. Rowland, Wilson Craven, and Rowland & Craven, all of Sacramento, for appellant.

A. J. Just, of Downieville, and Louis V. Skinner and Fitzgerald, Abbott & Beardsley, all of Oakland, for respondent.

EDMONDS, Justice.

The appellant asserts that, as the owner of a water right by appropriation, she is entitled to enjoin C. L. Best from polluting Rock Creek in connection with certain mining operations, and also to recover from him damages for such pollution. The judgment from which she has appealed is based upon findings that she does not own the water right claimed by her, and also that any rights which she acquired from her predecessors in interest are subject to an agreement made by them and the Ruby Gold Gravel Mining Co.

After alleging ownership of the property known as the Kennedy Ranch and the right to take water from Rock Creek in Sierra County, the appellant's complaint charges that, in the spring of 1937, and upon occasions since that time, the respondent has dumped and is now discharging, mine tailings into the creek, rendering the water wholly unfit for domestic or agricultural purposes. By answer, the respondent denied these allegations, and as a separate defense, pleaded a contract made in 1883 by the Ruby Gold Gravel Mining Co., his predecessor in interest, and Henry H. Kennedy, the then owner of the land and water right to which the appellant claims title, granting it the right to run mining debris into Rock Creek. Upon these issues the court heard extensive evidence which may be summarized as follows:

The Kennedy Ranch comprises 47 acres of land located near the mouth of Rock Creek, but not riparian thereto. In 1852, its owner appropriated water from that stream by means of a small diversion dam located approximately one-half mile above the ranch. From that dam the water was carried through a flume and ditch to the ranch. These water works are now in use by the appellant.

In 1875, Kennedy bought the ranch, with the right to take water from the creek through the ditch and flume. He and his family lived upon the property from 1875 to 1915 and during that period used the water for domestic, culinary and household purposes and for the irrigation of crops of hay, fruit and vegetables.

About the time Kennedy became the owner of the ranch, the Ruby Gold Gravel Mining Co. owned and operated patented mining claims, known as the Guatamala and Guatamala Extension, located some five miles above it on Rock Creek and tributary streams. In 1883, and for some time before, the mining company had been polluting the waters of the creek with tailings and mining debris taken from these claims. Kennedy filed suit to enjoin the pollution. For the purpose of compromising and settling the litigation, Kennedy and the mining company entered into a written agreement which was recorded seven months later.

The material provisions of this agreement are as follows: Kennedy granted to the mining company the right to run gravel, dirt and mining debris from any of its mines into Rock Creek until April 1, 1884, and released the company from any and all damage caused to him or his properties thereby. If the company polluted the water after April 1, 1884, it agreed to pay Kennedy $680, upon the payment of which sum it would acquire the right to deposit gravel in the stream from any mine operated by it until April 1, 1885. If the company polluted the stream in any year after April 1, 1885, it agreed to pay Kennedy the sum of $600 for each year in which such pollution occurred, the payment of which sum or sums would release it from all damage done to Kennedy or his property on account of such pollution during the year for which payment was made. If and when $3,000 was paid to Kennedy, then and thereafter the company should have, in so far as Kennedy was concerned, a perpetual right to pollute the waters of Rock Creek. The contract further provided that, in the event of a sale or conveyance by either party of any property to which the agreement related, such sale or conveyance should be expressly made subject to its terms, and that it "shall be binding upon, and available to the successors in interest * * * of both parties. * * *" This agreement was never formally assigned or transferred to any of the successors in interest of the land then owned by the mining company.

One year later, 1884, the mining company acquired by purchase an adjoining property known as the Garnet Claim. Some time thereafter, the company abandoned its mining operations, and although other owners mined the claims in later years, the only evidence concerning the resumption of pollution of the stream is that this occurred at intermittent times. The record shows no substantial and continuous pollution by suc-

cessors in interest of the Ruby Gold Gravel Mining Co. until shortly before the commencement of the present action. But for many years, Kennedy continued to farm the ranch, using the unpolluted waters of the creek for both household and irrigation purposes. In 1915, he sold the property, but until 1926, successive owners made similar use of the water, raising crops of hay, fruit and vegetables.

The appellant and others bought the ranch and the appurtenant water right in 1926. In the next 10 years these owners prospected the land for minerals and conducted no farming operations. However, the waters of Rock Creek were continuously used for household and domestic purposes and also for the irrigation of lawns, shrubs and some vegetables.

In 1933, the respondent acquired through mesne conveyances the mining property formerly owned by the Ruby Gold Gravel Mining Co., including the Guatamala, Guatamala Extension and Garnet claims. Thereafter, he purchased from others the Jade, Topaz, Irene and Opal claims, all of which are adjacent and contiguous to them. The entire group is commonly referred to as the "Ruby Mine."

The respondent's operations, which commenced in 1933, are dual in nature, consisting of quartz mining and underground placer mining. Upon the Garnet Claim, there is a stamp mill for quartz ore and a gravel washing plant through which gravel is run. The quartz is mined upon the Guatamala Claim; the gravel production comes principally from the Topaz Claim, although a small part of it is obtained from the Guatamala Extension.

It was not until 1936 that the pollution of Rock Creek from the Ruby Mine became noticeable. During the summer months of that year, however, great quantities of debris were discharged from the mine into the stream, and the pollution continued uninterruptedly until 1938, when the appellant, who was then the sole owner of the Kennedy Ranch, filed the present action.

In addition to the mining properties owned by the respondent, there are a number of other mines, located within the Rock Creek area above the Kennedy Ranch, which, when operating, also dispose of mine tailings in the creek. In addition to the appropriative right in Rock Creek, the appellant also owns and uses on the Kennedy Ranch a right to take water from Woodruff Creek, which, according to the respondent, furnishes an adequate supply of clear and unpolluted water for her domestic and irrigation needs.

From these facts, the trial court found that the appellant is the owner of the Kennedy Ranch, acquiring title to it with notice of the 1883 agreement; that the entire consideration ($3,000) called for by that agreement was paid; and that the respondent has succeeded to any rights created by that agreement. Other findings of the court are that the appellant's predecessors in interest were the owners of a water right in Rock Creek, which right is subject to the terms of and limitations imposed by the agreement; that she does not own the water right claimed by her; that the respondent is discharging, and threatens to continue to discharge into Rock Creek, quantities of clay, gravel and mill tailings, but that the water is not thereby polluted nor rendered totally unfit for domestic, household or agricultural purposes; and that appellant owns and is now using a supply of clear and unpolluted water from Woodruff Creek which is adequate for domestic and irrigating purposes. From these findings the court concluded that the respondent is the owner of a perpetual right to pollute the waters of Rock Creek and denied the appellant injunctive or other relief.

In attacking the judgment against her, the appellant contends that the findings are inconsistent and uncertain. One cannot determine, she says, whether the court decided that in the years between 1926 and 1937 she and her co-owners lost the right to take water from Rock Creek because of acts occurring during that time, or whether she now owns the water right claimed by her subject to the agreement made in 1883. But she takes the position that, under one theory of the case, she may recover without quieting her title to the water right, because one in possession may maintain an action to abate a muisance which injuriously affects his enjoyment of possession. The appellant also asserts that the findings concerning title to the water right, the nonpollution of the water of Rock Creek, and the payment of the consideration provided for in the 1883 contract are either contrary to, or not supported by, the evidence.

Other points presented challenge the trial court's conclusion of law that the respondent has succeeded to the rights of the mining company under the 1883 agreement. That contract, she argues, creates neither an ease-

ment appurtenant nor a covenant running with the land and, assuming that an easement was created, the trial court should have defined the parcel of land to which it is appurtenant and confined the respondent's rights to that land. Also, the fact that she has a right to take water from Woodruff Creek is not a defense to her action but may only be urged in diminution of damages.

In support of the judgment, the respondent asserts that the appellant has not established her ownership of the right which she seeks to protect by injunction; that she has not proved facts entitling her to injunctive relief and that the balance of convenience is against her position. He also maintains that the challenged findings are supported by the evidence and that the court drew correct conclusions of law from them.

[1] The finding upon the issue of the appellant's property rights is that, since the year 1926, she and her predecessors in title have not owned, possessed or used a water right such as is alleged in her complaint. But there is uncontradicted evidence to the contrary. In her complaint, she alleged that she and her predecessors in interest have owned a right in the waters of Rock Creek, acquired in 1852 by diversion and continuous use upon the Kennedy Ranch for irrigation and domestic purposes. This is a sufficient averment of the ultimate fact of ownership Gartlan v. C. A. Hooper & Co., 177 Cal. 414, 170 P. 1115; Chrisman v. Southern California Edison Co., 83 Cal. App. 249, 256 P. 618; 26 Cal.Jur. 519-520. In proof of that allegation, the appellant introduced in evidence a chain of title with respect to the water right showing that, through successive conveyances from the year 1856, the right was finally conveyed by deed to her as appurtenant to the Kennedy Ranch.

[2, 3] In addition to the record title, the appellant proved, by several witnesses, an uninterrupted beneficial use of the water by the successive owners of the ranch. Although the extent of the right, as originally acquired, is not specifically shown, several of the deeds in the chain of title describe the flume and ditch as having a capacity of 300 miner's inches, and a licensed engineer, called as a witness on behalf of the appellant, testified that the capacity of the flume is approximately 240 miner's inches. Moreover, inasmuch as this is a suit to enjoin the pollution of water beneficially used for more than 50 years, the quantity of water to which the right attaches is not material, for substantial pollution would destroy the usefulness of even a small amount of it. In the absence of any evidence to the contrary, the records offered in evidence and the corroborating testimony proved ownership of a water right acquired by appropriation and preserved by beneficial use, and which, by successive conveyances, has become appurtenant to the Kennedy Ranch.

[4] Equally unsupported by the evidence is the finding that the waters of Rock Creek were not polluted nor rendered wholly unfit for domestic, household and agricultural purposes. Admittedly, respondent has dumped, and is dumping, great quantities of sand, clay, gravel and mill tailings into the stream. According to the testimony of the respondent's mine superintendent, the quantity of debris deposited in the creek varied from 16,000 tons in 1937 to between 30 and 40,000 tons in 1938. Several witnesses, including persons who resided on the Kennedy Ranch, testified that in the years 1936 and 1937, the water was muddy and discolored by slickings from the mines and that it could not be used for either drinking or irrigation purposes. There is evidence that when the water was sprinkled on lawns, plants, and clothes or used on dishes, the debris would adhere to them and coat them, giving them the appearance of being painted grey. Other testimony shows that in 1938, when the water was used to generate power on the ranch, the debris would clog up pipe lines and ditches and wear out power machinery, and that during 1936 and 1937, the pollution was so great that the ditch would fill up twice a year, requiring a week for two men to clean it. These statements were further corroborated by the testimony of Walter Techow, a chemist, who made a chemical analysis of the waters of the creek and found that the deposited tailings would penetrate into the soil for a depth of a few inches, causing any percolation to entirely cease.

The only evidence to the contrary was given by a mining engineer, who testified that, according to a test made by him of the water in the creek, the turbidity of the stream was such that fish and plant life could exist in it. His test was conducted, however, at a time when the respondent's stamp mill was not operating. It is not directly contradictory of that offered by the appellant, which compels a finding that the waters of Rock Creek were substantially

polluted and rendered unfit for the appellant's reasonable household and irrigating uses.

[5] Considering the respective rights of the parties under these circumstances, it is an established rule in this state that an appropriator of waters of a stream, as against upper owners with inferior rights of user, is entitled to have the water at his point of diversion preserved in its natural state of purity, and any use which corrupts the water so as to essentially impair its usefulness for the purposes to which he originally devoted it, is an invasion of his rights. Any material deterioration of the quality of the stream by subsequent appropriators or others without superior rights entitles him to both injunctive and legal relief Phœnix Water Co. v. Fletcher, 23 Cal. 481; Hill v. Smith, 27 Cal. 476; Antioch v. Williams Irrigation Dist., 188 Cal. 451, 205 P. 688; Joerger v. Pacific Gas & Elec. Co., 207 Cal. 8, 276 P. 1017; 26 Cal.Jur. 188-189; Wiel, Water Rights, 3rd Ed., vol. 1, pp. 561–565. The respondent does not assert a right to pollute the waters of Rock Creek as a riparian owner, prior appropriator, or by way of prescriptive user. He bases his claim entirely upon the 1883 agreement, and his right therefore depends upon whether that agreement, under the law applying to interests in real property, is anything more than a personal covenant, binding only as between the original parties.

[6, 7] As a preliminary question concerning this contract, it is necessary to determine whether the evidence sustains the finding that the entire consideration of $3,000 was paid, for under the express terms of the writing, the existence of any perpetual right to pollute the stream is conditioned upon the payment of that amount. Upon that issue, the record includes the testimony of E. C. Kennedy, the son of H. H. Kennedy, who declared that his father told him he had received $3,000 from the mining company. This testimony was corroborated by that of Louis Fortier, an old-time resident of Sierra County, who declared Kennedy told him that "he [Kennedy] had received all his money from the settlement he had made with them." These declarations of a deceased predecessor in title, having been made in relation to the property before he parted with his interest therein, constitute admissible hearsay evidence and are binding upon his successors in title either as declarations against pecuniary interest or as in the nature of vicarious admissions. Code Civ.Proc. § 1853; Code Civ.Proc.1849. Although such evidence is not entirely satisfactory, it will support a finding, particularly in the absence of any showing to the contrary. Moreover, the transaction to which the evidence was directed, occurred over a half century ago, and other and better evidence was undoubtedly difficult, and perhaps impossible, to obtain.

[8, 9] The appellant objects to the testimony of E. C. Kennedy on the ground that the conversation with his father attested to by him occurred over 50 years before at a time when he was a small boy; she advances a similar objection to the testimony of Fortier, claiming that it contains certain inconsistencies and evidences a faulty memory on his part. Such objections do not go to the admissibility or sufficiency of the evidence, but rather to the weight of the testimony and the credibility of the witnesses, matters wholly within the exclusive province of the trier of fact, whose determination upon them will not be disturbed by an appellate court.

[10] Considering the express language of the agreement which the parties signed, it cannot be seriously argued that they intended to make a personal contract in the nature of a covenant not to sue, the force of which would automatically cease upon the conveyance by either of them of the property to which the contract related. The contract clearly and unambiguously grants to the Ruby Gold Gravel Mining Company the right to deposit tailings in Rock Creek from any of its mines forever, the right thus granted to be available to, and binding upon successors in interest and their respective properties. Undoubtedly, a perpetual right was intended. The difficulty lies in determining the legal nature of that right and whether it is one recognized by the law.

Pointing out that a water right by appropriation is independent of ownership and possession of land and subject to sale separately from it (26 Cal.Jur. 103; Wiel, Water Rights, 3rd Ed., vol. 1, p. 582), the respondent contends that the agreement constituted a sale of the quality of the water in Rock Creek to the mining company. According to his argument, an appropriative water right includes both quantity and quality, either of which is separately alienable. Upon that premise, he asserts that the appellant's predecessor in interest,

having conveyed his right to a flow of clear and unpolluted water, no such right descended to appellant.

[11-14] This argument must be rejected for several reasons. In the first place, the agreement itself does not contemplate a sale of quality. The mining company acquired no interest in the quality of the water under the contract; it was merely given the right to corrupt a quality enjoyed by the appellant's predecessor in interest. Moreover, quality, unlike quantity, which is a measurable element, is not a subject of sale. Finally, if respondent's contention were accepted, his right must be regarded as forfeited. The transferee of an appropriative right becomes vested with the right as such. An appropriative right is lost by a non-beneficial user for five consecutive years. Civ.Code, § 1411; Smith v. Hawkins, 110 Cal. 122, 42 P. 453; Lindblom v. Round Valley Water Co., 178 Cal. 450, 173 P. 994; Bazet v. Nugget Bar Placers, Inc., 211 Cal. 607, 296 P. 616. Consequently, if the mining company obtained an appropriative right to quality under the agreement, any such right has now become lost by continuous non-user for several years as shown by the evidence.

Although the agreement does not constitute a sale of the quality of the water of the stream it may still be available as a defense to the respondent, if it may be legally construed as creating some right which, by reason of attachment to the claims owned by the mining company passed to him by the conveyance of those claims. The respondent contends that the effect of the agreement is to create an easement burdening the Kennedy Ranch for the benefit of the Ruby Mine which is binding upon the appellant by reason of the constructive notice afforded by the recordation of the grant.

[15-18] An easement involves primarily the privilege of doing a certain act on, or to the detriment of, another's property. To the creation of an appurtenant easement two tenements are necessary, a dominant one in favor of which the obligation exists, and a servient one upon which the obligation rests. Applying these principles to the facts of the present case, the grant to the Ruby Mining Company to pollute the waters of Rock Creek cannot be said to have created an easement in the non-riparian Kennedy Ranch, for the granted privilege involves no use of the land, or restriction of its use. If the grant is regarded as one to deposit tailings upon the ranch, Kennedy could not have lawfully closed the diversion ditch leading to his land under the rule that a servient owner may not interfere with the exercise or enjoyment of an easement. Certainly no such result was contemplated by the parties for the mining company desired only to discharge tailings into the stream; their ultimate place of deposit was of no interest to it. Moreover, the fact that Kennedy was the owner of an appropriative right, severable and alienable from the land to which it is appurtenant, is most significant. Under these circumstances, and considering the express language of the grant, it may not reasonably be construed as creating an easement upon the land.

[19] The respondent cites several cases to the effect that a grant to a mining company of the right to discharge refuse material into a stream results in the creation of an easement in the land of the lower owner Luama v. Bunker Hill & S. Mining & Concentrating Co., 9 Cir., 41 F.2d 358; Gross v. Bunker Hill & S. Mining & Concentrating Co., D.C., 45 F.2d 651; Johnson v. Armour & Co., 69 N.D. 769, 291 N.W. 113, 127 A.L.R. 828, 838, 839; Brush v. Lehigh Valley Coal Co., 290 Pa. 322, 138 A. 860. These decisions, however, involved grants by lower riparian owners. Since a riparian right is inseparably annexed to the adjacent riparian land as part and parcel of it (25 Cal.Jur. 1068–1069), any grant by the riparian owner which affects his water right necessarily burdens his land. Accordingly, it is logical to hold that such a grant creates an easement in the land. The nature of the right of a non-riparian owner compels a different construction of the grant to the Ruby Gold Gravel Mining Co. and a determination that no easement in the Kennedy Ranch was contemplated by the parties or acquired by the grantee.

[20-23] The right clearly intended by the agreement is an easement annexed to the appropriative water right enjoyed by appellant, the waters of the creek to be used as a conduit to carry off the debris therein deposited from the claims worked by the Ruby Gold Gravel Mining Co. Although no authority has been cited for or against the proposition that an easement may be attached to a water right, there is no legal or practical objection to the creation of such an incident. A prescriptive right to pollute a watercourse may be acquired as against lower riparian users and

their successors in interest provided the deterioration in quality is not so great as to constitute a public nuisance. See cases cited in Tiffany, Real Property, 3rd Ed., vol. 3, § 764; 67 C.J. 776. Although an easement of pollution is not among the servitudes specified in section 801 of the Civil Code, that section does not purport to enumerate all the burdens which may be attached to land for the benefit of other property (Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 P. 593), and the section does recognize as appurtenant easements rights similar to the one under discussion, such as the right of discharging water upon land. An appropriative right is a corporeal hereditament and constitutes an interest in realty. Hill v. Newman, 5 Cal. 445, 63 Am.Dec. 140; Mount Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 P. 826; South Tule, etc., Ditch Co. v. King, 144 Cal. 450, 77 P. 1032; Wiel, Water Rights, 3rd Ed., vol. 1, § 283; 26 Cal.Jur. 50. It can therefore appropriately serve as a servient estate to which an easement may be annexed.

[24, 25] The novelty of the incident is no bar to its recognition as an easement if its creation violates no principle of public policy. There is no affirmative showing that the pollution from respondent's mining operations is so extensive as to amount to a public nuisance. A valuable consideration was paid for a privilege which is neither slight nor frivolous, and the agreement between the parties clearly expresses their intention to create an easement attached to an appropriative water right binding upon assignees who acquired that right with notice, actual or constructive. The court must therefore construe it accordingly.

It remains to define the dominant tenement intended to be benefited by the grant and to which the easement became appurtenant. Although the 1883 agreement undeniably purports to create an easement appurtenant to the mining property of the Ruby Gold Gravel Mining Co., it fails to describe specifically the property or claims intended to be benefited, stating only that the grant extended to "any of its mines" or "any mine owned or operated by it." Nor do the findings of the trial court define any specific property as a dominant tenement. The court did find, however, that respondent owned the "Ruby Mine," which, as has been stated, embraces all of the claims now owned by respondent, including those acquired after the execution of the contract. And as it concluded that the respondent obtained the right forever to run tailings into Rock Creek, the effect of the judgment is to give him a right to pollute from any and all of the claims now owned and operated by him.

[26-30] Unquestionably, the easement of pollution became appurtenant to the Guatamala and Guatamala Extension, the claims owned and operated by the Ruby Gold Gravel Mining Co. at the time of the execution of the agreement. True, those claims were not described in the agreement, but the trial court properly received evidence of their ownership. An intended easement will never be construed as personal when it may fairly be construed as appurtenant to some other estate. Accordingly, when the deed does not expressly declare the easement to be appurtenant, or when the language of the deed is ambiguous, and it does not clearly appear whether the easement was intended to be in gross or appurtenant to land, evidence aliunde the document is admissible to determine the nature of the easement and to establish a dominant tenement. Elliott v. McCombs, 17 Cal.2d 23, 109 P.2d 329; Hopper v. Barnes, 113 Cal. 636, 45 P. 874; Nay v. Bernard, 40 Cal.App. 364, 180 P. 827. This principle applies with even greater force where, as here, an appurtenant easement was clearly intended, but a dominant tenement was not specifically described. As the evidence shows the ownership and operation of the two Guatamala claims by the mining company at the time of the grant, the easement of pollution must be held appurtenant thereto, and exercisable by the respondent under the rules which have been stated.

An opposite conclusion, however, must be reached as to the Garnet, Topaz, Opal, Irene and Jade claims, all of which were acquired subsequent to the execution of the agreement. In the absence of a very clear intention to the contrary, a court should not assume that the grantor contracted with reference to any claims which were not then in operation. The agreement granting to the mining company the perpetual right to pollute the stream from "any of its mines" or "from any mine owned or operated by it," must therefore be construed as referring only to those claims which were owned and operated by the company at the time the agreement was made.

[31] Several cases cited by respondent hold that there may be an agreement to grant an easement appurtenant to property to be acquired in the future which as between the parties and their privies with notice is enforceable when the dominant tenement is acquired. Wells v. North East Coal Co., 255 Ky. 63, 72 S.W.2d 745; Kentucky West Virginia Gas Co. v. Crum, 258 Ky. 508, 80 S.W.2d 537; Kalinowski v. Jacobowski, 52 Wash, 359, 100 P. 852. In each of the cited cases, however, the controversy involved an agreement which expressly and unambiguously purported to grant an easement appurtenant to after-acquired property, and the court rested its decision upon the clear and unmistakable terms of the grant. In the present case, the agreement refers only to mines "operated by the company" and signicantly omits the words" now or hereafter owned or operated by the company" or words of similar import. Unattached rights in property suspended in abeyance are not favored in the law. In orde to validly create such rights which will benefit property to be later acquired, the parties must express their intention in such manner as to admit of no doubt.

[32] The Topaz, Opal, Irene and Jade claims were never owned by the Ruby Gold Gravel Mining Co. and were acquired by the respondent from third persons. It cannot be seriously contended that the agreement contemplated the creation of a right to pollute the creek from mining properties acquired by a successor in interest through an independent chain of title. The evidence shows that the greater amount of debris now being deposited in Rock Creek is derived from the Garnet and the Topaz claim purchased by respondent after 1933. To allow him to pollute the stream from mines operated upon these claims would permit the burden of an easement to be increased beyond the scope of the grant, contrary to the established principles of property law. Winslow v. City of Vallejo, 148 Cal. 723, 84 P. 191, 5 L.R.A.,N.S., 851, 113 Am.St.Rep. 349, 7 Ann.Cas. 851; Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 P. 906, 36 L.R.A.,N.S., 185; Cal.Civ.Code, § 806; 9 Cal.Jur. 950-951.

The respondent contends that the appellant has not shown any irreparable injury and has thus failed to make out a case for injunctive relief. According to him, the absence of irreparable injury is clearly demonstrated by the fact that the appellant has an adequate supply of water from an independent source, and by the additional fact that one Costa, appellant's predecessor in title, conveyed to the Wisconsin-North Fork Gravel Mines, another mining company conducting mining operations on Rock Creek above the Kennedy Ranch, the right to pollute the creek under a recorded agreement similar to the one now under consideration.

[33, 34] The finding that appellant has a supply of water from Woodruff Creek sufficient for her needs is directly contrary to the evidence, for the agreement under which she acquired the right to waters from that creek expressly limits her use of it to domestic and culinary purposes. She acquired no right thereunder to divert water for the purposes of irrigation. In any event, it is no defense to respondent's tortious act that appellant enjoys a supply of pure and wholesome water from another source. Durham v. Eno Cotton Mills, 141 N.C. 615, 54 S.E. 453, 7 L.R.A.,N.S, 321. The existence of the additional water right may only be urged in mitigation of damages and not as a complete bar to an action for injunction and damages.

[35] Nor is the Costa agreement a bar to injunctive relief against respondent. Although that agreement may be binding upon the appellant, the evidence fails to show any pollution of Rock Creek from the workings of the Wisconsin Company. On the other hand, the evidence does show that respondent has discharged tremendous quantities of tailings into the stream. Until it appears that the pollution caused by the Wisconsin mine is of such enormity as to render the waters of the stream wholly unfit for any purpose, apart from the pollution resulting from any other source, it may not be said that appellant is not irreparably injured by the respondent's operations.

[36] But the respondent asserts a right to pollute the creek from the entire Ruby Mine, relying upon the equitable doctrine of the "balancing of the conveniences." Under this doctrine, a court of equity may deny injunctive relief and relegate the plaintiff to his remedy at law, if the benefit resulting to him from the granting of the injunction will be slight as compared to the injury caused the defendant thereby. Frost v. City of Los Angeles, 181 Cal. 22, 183 P. 342, 6 A.L.R. 468; Peterson v. City of Santa Rosa, 119 Cal. 387, 51 P. 557; Clough

v. W. H. Healy Co., 53 Cal.App. 397, 200 P. 378. Despite a proper showing in other respects of a right to injunctive aid, if a plaintiff is merely seeking to protect a technical and unsubstantial right, and the issuance of the injunction will bring no actual advantage, it may be properly refused where to do otherwise would result in unusual hardship to the defendant or the public.

The respondent, however, has not proved facts sufficient to provide a basis for the application of that principle. In his briefs, he alleges that the Kennedy Ranch is of "doubtful value"; that plaintiff enjoys a right to unpolluted water from an independent source; and that the granting of an injunction would be an ineffective and useless act, as the appellant would receive no protection therefrom because of the right enjoyed by the Wisconsin Mine to pollute the stream to any extent at any time. On the other hand, he asserts that he will be greatly damaged by the issuance of the writ. He alleges that tailings from the Ruby Mine cannot be impounded or disposed of anywhere except in Rock Creek. To grant the injunction, he contends, will force the closing of a mine "valued at many hundreds of thousands of dollars," throw "thirty to fifty" persons employed by him out of work, and seriously injure the inhabitants of Sierra County.

None of these assertions is supported by the evidence. The appellant's property is not of doubtful value, for the evidence affirmatively shows that at least three-fourths of the Kennedy Ranch is productive and particularly suitable for the raising of fruits and grain. And as the appellant does not enjoy an adequate supply of water from Woodruff Creek for irrigation purposes and because the evidence fails to show any pollution of Rock Creek by the Wisconsin Mine, there is no foundation for the claim that the appellant will not gain any protection by an injunction.

[37, 38] Turning to the respondent's allegations of irremedial injury, there is no proof to support his assertion that Rock Creek is the only source of disposal of debris from the Ruby Mine. Furthermore, there is no evidence whatsoever in the record as to the value of the respondent's properties or operations. The record is also silent as to the number of persons employed by him at the mine. And there is no showing that the inhabitants of Sierra County have any vital interest in the continuance of his mining operations. The appellant seeks to protect a substantial right by injunction, and the remedy should not be denied her upon claims of unusual hardship to the respondent, wholly unsupported by proof. Moreover, the courts of this state have manifested a reluctance to apply the doctrine of balancing the conveniences to a situation where, as here, the act complained of is in its incidents wilfully tortious (Hulbert v. California, etc., Cement Co., 161 Cal. 239, 118 P. 928, 38 L.R.A.,N.S., 436; 14 Cal.Jur. 232), excepting cases where an injunction to restrain a nuisance will produce some great public mischief. Frost v. City of Los Angeles, supra.

Finally, the doctrine relied upon by the respondent presupposes a right in the appellant to an injunction but for the balance of convenience against her demand for it. The court's determination that the appellant's rights are barred by the 1883 agreement left no basis for the consideration of that principle, although it is mentioned in the order denying a new trial.

The judgment is reversed.

GIBSON, C. J., and CURTIS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

WEST KEY NUMBER SYSTEM

19 Cal.2d 319

GREENBERG v. SUPERIOR COURT FOR CITY AND COUNTY OF SAN FRANCISCO.

S. F. 16656.

Supreme Court of California

Jan. 29, 1942.

1. Habeas corpus ⇐22(1)

If there is no reasonable or probable cause for committing order of magistrate, defendant may be discharged on habeas corpus. Pen.Code, § 1487.

2. Indictment and Information ⇐1

An "indictment" is an accusation in writing presented by the grand jury to a competent court charging a person with a public offense without the necessity of a pre-

liminary examination by a magistrate. Pen. Code, § 917.

See Words and Phrases, Permanent Edition, for all other definitions of "Indictment".

3. Indictment and information ⇐10

A grand jury's function is to return an indictment against a person only when the evidence presented to it indicates that he has committed a public offense. Pen.Code, § 921.

4. Indictment and information ⇐10

A grand jury that indicts a person, when no evidence has been presented to connect him with the commission of the crime charged, exceeds its authority and encroaches upon the right of the person to be free from prosecution for crime unless there is some rational ground for assuming the possibility that he is guilty. Pen.Code, §§ 682, 688, 921; Const. art. 1, § 8.

5. Indictment and information ⇐10

Where grand jury indicts a person when no evidence has been presented to connect him with the commission of the crime charged, the indictment is void and confers no jurisdiction upon a court to try the person for the offense charged. Pen.Code, §§ 682, 688, 921; Const. art. 1, § 8.

6. Indictment and information ⇐10

If there is some evidence to support an indictment court will not inquire into its sufficiency but lack of any evidence conclusively establishes that the grand jury has exceeded its authority in returning an indictment. Pen.Code, §§ 682, 688, 921; Const. art. 1, § 8.

7. Indictment and information ⇐10

At common law an indictment returned by a grand jury was unimpeachable because the grand jury's proceedings were clothed in secrecy and a court had no access to the evidence upon which the indictment was based but such rule was abrogated by adoption of statute requiring that a transcript available to both defendant and prosecutor be kept of testimony introduced before grand jury in all criminal cases where an indictment is returned. Pen.Code, § 925.

8. Grand jury ⇐1

The grand jury is a "judicial tribunal" from whose decision there is no appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Tribunal".

9. Prohibition ⇐3(4)

Where an indictment charged that defendant and others conspired to commit grand theft, and that they procured insurance on an automobile that had already been wrecked and then reported to insurer that automobile was wrecked after date of issuance of the insurance, but where transcript of testimony on which indictment was based did not contain evidence supporting charge against the defendant, he was entitled to a writ of prohibition restraining trial upon the indictment since prohibition was the only "adequate remedy". Pen.Code, §§ 182, 917, 921, 925; Const. art. 1, § 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Adequate Remedy".

In Bank.

Proceeding by Morris Greenberg against the Superior Court of the City and County of San Francisco for a writ of prohibition to restrain the respondent court from proceeding with the trial of a criminal case.

Writ of prohibition granted

James C. Purcell and William E. Ferriter, both of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and John R. Golden, Asst. Dist. Atty., both of San Francisco, for respondent.

TRAYNOR, Justice.

The grand jury of the City and County of San Francisco returned an indictment charging petitioner and four others with conspiracy to commit grand theft in violation of Penal Code section 182. The indictment charged that all of the persons named therein procured fro. the Fireman's Fund Insurance Company a policy of automobile insurance on an automobile that had already been wrecked, that they then reported to the company that the car was wrecked at a time after the date of issuance of the insurance, and that the company paid them for the asserted loss. After petitioner was arraigned, he moved to quash the indictment on the ground that it was void and that the court was without jurisdiction to proceed thereon because there was no evidence before the grand jury tending to support the charges made against him. His motion was denied and he demurred to the indictment. The court overruled the demurrer and set the case for trial. Petitioner has no appeal from

either the order of the court refusing to quash the indictment or the overruling of the demurrer, and has therefore petitioned this court for a writ of prohibition to restrain the lower court from proceeding with the trial.

The transcript of the testimony upon which the indictment was based contains no evidence even remotely supporting the charges made against petitioner. Respondent contends, however, that in California prohibition will not lie to restrain a court from proceeding with the trial of a petitioner on the ground that there was no evidence presented to the grand jury of his guilt of the offense charged.

[1, 2] Prohibition will issue to restrain an inferior tribunal from acting in excess of its jurisdiction if there is no plain, speedy, and adequate remedy in the ordinary course of law. Cal. Code Civ.Proc., §§ 1102, 1103. Public offenses against the State of California must with few exceptions be prosecuted by indictment or information, and a court has no jurisdiction to proceed with the trial of an offense unless a valid indictment or information has first been presented. Cal. Const., art. I, § 8; Cal.Pen.Code, §§ 682, 888. An information is a written accusation of crime made by a district attorney, without action by a grand jury, after a magistrate, at a preliminary hearing, has found sufficient cause to believe the defendant guilty of a public offense and has ordered him committed. Cal.Const., art. 1, § 8; Cal.Pen.Code, section 809; see cases cited in 7 Cal.Jur. 967, note 15. If there is no reasonable or probable cause for the order of the magistrate the defendant may be discharged on habeas corpus. Pen.Code, section 1487; see cases cited in 13 Cal.Jur. 230. An indictment is "an accusation in writing, presented by the grand jury to a competent court, charging a person with a public offense" without the necessity of a preliminary examination by a magistrate. Pen. Code, § 917; People v. Goldenson, 76 Cal. 328, 19 P. 161.

[3] A grand jury's function is to return an indictment against a person only when the evidence presented to it indicates that he has committed a public offense. It is no Star Chamber tribunal empowered to return arbitrary indictments unsupported by any evidence. On the contrary the necessity of basing an indictment upon evidence is implicit in section 921 of the Penal Code which provides: "The grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury."

[4-6] A grand jury that indicts a person when no evidence has been presented to connect him with the commission of the crime charged, exceeds the authority conferred upon it by the Constitution and laws of the State of California and encroaches upon the right of a person to be free from prosecution for crime unless there is some rational ground for assuming the possibility that he is guilty. People v. Restenblatt, 1 Abb.Prac., N.Y., 268; People v. Glen, 173 N.Y. 395, 66 N.E. 112; People v. Buffalo Gravel Corp., Sup., 195 N.Y.S. 940; People v. Brickner, 15 N.Y.S. 528, 8 N.Y.Cr. R. 217; People v. Price, 2 N.Y.S. 414, 6 N. Y.Cr.R. 141; Gore v. State, 217 Ala. 68, 114 So. 794; Sparrenberger v. State, 53 Ala. 481, 25 Am.Rep. 643; People v. Sexton, 187 N.Y. 495, 80 N.E. 396, 116 Am.St. Rep. 621; see United States v. Silverthorne, D.C., 265 F. 853; see Brady v. United States, 8 Cir., 24 F.2d 405, 59 A.L.R. 567. Such an indictment is void and confers no jurisdiction upon a court to try a person for the offense charged. Ibid. It has long been settled in most jurisdictions that an indictment is invalid if it is unsupported by any evidence before the grand jury. See cases collected in 59 A.L.R. 567. If there is some evidence to support the indictment the courts will not inquire into its sufficiency (see cases collected in 59 A.L.R. 573), but the lack of any evidence conclusively establishes that the grand jury has exceeded its authority in returning an indictment.

[7] At common law an indictment returned by a grand jury was unimpeachable because the grand jury proceedings were clothed in secrecy and a court had no access to the evidence upon which the indictment was based. People v. Tinder, 19 Cal. 539, 81 Am.Dec. 77. There ceased to be any reason for the common law rule in this state, however, when section 925 of the Penal Code was amended to require that a transcript, available to both defendant and prosecutor, be kept of the testimony introduced before the grand jury in all criminal causes where an indictment is returned. In the case of In re Kennedy, 144 Cal. 634, 78 P. 34, 67 L.R.A. 406, 103 Am.St.Rep.

117, 1 Ann.Cas. 840, a defendant petitioned for a writ of habeas corpus on the ground that the uncorroborated testimony of an accomplice which constituted the evidence presented to the grand jury, was insufficient to justify an indictment. The court properly refused the writ, holding, in accordance with the general rule, that it would not inquire into the sufficiency of the evidence. Brobeck v. Superior Court, 152 Cal. 289, 92 P. 646, in holding that a writ of prohibition did not lie to restrain a trial court from proceeding upon an indictment where there was no evidence presented to the grand jury to support the charges, relied solely upon the authority of In re Kennedy without noting the difference between the two cases. At the time each case was decided, section 925 of the Penal Code merely permitted the district attorney at his discretion to have testimony before the grand jury reported but did not make such reporting mandatory. The cases therefore do not control the present situation and the views expressed therein inconsistent with this opinion are disapproved.

[8, 9] Petitioner cannot appeal either from the order denying his motion to quash the indictment or from the overruling of his demurrer. He could not be required to stand trial and to appeal from a possible adverse judgment without being subjected to unreasonable expense, inconvenience, and delay. Bruner v. Superior Court, 92 Cal. 239, 28 P. 341; Terrill v. Superior Court, 6 Cal.Unrep. 398, 60 P. 38; Evans v. Willis, 22 Okl. 310, 97 P. 1047, 19 L.R.A.,N.S., 1050, 18 Ann.Cas. 258; see Farraher v. Superior Court, 45 Cal.App. 4, 187 P. 72. The only adequate remedy he may seek, therefore, is a writ of prohibition. Ibid. Regardless of the fact that the grand jury is a judicial tribunal from whose decisions there is no appeal (In re Kennedy, supra), defendant has the statutory right to restrain the court by prohibition from proceeding in excess of its jurisdiction to try an offense based on a void indictment. Petitioner is therefore entitled to a peremptory writ of prohibition restraining the respondent court from proceeding with the trial.

Let a writ of prohibition issue as prayed.

GIBSON, C. J., and CURTIS, EDMONDS, HOUSER, and CARTER, JJ., concurred.

19 Cal.2d 354

In re KING'S ESTATE.

KING et al. v. KING.

Sac. 5356.

Supreme Court of California.

Feb. 3, 1942.

1. Executors and administrators ⇐497

Under will directing executors to care for testator's horses and cattle until they could be disposed of to good advantage, which might be within about a year from date of will, court properly awarded executrix $2,000 as extra compensation for carrying on cattle business, where, within a year after testator's death, executors were authorized by court order to continue stock business and stock appraised at $16,950 was eventually sold for $29,008.45. Probate Code, § 572.

2. Wills ⇐801

The fact that testator's widow elected to take under rules of succession rather than under provisions of will did not abrogate provision of will directing executors to care for testator's livestock until it could be disposed of to good advantage.

3. Executors and administrators ⇐91

An executor, with or without court order, has duty to take charge of property of estate and preserve it in as good condition as is reasonably possible pending administration.

4. Executors and administrators ⇐497

In determining whether executrix was entitled to reasonable compensation for caring for testator's horses and cattle pending administration of estate, court was required to presume that stock was properly cared for, that expense of doing so was necessarily incurred, and that stock was sold as promptly as necessary for best interests of estate.

5. Executors and administrators ⇐497

Under provisions of Probate Code prior to 1939 amendment authorizing allowances to executor or administrator for special services, court was authorized to allow executrix additional compensation for feeding and care of horses and cattle belonging to testator's estate. Probate Code, § 902.

6. Executors and administrators ⇐93(1)

Though ordinarily it is not duty of executor to carry on testator's business during administration of estate, executor may

do so when authorized by will or where necessary for preservation of estate.

7. Executors and administrators ⇐497

The amount of extra compensation to executor for carrying on testator's business pending administration of estate is matter within sound discretion of probate judge. Probate Code, §§ 572, 902.

8. Executors and administrators ⇐501

The amount of extra compensation awarded to executor for carrying on testator's business pending administration of estate will not be disturbed on appeal unless it was improperly allowed or clearly appears to be excessive. Probate Code, §§ 572, 902.

9. Executors and administrators ⇐501, 510 (6)

The right of appeal from order settling first and final account and allowing executrix extra compensation for caring for livestock was "waived" by failure to give notice of appeal within 60 days from time of settlement of account. Probate Code, § 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

10. Executors and administrators ⇐88

Where unpaid matured notes executed by one of testator's sons to testator did not outlaw until after son qualified as co-executor of estate, the notes became chargeable to co-executor as "cash on hand" and were properly charged, together with accumulated interest thereon, against his distributive share of estate. Probate Code, § 602.

See Words and Phrases, Permanent Edition, for all other definitions of "Cash on Hand".

11. Executors and administrators ⇐88

An executor, by virtue of his fiduciary relationship, is not only chargeable with principal sum of note owing by him to deceased if it is not outlawed before he accepts that trust, but he is chargeable with interest due thereon as "cash in his hands". Probate Code, § 602.

12. Executors and administrators ⇐173

The right of a widow to receive a family allowance pending administration of estate is purely statutory. Probate Code, §§ 680, 750.

13. Wills ⇐801

Testator's widow, by her renunciation of will and according to rules of succession, succeeded to her half of entire community property over which husband had no right of testamentary disposition, and in addition she succeeded to entire community interest in a certain ranch because of her statutory one-half community ownership therein, and her right to succeed to the other half as community property over which her deceased husband's attempted testamentary disposition became ineffective because of widow's renunciation of will. Probate Code, § 201.

14. Executors and administrators ⇐181

The community property to which testator's widow succeeded because of her statutory one-half interest by operation of law on testator's death "belonged" to her as surviving wife, and testator's unsuccessful attempt to dispose of her community interest therein did not render such property "not disposed of by the will" so that it should be first resorted to for payment of family allowance and expenses of administration under statute. Probate Code, §§ 201, 750.

See Words and Phrases, Permanent Edition, for all other definitions of "Belong" and "Not Disposed of by the Will".

15. Evidence ⇐65

A husband is charged with knowledge that if he makes testamentary disposition of wife's half of community property, the law gives her right of renunciation of will, with whatever attendant benefits may flow therefrom. Probate Code, § 201.

16. Wills ⇐801

A widow repudiating a will is entitled to benefit of statutes of succession as fully and completely as though there was no will. Probate Code, § 201.

17. Executors and administrators ⇐181

Where will devised certain ranch which was community property, to testator's widow, and widow made renunciation of will, contention that one-half of the ranch, which because of widow's renunciation became ineffective as devise, should be regarded as property "not disposed of by the will" so as to be subject at first to payment for family allowance or any other expenses of administration, could not be sustained, in view of statute providing that legacy should be paid first from property expressly appropriated therefor by will and secondly from property not disposed of by will. Probate Code, §§ 201, 750, 751.

18. Executors and administrators ⇐181

The family allowance granted widow pending administration of estate was not required to be paid from community interests of testator and his widow, but was properly charged against assets of estate without regard to whether it constituted community or separate property. Probate Code, §§ 202, 300, 680.

TRAYNOR, J., and GIBSON, C. J., dissenting.

In Bank.

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Proceeding in the matter of the estate of Frank J. King, deceased, who left surviving his widow Josephine King, and two sons, Frank A., and William H. King. From an order settling the executor's final account and directing distribution of the estate, Frank A., and William H. King appeal.

Affirmed.

For prior report see 113 P.2d 282.

Carter, Barrett & Carlton, Daniel S. Carlton, and Oliver J. Carter, all of Redding, and Ferol Thorpe, of Redding, for appellants.

George R. Freeman and Elmer Laine, both of Willows, for respondent.

Ezra Decoto, of Oakland, for estate of Frank J. King, deceased.

HOUSER, Justice.

The cause herein was transferred to this court after decision by the District Court of Appeal of the Third Appellate District. Upon examination of the record, we adopt as the decision of this court the opinion of the District Court of Appeal, with such omissions and additions as may hereinafter appear.

"Two sons of Frank J. King, deceased, have appealed from the order settling the final account and directing distribution of his estate. The appellants also seek to review a previous order settling the first annual account of the executor, from which no appeal was taken. * * *

"Frank J. King died testate, December 12, 1936, at San Francisco, leaving surviving him, his widow, Josephine King, two sons, Frank A. and William H. King, and a brother named George W. King. He left a will * * * by the terms of which he appointed his widow and his son Frank as coexecutors. The will purported to dispose of his entire separate property and of all the community property belonging to himself and wife. He willed specific real and personal property [which included farm lands and cattle] to each of his heirs. * * * Letters testamentary were issued to Josephine King and Frank A. King, February 16, 1937. The estate was appraised at $49,142.33. The inventory included two unpaid notes executed by Frank A. King and payable to his father, both of which were matured. One note was for $4,328.10, upon which unpaid interest was then due in the sum of $1,363.83. That note was appraised at $5,691.93. The other note was appraised at $600.00. * * *

"The widow renounced her right to inherit property from the estate of her husband according to the terms of his will, and upon the contrary elected to take her share of the property pursuant to the rules of succession. The executor's first annual account was settled and approved October 21, 1938. In that account the widow was allowed $2,000 extra compensation, to be paid from the assets of the estate. The order making that allowance and settling the account was entered October 21, 1938. No appeal was taken from that order and it became final. Upon application therefor the court also made an award of $100 per month to the widow for a family allowance during the process of administration.

"The final account was settled and distribution of the property of the estate was made and entered September 12, 1939. At that time the assets of the estate were marshaled and the expenses of administration were properly apportioned against the respective devisees, legatees and heirs in the proportions ascertained from the appraised valuations of the distributive shares received by each one. Besides the several ranches and other personal property on hand for distribution, there was $35,090.37 in cash, received from the sales of [several hundred] horses and cattle and from other sources. The costs of administration were $12,277.53. The portion of the costs assessed against the widow was the sum of $5,295.09.

"All of the cash on hand, the two notes and the three ranches which are involved on this appeal, are community property. Those farms were called respectively the 'Peterich Ranch,' the 'Edgewood Ranch,' and the 'Magoffey Ranch' [the community

ownership in the last-mentioned ranch extending only to a two-thirds interest]. By the terms of the will the Peterich Ranch was devised to the widow, together with a legacy of $10,000, one-third of the proceeds from the sales of horses and cattle, and whatever residue remained after the debts and expenses of administration had been paid. The will gave to Frank A. King the Edgewood Ranch, the Magoffey Ranch, together with some other property, and a third of the proceeds from the sales of cattle and horses.

"Having elected to inherit her share of the estate according to the rules of succession, there was distributed to Josephine King the Peterich Ranch, consisting of 314 acres of land, an undivided one-half interest in the Edgewood Ranch, one-third interest in the Magoffey Ranch, one-half interest in two small notes and cash in the sum of $12,930.37, all of which properties distributed to her were her community share thereof, except that she took the entire Peterich Ranch under section 201 of the Probate Code, as community property which was not disposed of by will on account of her renunciation of that instrument.

"In the decree settling the final account and directing distribution to be made, the court charged Frank A. King with the appraised value of the two matured notes as cash in his hands as a coexecutor, aggregating the sum of $6,854.46, which he owed to the estate. From that decree settling the final account and directing distribution of the estate to be made, Frank A. King and his brother William have appealed."

"It is contended the court erred in allowing the executrix extra compensation for services in conducting a cattle business during administration [without a previous order of court therefor]; that the compensation was wrongfully charged against both separate and community property of the estate; that the expenses of administration were improperly apportioned; that the community interests of the deceased in certain real and personal property were illegally distributed to the widow, and that Frank A. King was wrongfully charged as a coexecutor with the appraised value as cash on hand, of [the] two matured notes which he owed the deceased. * * *

[1, 2] "We are of the opinion the allowance of $2,000 as extra compensation for carrying on the cattle business was properly awarded. The will specifically authorized the executors to retain the cattle and horses for a period of 'about one year from the date of the will,' and they were directed to sell them when it was most advantageous to do so. That provision necessarily infers that the business of carrying on the cattle enterprise for a period of at least one year was authorized by the testator. The fact that the widow elected to inherit her share of the estate in accordance with the rules of succession rather than under the provisions of the will, in no way abrogated the independent authorization of the testator to carry on the business until the cattle could be sold to advantage. That provision of the will is nevertheless valid and binding. * * * The will was dated September 26, 1936. On July 12, 1937, a portion of the cattle and horses was sold * * * for $16,776.20. On October 8, 1937, before the year had expired, the court made an order under section 572 of the Probate Code, authorizing the executors to continue the stock business. The following January the balance of the cattle was sold * * * for $12,232.25. There is no evidence the stock could have been sold to advantage before they were actually disposed of. Evidently the business was conducted at a profit, for the horses and cattle were appraised at $16,950. They were sold for the total sum of $29,008.45.

[3, 4] "It is the duty of an executor, with or without an order of court, to take charge of the property of an estate and to preserve it in as good condition as is reasonably possible pending administration. In re Estate of Fulmer, 203 Cal. 693, 265 P. 920, 58 A.L.R. 430; In re Estate of Freud, 131 Cal. 667, 63 P. 1080, 82 Am.St. Rep. 407; In re Estate of Smith, 118 Cal. 462, 50 P. 701; 11B Cal.Jur. 250, § 842; 2 Bancroft's Prob.Pr., 682, § 359. See, also, In re Estate of Meyer, 11 Cal.App.2d 409, 412, 53 P.2d 984. In the absence of evidence to the contrary it must be presumed the stock was properly cared for; that the expense of doing so was necessarily incurred, and that the horses and cattle were sold as promptly as was for the best interest of the estate. The court so found. There is evidence to support the finding that these duties were performed.

[5, 6] "The court was authorized under section 902 of the Probate Code, as it existed prior to the amendment of that section in 1939, to allow additional compensation for

the feeding and care of 565 head of horses and cattle belonging to the estate. That section then provided in part: 'Such further allowances may be made as the court may deem just and reasonable for any extraordinary services, such as * * * the carrying on of the decedent's business pursuant to an order of the court, and *such other * * * special services as may be necessary for the executor or administrator to * * * perform.*' (Italics added.) It is said in Riedy v. Bidwell, 70 Cal.App. 552, at page 555, 233 P. 995 at page 996, there is an exception to the general rule that it is not ordinarily the duty of an executor to carry on the business of the testator during the administration of his estate. That exception exists 'where the will of the testator expressly creates the power so to do, or where the carrying on of a business would be cast upon the executor as a necessary means for the preservation of the estate.'" See, also, In re Estate of Maddalena, 42 Cal.App.2d 12, 108 P.2d 17; In re Estate of Broome, 162 Cal. 258, 122 P. 470; In re Estate of Ward, 127 Cal.App. 347, 15 P.2d 901. And in 11B California Jurisprudence, at page 269, it is stated: "A power to continue decedent's business may be conferred on the executor by will, and the statute providing that the court may authorize such continuance recognizes existing law and merely adds another method of obtaining authority."

"Where a continuation of the business of a deceased person during administration results in a profit to the estate, it has frequently been said the executor is entitled to extra compensation therefor, even though he voluntarily assumes to perform that service. 11B Cal.Jur. 270, § 860; 2 Bancroft's Prob.Pr., 788, § 419. In the text last cited it is said: 'Likewise, for management of farm operations, because of the chance of loss to the estate and personal liability on the part of the representative, *extra compensation may be allowed.*' * * *

[7, 8] "When extra compensation is allowable for such service, the amount which it is proper to fix is within the sound discretion of the probate judge. In re Estate of Broome, supra. The amount of extra compensation which has been awarded will not be disturbed on appeal unless it is improperly allowed or clearly appears to be excessive. * * *

[9] "Moreover the appellants waived their right of appeal from the order allowing extra compensation, by their failure to give notice of appeal therefrom within sixty days from the time of the settlement of the account. * * * In re Estate of Meyer, 11 Cal.App.2d 409, 412, 53 P.2d 984; In re Estate of Grant, 131 Cal. 426, 63 P. 731; In re Estate of Fernandez, 119 Cal. 579, 51 P. 851; In re Estate of Ward, 127 Cal.App. 347, 351, 15 P.2d 901; Prob. Code, § 1240; 11A Cal.Jur., p. 211. * * * [On] October 21, 1938, the probate court made and entered its order settling the * * * account. That order specifically found that Josephine King performed valuable services feeding and caring for the cattle; that her special services were worth $2,000, and thereupon allowed extraordinary compensation in that amount. * * * The notice of appeal in this case is from the order settling the final account and making distribution of the estate only, which was made and entered September 12, 1939. * *

[10] "The court properly charged against the distributive share of the estate received by the executor, Frank A. King, [the] two unpaid matured promissory notes executed by him to the deceased in his lifetime * * * [which] were included in the inventory as assets of the estate. The appellants contend that these notes were barred by the statute of limitations, and that they were therefore erroneously charged to the distributive share of the maker of the notes.

"[On] September 5, 1930, for value received, Frank A. King and Grace V. King, executed and delivered to the deceased, Frank J. King, their note for $1,200, payable five years after the date thereof. It was never paid. It became a part of the assets of the estate in the hands of Frank A. King, one of the makers thereof, as coexecutor of the will of the deceased. It was due and was appraised at $600. It did not outlaw until February 6, 1939. Frank A. King qualified as executor February 16, 1937. The note was in his hands as an executor of the estate for two years before it outlawed.

"On November 25, 1932, for a valuable consideration, Frank A. King executed and delivered to his father, another note for $4,328.10, due one year after the date of execution. It was secured by a mortgage on real property. The note was never paid. That note did not outlaw until November 26, 1937. It was also in the hands of the maker, as executor, for about three months before it would outlaw.

"Section 602 of the Probate Code charges an executor with obligations which he owes to the testator 'as for so much money in his hands.' It provides that such debts shall be included in the inventory, and that the executor is liable therefor. * * *

"The notes executed by the executor which were due and payable, and in his hands as assets of the estate before they were outlawed, become chargeable to him as cash on hand, and they were therefore properly charged, together with the accumulated interest thereon, against his distributive share of the estate. In re Estate of Clary, 203 Cal. 335, 264 P. 242; In re Estate of Miner, 46 Cal. 564; In re Estate of Jones, 115 Cal.App. 664, 2 P.2d 483; Treweek v. Howard, 105 Cal. 434, 39 P. 20; 11B Cal.Jur. 554, sec. 1100. In * * * Re Estate of Clary, supra, [203 Cal. 335, 264 P. 244], it is said: '* * * as pointed out in 16 California Jurisprudence, p. 420 et seq., sections 30 to 37, the rule is that the statute of limitations does not run where the parties occupy a fiduciary relationship toward each other, so long as such relationship is not repudiated. * * * Irrespective of the lapse of time which would ordinarily bar an action upon the note, the executor, by reason of his fiduciary capacity, becoming chargeable with the note in his hands as so much money, is in that capacity, precluded from pleading the bar of the statute, and, therefore, so long as the trust relation continues, the statute does not run.'

[11] "It has been held that an executor, by virtue of his fiduciary relationship, is not only chargeable with the principal sum of a note which he owes to the deceased, if it is not outlawed before he accepts that trust, but he is also chargeable with the interest due thereon, as cash in his hands. In re Estate of Miner, supra; 11B Cal.Jur. 556, § 1100. In Re Estate of Miner, supra, the court says with respect to the obligation of the executor to pay both principal and interest of a note which he owes to the deceased: 'We think there was no error in charging the administrator with the amount of his own note and the stipulated interest. It is a debt due to the estate and has never been paid. The money has remained in his hands, not separated or set apart from his private funds or been devoted to the uses of the estate. Under what circumstances an administrator will become liable to pay interest is discussed In the Matter of Estate of Mary McQueen, 44 Cal. 584, and upon the principles settled in that case we think the administrator cannot escape the payment of interest.'"

[12] "The appellants contend that the court erroneously directed payment of the family allowance, which was previously granted to the widow under section 680 of the Probate Code, to be charged against the 'devisees and legatees in the proportions that they respectively share in the properties, both community and separate,' upon final distribution. It is asserted the entire amount of family allowance granted to the widow is required to be paid from the *community interests* of the deceased and his widow. We think not. The right of a widow to receive a family allowance, pending the administration of the estate, is purely statutory. Hills v. Superior Court, 207 Cal. 666, 279 P. 805, 65 A.L.R. 266; 11A Cal.Jur. 505, § 367; 21 Am.Jur. 560, § 314; 24 C.J. 230, § 758. The will may direct that a specified sum of money for family allowance shall be paid *from particularly designated property.* Prob.Code, § 750. The section last mentioned provides that if the designated property 'is insufficient' in value from which to pay the family allowance, the obligation shall be made a charge against 'that portion of the estate not disposed of by the will.' It is further provided that if such designated property is not sufficient for that purpose 'the property given to residuary legatees or devisees shall be resorted to, and thereafter all other property devised and bequeathed is liable for the same, in proportion to the value or amount of the several devises and legacies, but specific devises and legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate.'"

It here should be noted that the testator made no reference in his will to the payment either of a family allowance or of any debt or expense of administration, nor did he designate any property out of which such or any expense was to be paid. However, it is the appellants' contention that the provisions of section 750 of the Probate Code were applicable here,—that under such application all of the community property distributed to the widow was property "not disposed of by the will," and therefore that such property should have been first resorted to for the payment of the family allowance and other expenses of administration.

[13] To recapitulate, by her renunciation of the will, and according to the rules of succession, the widow succeeded to her half of the entire community property, over which portion the husband had no right of testamentary disposition. That portion consisted of: an undivided one-half interest in the Edgewood ranch; a one-third interest in the Magoffey ranch; a one-half interest in the two small notes; cash in the sum of $12,930.37; and, in addition thereto, she succeeded to the entire community interest in the Peterich ranch. Her succession to that entire interest was based on her statutory one-half community ownership therein and, pursuant to the provisions of section 201, Probate Code, on her right to succeed to the other half as community property over which her deceased husband's exercise of his right of testamentary disposition became ineffective as a result of her renunciation of the will.

[14] With respect to all the community property to which the widow succeeded solely by virtue of her statutory one-half interest, by operation of law, on the death of her husband such property "belonged to" her as the surviving wife. Prob.Code, § 201. It therefore may not be successfully argued that where, as here, the husband attempted to dispose of the wife's community interest it thereafter became property "not disposed of by the will," and that therefore it should have been first resorted to for the payment of family allowance and expenses of administration. Such property never belonged to the husband and the failure of his testamentary disposition thereof could not operate to place it in the category of property "not disposed of by the will." In re Estate of Haselbud, 26 Cal.App.2d 375, 79 P. 2d 443; In re Estate of Marinos, 39 Cal. App.2d 1, 8, 102 P.2d 443.

[15, 16] But it is contended by the appellants that, in any event, the community interest in the Peterich ranch over which the testator possessed the right of testamentary disposition, i. e., his community half of such property, having failed as a devise became property "not disposed of by the will." Under the provisions of section 201, Probate Code, in the absence of a testamentary disposition by a deceased spouse of *his* one-half of the community property, on his death such portion "goes to" the surviving spouse. The husband is charged with knowledge that if he makes a testamentary disposition of the wife's half of the community property the law gives her the right of renunciation of the will, with whatever attendant benefits may flow therefrom. In the present case, one of the effects of the widow's renunciation was to revoke and render inoperative as a devise the decedent's testamentary disposition of his one-half of the Peterich ranch. As another result of her election to renounce the will the widow became entitled to that one-half interest by virtue of the statutory right conferred on her by the provisions of section 201, to receive such property in the absence of an effective testamentary disposition thereof by her deceased husband. The effect of her renunciation of the will was to entitle her to the benefit of the statutes of succession "as fully and completely as if there had been no will." In re Estate of Bump, 152 Cal. 274, 92 P. 643, 644; 11A Cal.Jur., pp. 513, 514. It follows that as to the widow such property cannot be regarded as property "not disposed of by the will" and therefore cannot be subjected first to the payment of family allowance or any other expense of administration.

[17] Moreover, by section 751 of the Probate Code it is provided that *legacies* shall be paid, first, from property expressly appropriated therefor by the will and, secondly, from "property not disposed of by the will." Therefore, were we to accept appellants' contention that in any event the remaining one-half of the Peterich ranch—which because of the widow's renunciation of the will became ineffective as a devise—should be regarded as property "not disposed of by the will," under the provisions of section 751 such property could be taken from the wife and resorted to for the payment of legacies to other persons, a result which, obviously, the legislature never intended should follow from its reference in the several sections of the Probate Code to property "not disposed of by the will."

[18] The appellants also contend that under the provisions of section 202 of the Probate Code it was intended that the *community* property alone should be chargeable with the payment of family allowance and expenses of administration. We do not so interpret the section.

"In Re Estate of Finch, 173 Cal. 462, at page 464, 160 P. 556, 557, it is said: '* * * the surviving wife is * * * given the right to have a reasonable allowance made by the court for her support from the estate of her deceased husband *whether the estate was community property or his separate estate and irrespective of whether the widow*

has estate of her own out of which she might support herself.'

"Section 300 of the Probate Code specifically provides that *'All of his* [*decedent's*] *property* shall be subject to the possession of the executor or administrator and to the control of the superior court for the purpose of administration * * * *and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family,* except as otherwise provided in this code.'"

And in the case of In re Estate of Haselbud, 26 Cal.App.2d 375, 79 P.2d 443, under the provisions of section 70, Probate Code, the will was revoked as to the surviving wife, and it was contended that the expenses of family allowance and other debts of administration should be paid entirely from community funds to which the widow had succeeded. It was there held that section 750 was not applicable and that, pursuant to the provisions of section 300, such expenses were to be borne ratably by the community and separate property of the decedent.

"A contrary construction of the statute might result in charging the obligation of an estate to pay family allowance to a widow against her own community interest in the property. That construction is opposed to the policy of the law with respect to family allowances. See note in 98 A.L.R. at page 1326. * * *

"We conclude that, under the circumstances of this case, the court properly held that the family allowance [as well as other expenses of administration] was chargeable to the assets of the estate without regard to whether it consists of community or separate property of the decedent."

The appellants' separate contention that the court wrongfully distributed to the widow any community property other than that in which she possessed a statutory one-half interest, has been fully discussed hereinbefore.

The decree settling the final account and ordering distribution of the estate is affirmed.

CURTIS, EDMONDS, and SHENK, JJ., concurred.

CARTER, J., did not participate herein.

TRAYNOR, Justice (dissenting).

I dissent from that part of the opinion upholding the charging of the debts, expenses of administration, and the family allowance against the respective persons interested in the estate in the proportion that each shared in the estate.

Probate Code section 201 provides: "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse." Respondent, testator's widow, after renouncing her right to take under the will, succeeded to one-half of all the community property as a matter of right under the above section. She was given all of the Peterich Ranch, which was community property, on the basis of the above section, because her husband, the testator, had failed to make an effective testamentary disposition of his half.

The court charged the debts of the testator and the expenses of administration, including a family allowance to the widow, against the respective persons interested in the estate in the proportion that they shared in the estate. Probate Code section 750 provides: "If the testator makes provision by his will, or designates the estate to be appropriated, for the payment of his debts, the expenses of administration, or family allowance, they must be paid according to such provision or out of the estate thus appropriated, so far as the same is sufficient. If insufficient, *that portion of the estate not disposed of by the will,* if any, must be appropriated for that purpose." (Italics added.) The testator did not designate in his will any particular portion of the estate to be used for the payment of his debts, administration expenses, and family allowance. Therefore, under section 750, that portion of the estate not disposed of by will should be resorted to for the payment of these amounts before other portions of the estate are assessed. Since one-half the community property automatically passes to the surviving wife upon the husband's death he has no power to dispose of it by will, and it therefore does not constitute a portion of his estate within the meaning of section 750. Although it is subject to his debts and administration expenses by virtue of Probate Code section 202, it cannot be first resorted to under section 750. In re Estate of Haselbud, 26 Cal.App.2d 375, 79 P.2d 443. The testator, however, has the power to dispose of the other half of the community property by will. If he does not do so, it must be considered a portion of his estate

not disposed of by will within the meaning of section 750. If he fails to dispose of it by will, it passes to his wife under section 201, but in this respect it does not differ materially from separate property of which he makes no testamentary disposition. When he does not dispose of some of his separate property by will, it passes to his wife, his wife and children, or to other heirs, according to the laws of intestate succession. The latter half of section 201 simply fixes the intestate succession to the deceased spouse's half of the community property. Thus, if a testator does not dispose of his half of the community property by will it constitutes property not disposed of by will within the meaning of section 750 and must be resorted to first for the payment of debts and administration expenses, if no property is specifically appropriated for this purpose, just as if it were separate property undisposed of by will.

In re Estate of Haselbud, supra, is distinguishable from the present situation. In that case the decedent married after he made his will. His widow was therefore a pretermitted heir; under Probate Code section 70 the will was revoked as to her and she was entitled to her intestate share of the estate. Since section 750 has no application to the estates of persons dying completely intestate, the court, in order to insure the wife's receiving the share of the estate that she would receive if the husband died completely intestate, properly held that the property which the wife took as her intestate share of the estate, including all of the community property, should not be resorted to first for the payment of debts and expenses under section 750, but should be charged for the debts and expenses on the same basis that it would be charged if the husband died completely intestate. In the present case, however, the respondent's renunciation of her right to take under the will does not entitle her to an intestate share of the estate, but merely gives her the right to take her half of the community property free from the testamentary disposition made of it by the testator. She takes the other half of the Peterich Ranch, not on the theory that her husband died intestate but because after her renunciation it remained undisposed of by will.

In the present case, therefore, one-half of the Peterich Ranch constitutes property undisposed of by the will of the testator and, under section 750, should be resorted to for the payment of debts, administration expenses, and the family allowance, before other portions of the estate are charged.

GIBSON, C. J., concurred.



19 Cal.2d 458

HINDS et al. v. WHEADON et al.

L. A. 18075.

Supreme Court of California.

Feb. 10, 1942.

Rehearing Denied March 9, 1942.

1. Appeal and error ⇐927(3)

In reviewing a judgment rendered upon a motion for nonsuit, the court must assume that all evidence received in favor of plaintiff relevant to the issues is true, and all presumptions, inferences, and doubtful questions must be construed most favorably to the plaintiff.

2. Negligence ⇐22

The owners of a dehydrator tank who invited a welder upon their premises to perform a welding operation on the tank owed welder a duty to make tank safe for the welding operation which welder was ordered to perform.

3. Negligence ⇐32(1)

An invitor's responsibility for safety of a business visitor is not absolute, but invitor is required to use ordinary care for the safety of the persons he invites to come upon the premises.

4. Negligence ⇐52

If there is a danger upon entry of premises by a business visitor, or upon work which business visitor is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, owner of premises has duty of giving business visitor reasonable notice or warning of such danger.

5. Negligence ⇐22

Where owners of a dehydrator tank who invited a welder upon their premises to perform a welding operation on the tank undertook to prepare the tank for the welding operation, a duty of reasonable care devolved upon owners to make the tank safe for the purpose for which it was supplied.

6. Negligence ⇐121(2)

The doctrine of "res ipsa loquitur" is applicable where a thing is shown to be under exclusive management or control of the defendant or his servants, and accident is such as in ordinary course of things does not happen if those who have management use proper care.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur."

7. Negligence ⇐121(2), 136(6)

In negligence action, where doctrine of res ipsa loquitur is applicable, it is incumbent upoon defendant to bring forth evidence to rebut inference of negligence, and a nonsuit is improper, since case should be submitted to jury.

8. Negligence ⇐121(3), 136(6)

In action for death of welder caused by explosion of dehydrator tank upon which welder was working, where evidence offered by plaintiffs tended to show that explosion was caused by an unexplained absence of water at top of tank behind spot where welding was done, that work being done by welder was on outside of tank and had no relation with system of valves and pipes which regulated water level within tank, and that owners had undertaken to prepare the tank for the welding operation, doctrine of "res ipsa loquitur" was applicable and required submission of case to jury.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Ina Hinds and others against I. M. Wheadon and others, to recover for wrongful death. From a judgment for defendants, the plaintiffs appeal.

Reversed.

Prior opinion, 115 P.2d 35.

Syril S. Tipton, John J. Ford, and Marvin Wellins, all of Los Angeles, for appellants.

Joseph A. Ball, Fred N. Howser, and Kenneth Sperry, all of Long Beach, for respondents.

LeRoy P. Anderson, of Costa Mesa, for respondent Fisher.

GIBSON, Chief Justice.

This action was instituted by the widow and minor children of George T. Hinds, deceased, to recover damages for his wrongful death, which was alleged to have been caused by the negligence of defendants. The deceased was employed as a welder by E. H. Irwin who did business as the Irwin Welding Works. The defendant, I. M. Wheadon, did business as the Allied Petroleum Company, and in connection with his business employed the defendants Chester Fisher and Mark Haines. On February 23, 1937, Hinds was directed by his employer to go to the premises of the Allied Petroleum Company for the purpose of performing certain welding operations which had been ordered by defendants. The defendant Fisher informed him that a steel dehydrator tank, used in treating crude petroleum, had been prepared for the welding operation, that is, that it had been washed out and filled with water. In order to demonstrate that the tank was filled with water, Fisher ordered that the pump be started. When water flowed from a bleeder line at the top of the tank, Hinds said that it was satisfactory and began the welding operation which consisted of affixing metal brackets or straps to the outside of the dehydrator tank. The lower bracket was welded first and then Hinds commenced to work on the upper one. Shortly after Hinds commenced the final portion of the top weld, the tank exploded and he was killed. After the introduction of evidence by plaintiffs, the trial court granted defendants' motion for a nonsuit upon the theory that no evidence of negligence on the part of defendants had been produced. Plaintiffs appeal from the judgment of nonsuit.

[1] Where a judgment is rendered upon a motion for nonsuit, the court must assume that all evidence received in favor of the plaintiff relevant to the issues is true. All presumptions, inferences and doubtful questions must be construed most favorably to the plaintiff. Richardes v. Richardes, 211 Cal. 392, 295 P. 816; Mitchell Camera Corp. v. Fox Film Corp., 8 Cal.2d 192, 64 P.2d 946; Moffatt v. Buffums' Inc., 21 Cal.App.2d 371, 373, 69 P. 2d 424; 9 Cal.Jur. 552. Here, the evidence introduced on behalf of plaintiffs, when construed most favorably to their case, tended to establish that the explosion resulted from an absence of water in the tank behind the point at which the upper bracket was to be attached. The testimony of plaintiffs' witness who was an expert in the field of physics, metallurgy and welding was that the discoloration found after the explosion on the inside of the

dehydrator tank indicated an absence of water behind that point during the welding operation. He also testified that in his opinion it was probable that oil particles which had collected on the inside of the tank had vaporized and exploded because of the intense heat developed under such circumstances during the welding.

[2-5] The defendants had an obligation, which they do not dispute, to exercise reasonable care in order to make the dehydrator tank safe for the welding operation which Hinds was ordered to perform. Such a duty of care was required because Hinds was invited upon the premises as a business visitor to work upon the tank. Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793; Sawyer v. Hooper, 79 Cal.App. 395, 249 P. 530; Wooll v. J. S. Shea Co., 214 Cal. 302, 5 P.2d 421; Dobbie v. Pacific Gas & Electric Co., 95 Cal.App. 781, 273 P. 630; Mendelsohn v. Van Herick, 133 Cal.App. 612, 24 P.2d 878; 19 Cal.Jur. 621; Restatement, Torts, sec. 343. The invitor's responsibility is not absolute but he is "required to use ordinary care for the safety of the persons he invites to come upon the premises. If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger." Shanley v. American Olive Co., supra, 185 Cal. at page 555, 197 P. at page 794. The evidence indicates further that defendants undertook to prepare the dehydrator tank for the welding operation and, in that event, a duty of reasonable care devolved upon them to make the tank safe for the purpose for which it was supplied. Mondine v. Sarlin, 11 Cal.2d 593, 597, 81 P.2d 903; Restatement, Torts, Sec. 392.

[6-8] Defendants contend, however, that there is no evidence from which it could be found that they were guilty of negligence. It may be conceded that plaintiffs have not produced evidence which tends to establish specific acts of negligence. Negligence was pleaded generally, and plaintiffs rely upon the doctrine of res ipsa loquitur to establish a prima facie case of negligence sufficient to warrant submitting the case to the jury. This doctrine is applicable where a thing is shown to be under the exclusive management or control of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care. In such cases an inference arises that the accident resulted from a want of proper care on the part of the defendants. Judson v. Giant Powder Co., 107 Cal. 549, 556, 40 P. 1020, 29 L.R.A. 718, 48 Am.St.Rep. 146; Michener v. Hutton, 203 Cal. 604, 607, 265 P. 238, 59 A.L.R. 480; Hernandez v. Southern California Gas Co., 213 Cal. 384, 2 P.2d 360; 1 Shearman & Redfield, Negligence, Rev.Ed.1941, pp. 149 et seq.; 23 Cal.L.Rev. 169; 10 So. Cal.L.Rev. 166; 19 Cal.Jur. 704. It is incumbent upon the defendant in such a case to bring forth evidence to rebut the inference of negligence, and under such circumstances a nonsuit is improper since the case should be submitted to the jury. Anderson v. I. M. Jameson Corporation, 7 Cal.2d 60, 59 P.2d 962; Prosser, Torts (1941), pp. 302 et seq.; 23 Cal.L.Rev. 169. It is urged by defendants that they did not have exclusive control over the dehydrator tank during the time the welding was being done and that consequently no inference of negligence should arise. The evidence introduced by plaintiffs, however, indicates that the explosion was caused by the unexplained absence of water at the top of the tank behind the spot where the welding was to be done. The work done by deceased on the outside of the tank had no relation whatever to the complicated system of valves and pipes which regulated the water level within the tank and, insofar as the matter can be determined upon the evidence introduced by plaintiffs, such matters were within the exclusive control of the defendants. At no time had the tank passed into the hands or control of any intermediate or third person. The cases relied upon by defendants are distinguishable either upon the ground that the cause of the accident could not be determined from the evidence before the court (Biddlecomb v. Haydon, 4 Cal.App.2d 361, 40 P.2d 873; Hubbert v. Aztec Brewing Co., 26 Cal.App.2d 664, 80 P.2d 185, 1016; White v. Spreckels, 10 Cal.App. 287, 101 P. 920) or upon the ground that the defendants actually had relinquished their control over the instrumentality which caused the injury. Peters v. Pioneer Laundry Co., 32 Cal.App.2d 494, 90 P.2d 146. In the present case the absence of water in the dehydrator tank, which resulted in the explosion, is not such an occurrence as happens in the ordinary course of

things if those in control of the matter have used the proper amount of care. Under the facts of this case, therefore, we think an inference of negligence on the part of defendants arises which they are required to rebut and which is sufficient to take the case to the jury.

The judgment of nonsuit is reversed.

SHENK, CURTIS, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.



19 Cal.2d 446

MONTEREY PENINSULA AIRPORT DIST. v. MASON.

S. F. 16708.

Supreme Court of California.

Feb. 6, 1942.

1. Municipal corporations ⇐11

The general statute providing for establishment of airport district is wholly permissive and does not provide for "mandatory" establishment of airports. St.1929, p. 1857.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

2. Statutes ⇐76(1)

Where general act is inadequate to accomplish objectives necessary for the protection of the public health, safety, and morals, the Legislature may enact more specific legislation dealing with the subject without violating the constitutional prohibition against special legislation where a general law can be made applicable. Const. art. 4, § 25, subd. 33.

3. Statutes ⇐76(1)

The statute creating the Monterey Peninsula Airport District for the mandatory improvement of airport for purpose of national defense is not violative of the constitutional provision prohibiting special laws where a general law can be made applicable on ground that improvement could be made under general statute providing for establishment of airport district, since general law is inadequate to accomplish the objective of the special law. St.1941, p. 684; St. 1929, p. 1857; Const. art. 4, § 25, subd. 33.

In Bank.

Mandamus proceeding by Monterey Peninsula Airport District against Edna Mason, as secretary of the Monterey Peninsula Airport District, to compel defendant to affix the official seal of the district to certain bonds.

Writ issued.

Argyll Campbell, of Monterey, for petitioner.

Orrick, Dahlquist, Neff & Herrington, of San Francisco, for respondent.

PER CURIAM.

By this proceeding in mandamus the Monterey Peninsula Airport District, a public corporation, seeks to compel respondent, as secretary of its board of directors, to execute and sign, and to affix the official seal of the district to certain "Acquisition and Improvement Bonds, Issue of 1942," as authorized and directed by resolution of the board. The respondent has demurred to the petition, contending that the act creating the petitioner district, Stats.1941, ch. 52, p. 684, Deering's Gen.Laws, 1941 Supp., Act 153, is invalid in that it violates the provision of the Constitution which forbids local or special laws in all cases "where a general law can be made applicable." Cal.Const., art. IV, sec. 25, subd. 33.

The challenged act creates and defines the extent of the petitioner district and empowers it to establish and maintain an airport for civil and military purposes. It also empowers the district to borrow money from the United States and to issue bonds to raise money when authorized by resolution of its board of directors. The legislature has declared the act to be an urgency measure necessary to the preservation of the public peace, health and safety because of the existence of a state of war "in numerous areas throughout the world," thus requiring augmentation of the inadequate air facilities at Monterey for purposes of national defense—an urgency made more acute because of events transpiring since enactment of the act. The act further declares that the War Department has certified the Monterey Municipal Airport, which has been acquired by the district, as necessary for national de-

fense and that a federal appropriation in excess of $700,000 has been approved for its enlargement.

The Works Project Administration has approved the project and federal funds have been allocated to the district contingent upon the acquisition by it of adjacent lands, contemplated to cost in excess of $214,000, and a cash contribution by the district of not less than $25,000. In order to acquire these necessary funds the district, through its board of directors, by resolution has authorized issuance of bonds aggregating $250,000, which bonds it is here sought to have respondent sign.

In support of her demurrer and contention that the act here involved is special legislation and therefore violative of the cited constitutional provision, respondent relies principally upon the case of Ventura County Harbor District v. Board of Supervisors, 211 Cal. 271, 295 P. 6, and argues that at the time the legislation here challenged was enacted there was in existence a general act of the legislature entitled the California Airport District Act, Stats.1929, p. 1857, Deering's Gen.Laws, 1937, Act 150, providing for the establishment of airport districts in the state.

[1] This argument, however, disregards the fact that the general act is wholly permissive in nature and does not provide for the mandatory establishment of airports. It requires a petition signed by a percentage of the voters in the district, notice and hearing before the Board of Supervisors, a general election in the area to determine whether the district shall be established and a two-thirds vote of the electors for the issuance of bonds. The present act, on the contrary, is designed to authorize the prompt and mandatory improvement of the airport in question for purposes of national defense.

[2] This court has held that if a general act is inadequate to accomplish certain objectives necessary for the protection of the public health, safety and morals, the legislature may enact more specific legislation dealing with the subject without violating the constitutional inhibition aimed at special legislation. This was recognized in the case of American River Flood Control District v. Sweet, 214 Cal. 778, 7 P.2d 1030, 1031, which presented a situation and problem analogous to those here presented. The cited case points out that the Ventura case, supra, relied on here by respondent, recognizes "that special legislation might coexist with a general law on the subject, and that it would be deemed a valid exercise of legislature power until it is demonstrated that a general law could be made applicable." It also points out, which is also significant here, that "the general law is permissive only. The initiation of proceedings for the formation of such districts under general law must depend on the voluntary petition of landowners in the district. The landowners in the district might never file, or might indefinitely delay the filing of, such a petition. Here the district is created by the special act. It has no alternative but to function and carry out the purposes of the act. The act contemplates the safeguards of life and property. * * * The project contemplated by the act is one of the essential parts of the coordinated plan. * * * The federal act made certain appropriations in aid of the plan provided for by the act here in question, conditioned * * * on assurances that appropriations would be made by the state of California * * *."

[3] The facts of the present case are even more compelling than those of the cited case. Here, the legislature in providing for the protection of a large and populous area has created a public corporation to execute an important unit of the national defense plan. The accomplishment of this project presents a problem unlike any other existing in the state and the machinery of the general law is inadequate to accomplish the objective. The legislature, in its wisdom, has determined that a solution of the problem lies only in the creation of a separate and special entity. It is not our province to interfere with that determination.

Let a peremptory writ of mandate issue as prayed, and pursuant to stipulation of the parties, here filed, waiving the statutory time within which such writ may issue, it is further ordered that such peremptory writ may issue upon the filing of this decision.

FIRST NAT. TRUST & SAV. BANK OF SAN DIEGO v. SUPERIOR COURT OF LOS ANGELES COUNTY.

S. F. 16651.

Supreme Court of California.

Feb. 4, 1942.

Rehearing Denied March 2, 1942.

1. Prohibition ⇐5(3)

A writ of prohibition would not be issued on application of a trustee to restrain action by an alleged beneficiary of the trust for an accounting and declaration of rights of parties until all beneficiaries were brought in as indispensable parties, where it was not shown that portion of income from trust estate claimed by alleged beneficiary, if granted to her by final judgment, would necessarily diminish any share or income to which persons not ordered by trial court to be brought in might become entitled under terms of trust, and especially where it was not shown that remedy of trustee by appeal from the final judgment would prove inadequate.

2. Parties ⇐51(4)

A mandatory duty to order other parties brought in is shown only when trial court finds or record indisputably discloses that such parties are indispensable to a complete determination of the controversy.

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

In Bank.

Original proceeding in prohibition by the First National Trust & Savings Bank of San Diego to restrain the Superior Court of Los Angeles County from exercising jurisdiction in an action in the absence of alleged indispensable parties.

Writ denied.

Rehearing denied; GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

Gray, Cary, Ames & Driscoll and John M. Cranston, all of San Diego, and James Archer, of San Francisco, for petitioner.

J. H. O'Connor, County Counsel, Douglas DeCoster, Deputy County Counsel, and LeRoy B. Lorenz, all of Los Angeles, for respondent.

SHENK, Justice.

The petitioner seeks the writ of prohibition to restrain the respondent superior court from exercising jurisdiction in a pending action until it has ordered the presence of parties claimed to be indispensable to a complete determination of the controversy. See section 389, Code of Civil Procedure. This court issued the alternative writ. The matter is submitted on the petition and the respondent's demurrer and answer.

The pleadings herein show that on March 15, 1941, Sallyneil B. Wilson commenced an action in the Superior Court in Los Angeles County naming the First National Trust and Savings Bank of San Diego, petitioner herein, as the sole defendant. The plaintiff in that action sought to recover from the defendant, trustee of an express trust, one-half of the income from the trust estate under an amendment to the declaration of trust whereby the plaintiff was made a beneficiary of the trust. The following are the facts alleged in the complaint in that action:

On August 16, 1929, Edith W. Crose executed a declaration of trust covering real and personal property, naming the First National Trust and Savings Bank of San Diego as trustee to collect the income therefrom and pay the same to Juliet Guthrie Wilson during her lifetime, and upon her death to her surviving issue. Juliet Guthrie Wilson died in December, 1929, and was survived by her son, F. Guthrie Wilson, and her daughter, Edith W. Crose. The trustee thereupon paid the income from the trust estate to the two surviving children in equal shares.

The trust instrument provided that the trustor should have the right, upon thirty days' written notice to the trustee, to revoke the trust in whole or in part and to alter or amend the same by a memorandum in writing delivered to the trustee, provided the amendment be accepted by the trustee. On June 30, 1933, the trustor, Edith W. Crose, executed and delivered to the trustee an amendment of the trust declaration as follows: "F. Guthrie Wilson, my brother, is about to marry one Sallyneil Braden. In the event said marriage is consummated, and in case said Sallyneil Braden survives F. Guthrie Wilson, then in that event, I direct the trustee shall pay to her for so long as she may live, all of the income to which the said F. Guthrie Wilson would have been entitled had he survived."

The trustee accepted the amendment. On July 29, 1933, Sallyneil Braden married F. Guthrie Wilson. On December 14, 1940, F. Guthrie Wilson died. The trustee refused to recognize the validity of the foregoing amendment to the trust declaration

and the plaintiff brought the action for the purpose of establishing herself as beneficiary of one-half of the income of the trust, that being the portion which F. Guthrie Wilson would have received had he lived. The plaintiff also sought an accounting and a declaration of the rights of the parties.

It was also alleged in the complaint that F. Guthrie Wilson and Edith W. Crose were the sole issue of said Juliet Guthrie Wilson and therefore became the sole beneficiaries of the trust. The original trust declaration, annexed as an exhibit to the complaint, contained the following provisions with respect to the payment of the net income derived from the estate after the death of the first named beneficiary, Juliet Guthrie Wilson:

"Upon the death of Juliet Guthrie Wilson, the trustee shall pay the net income * * * to the issue of Juliet Guthrie Wilson living at each income date until the termination of this trust as hereinafter provided.

"Upon the death of the last survivor of the Trustor, Juliet Guthrie Wilson, F. Guthrie Wilson, brother of the Trustor, and Janet C. Stanley and Catherine C. Crose, daughters of the Trustor, this trust shall cease and determine, and thereupon the Trustee shall transfer, pay over, convey and deliver the trust estate and any accumulations thereof then in its hands, to the issue of Juliet Guthrie Wilson then living, per stirpes and not per capita.

"In case Henry T. Stanley, Jr., Grandchild of the Trustor, shall not have attained the age of thirty (30) years at the time of the termination of this trust, his share of the trust estate shall vest but possession thereof shall be postponed" until he shall have attained the age of thirty years. Similar provisions were made respecting the share of "any other beneficiary, being the issue of Juliet Guthrie Wilson, under the age of thirty (30) years at the time of the termination of this trust."

The defendant trustee filed an answer in said action alleging that in fact Juliet Guthrie Wilson was the trustor, and that Edith W. Crose was not the owner of the trust property nor the trustor, and denying that the plaintiff was a beneficiary of the trust. In the answer it was admitted that the amendment of June 30, 1933, was executed by Edith W. Crose, but it was alleged that Edith W. Crose, purporting to act as trustor, on April 22, 1935, executed another instrument amending the trust declaration, accepted by the trustee, which was a substitute for the amendment of June 30, 1933, and provided that Sallyneil B. Wilson, should she survive F. Guthrie Wilson, should receive two-thirds of the income to which F. Guthrie Wilson would have been entitled, unless she became divorced from her husband or should remarry, and but one-third of such income upon termination of the trust, unless she had been divorced or had remarried.

On the trial the defendant in the action objected to the introduction of evidence on the ground that the court did not have jurisdiction to render judgment therein without the presence of Edith W. Crose, Janet C. Stanley, Catherine C. Crose and Henry T. Stanley, Jr., who were named in the original trust instrument. On July 22, 1941, the trial court rendered an interlocutory judgment whereby it decreed that the original trust instrument was duly amended by the writing dated June 30, 1933, but that the instrument of April 22, 1935, was ineffective as a modification of said amendment and of said trust instrument and was therefore void; that upon the death of Juliet Guthrie Wilson, F. Guthrie Wilson became one of the two sole surviving beneficiaries of the trust and was entitled to one-half the income therefrom so long as he lived, and that upon his death the plaintiff became entitled to the same share of the income. The court ordered the trustee to render an accounting and report of its administration under oath. It also ordered that Edith W. Crose, the trustor under the trust instrument, and the only other beneficiary thereunder, be made a party to the action "for the purpose of the accounting"; further, "that she be served forthwith with a copy of this judgment; that she, as well as the plaintiff, be served by the defendant trustee with a copy of the account * * * that said Edith W. Crose, as well as the plaintiff, serve and file herein her objections and exceptions to such account and the same be set for hearing and determination, upon motion of any of the three parties to such accounting. * * * That plaintiff have a personal judgment, with costs, against the defendant, for any and all" income found to be due and payable to the plaintiff after the court "shall have passed upon said account and rendered its decision thereon," and that said Edith W. Crose should have a personal judgment against the defendant trustee for any sums

found to be due her as a result of such accounting.

It is asserted that, as there is no appeal from the interlocutory judgment, any appeal from the final judgment would be inadequate and that the petitioner is therefore entitled to the writ of prohibition to restrain the exercise of jurisdiction by the respondent court until the additional parties have been brought in.

The petitioner contends that all beneficiaries of a trust are indispensable parties; that without their presence the trial court has no jurisdiction to proceed; that Edith W. Crose, Janet C. Stanley, Catherine C. Crose and Henry T. Stanley, Jr., are beneficiaries of the trust and are therefore such indispensable parties; also that the respondent court had no jurisdiction to enter a judgment in favor of Edith W. Crose until she had been made a party as provided by section 389 of the Code of Civil Procedure.

The interlocutory judgment is declaratory of the right of Edith W. Crose, when she shall have been brought in as a party by the service of summons as required by law (section 410, Code of Civil Procedure), to a personal judgment against the trustee, if any amounts be shown to be due her by the accounting. The interlocutory judgment does not serve as such personal judgment against the trustee. A personal judgment, it is assumed, will not be entered until the court has acquired jurisdiction of Edith W. Crose as a party in the action, and after an opportunity has been given to her to file any pleadings she may be entitled to file and to be heard on any objections she may timely make. Likewise, the entry of the interlocutory judgment does not prevent the defendants in the action from urging error in the accounting, or otherwise, upon appeal from the final judgment.

It may be assumed that under the law the beneficiaries of a trust are indispensable parties to an action involving conflicting rights between themselves or between them and the trustee. McPherson v. Parker, 30 Cal. 455, 456, 89 Am.Dec. 129; O'Connor v. Irvine, 74 Cal. 435, 16 P. 236; Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L.R.A.,N.S., 275; Title Guarantee & Trust Co. v. Henry, 208 Cal. 185, 280 P. 959. But whether the writ should issue in this proceeding involves more than a mere declaration that beneficiaries of a trust are indispensable parties to such an action. It must first be shown that the parties claimed to be indispensable are beneficiaries of the trust.

In support of its contention that all the persons named in the trust declaration are beneficiaries of the trust the petitioner relies on an excerpt from the opinion in the case of Bank of California v. Superior Court, 16 Cal.2d 516, at page 521, 106 P. 2d 879. There this court defined as indispensable parties persons who have undetermined interests in the same property, or in a particular trust fund, and one of them seeks in an action to recover the whole, to fix his share, or to recover a portion claimed by him. In that case an application for the writ of prohibition was denied because it appeared that the interests of the persons not ordered to be brought in were not involved and would not be "affected" by any decree which the trial court would or could render on the issues presented for determination. It was there recognized that the issuance of the writ of prohibition in such cases may be a matter of discretion, depending on the particular facts and circumstances.

[1, 2] On the facts and issues involved in the action pending in the respondent court it likewise appears that it would not be appropriate for this Court to grant the trustee's application for the writ of prohibition. The principal issues in the action are the construction of the provisions of the trust and the determination of who are beneficiaries thereunder. Those issues were raised not only by the defendant's denials of the allegations of the complaint, but also by affirmative allegations contained in its answer. It is apparent that the trial court, for the purpose of the interlocutory decree only, and in order that all the beneficiaries of the trust might be brought in, determined that the surviving children of Juliet Guthrie Wilson, namely, F. Guthrie Wilson and Edith W. Crose, were the sole beneficiaries of the trust. Accordingly Edith W. Crose was ordered brought into the action. In so far as the record in this proceeding is concerned, there is no showing upon which we may properly conclude that a mandatory duty rests upon the respondent court to order persons other than Edith W. Crose now to be brought into the action. In Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, at page 671, 284 P. 445, it was pointed out that

a mandatory duty to order other parties brought in is shown only when the trial court finds or the record indisputably discloses that such parties are indispensable to a complete determination of the controversy. See, also, Morrow v. Superior Court, 9 Cal.App.2d 16, at pages 26, 27, 48 P.2d 188, 50 P.2d 66, opinion of this court on denial of petition for hearing; De Olazabal v. Mix, 24 Cal.App.2d 258, 74 P. 2d 787. It was there stated that when the course of judicial action appeared to be mandatory, the writ of prohibition would be appropriate. It cannot be said that the record in this proceeding presents such a case. Furthermore, it is not shown that the portion of the income from the fund claimed by the plaintiff in the pending action, if the same be granted to her by the final judgment, will necessarily purport to diminish any share or income to which persons not now ordered to be brought in may become entitled under the terms of the trust. Any further review of the question of who are beneficiaries of the trust is one which properly may be considered only on an appeal from the final judgment. Bank of California v. Superior Court, supra; Fitts v. Superior Court, 4 Cal.2d 514, 519, 51 P.2d 66, 102 A.L.R. 290.

The petitioner has also failed to establish that its remedy by appeal will prove inadequate. The additional persons now sought to be brought into the pending action are concededly not presently entitled to any of the income from the trust concerning which the trustee has been ordered to render an accounting. If on the appeal from the final judgment such additional persons are determined to be beneficiaries of any part of the trust estate their rights to future participation in the income can be saved to them by appropriate direction. The plaintiff seeks to participate only in the income from the trust. All the parties who have any present right to such income are or will be before the court before final judgment.

In the light of the foregoing considerations the issuance of the peremptory writ would serve only to delay further the matter of the accounting by the trustee and thus postpone without reason the final disposition of the controversy.

The peremptory writ is denied.

CURTIS, HOUSER, and CARTER, JJ., concurred.

GIBSON, Chief Justice.

I dissent. The majority opinion in the present case concludes that this court should not issue its writ of prohibition to halt the proceedings in the court below, despite the fact that the court has exceeded its jurisdiction by proceeding in the absence of an indispensable party and although further action remains to be taken by the trial court.

Stated in simplest terms, the facts are that Edith W. Crose and F. Guthrie Wilson, as the surviving issue of Juliet Guthrie Wilson, were entitled upon her death to share equally in the income from certain trust property. When F. Guthrie Wilson died in 1940, Edith W. Crose would have been entitled to the entire current income under the terms of the original trust instrument. The plaintiff, Sallyneil B. Wilson, who is the surviving wife of F. Guthrie Wilson, claims that she is entitled to receive her husband's share of the income under the terms of an amendment to the trust instrument executed in 1933. A further amendment of the trust instrument in 1935 purported, under certain conditions stated therein, to grant the plaintiff two-thirds of the share to which F. Guthrie Wilson was entitled during his lifetime. The defendant trustee refused to recognize the 1933 amendment after the death of F. Guthrie Wilson, and plaintiff brought this action to enforce the trust according to the terms of that amendment.

At the commencement of the trial the trustee objected to the jurisdiction of the court to proceed in the absence of Edith W. Crose and the other beneficiaries of the trust upon the ground that they were indispensable parties to the action. The trial court overruled this objection and proceeded to the trial with the trustee as the sole defendant. In the absence of Edith W. Crose, who would have been entitled to the entire present income under the original trust instrument, the court determined that the amendment of 1933 was valid and that the amendment of 1935 was null and void. It determined that the plaintiff, Sallyneil B. Wilson, should "have and receive all the income therefrom and arising thereunder as long as she may live and to which said F. Guthrie Wilson would have been entitled had he survived." The court ordered that the defendant trustee make an accounting and that Edith W. Crose "be, and she is hereby made a party to this action for the purpose of the accounting

to be had herein * * *." It was ordered that a copy of the judgment establishing plaintiff's right to one-half of the trust income be served upon Edith W. Crose, that she be served with a copy of the trustee's account, that she file her objections to such account, and that she as well as the plaintiff be granted a personal judgment against the trustee for the amount found to be due as a result of the accounting.

The law is settled in this state that, where one of several beneficiaries seeks to fix his share in a trust fund and where judgment in his favor would inevitably determine the amount available for others similarly situated, such other beneficiaries are indispensable parties. A judgment rendered in their absence and purporting to determine their rights is in excess of the court's jurisdiction. Bank of California v. Superior Court, 16 Cal.2d 516, 521, 106 P. 2d 879; O'Connor v. Irvine, 74 Cal. 435, 16 P. 236. When such parties are indispensable to a complete determination of the controversy, the court must order that they be brought in. Code Civ. Proc. § 389; Mitau v. Roddan, 149 Cal. 1, 7, 84 P. 145, 6 L.R.A.,N.S., 275. In the present case a determination that the plaintiff is entitled to any portion of the present income inevitably reduces the income to which Edith W. Crose is entitled and under the cases above cited she is an indispensable party to the action. This is not true, however, as to the other beneficiaries who have no interest in the income in which plaintiff seeks to establish her share. The majority opinion apparently concedes that Edith W. Crose is an indispensable party. The opinion does not hold that the action already taken by the trial court is valid in so far as it has attempted to determine the rights of Edith W. Crose in her absence. Instead, the denial of the writ of prohibition is sought to be justified upon the ground that the court belatedly ordered that Edith W. Crose be made a party for the purpose of the accounting. This does not warrant a denial of prohibition under the facts here presented. The rights of an indispensable party cannot be protected by an order which, as indicated above, made her a party "for the purpose of the accounting." That order was made as a part of the interlocutory judgment which purported to establish the relative interests of plaintiff and Edith W. Crose in the trust income and which ordered that final judgment be entered for each of them in the amount determined to be due after the accounting. Nor is it an answer to say that any error can be corrected upon an appeal from the final judgment. The fact that an indispensable party was not present when her rights were adjudicated constitutes a fatal defect in the action below which is clearly disclosed in the present prohibition proceeding. That being so, there is no sound reason for permitting the trial court to continue to a final judgment which must inevitably be reversed upon the appeal.

Since the respondent court has proceeded in excess of its jurisdiction by purporting to determine the plaintiff's right to one-half of the trust income in the absence of Edith W. Crose and since the court has ordered that an accounting be held and final judgment be entered for plaintiff in accordance therewith, a writ of prohibition should issue both to restrain further acts of the trial court and to correct the past acts of the court in excess of its jurisdiction. It is true that ordinarily the writ of prohibition is a preventive, rather than a corrective, remedy. But, from the early case of Havemeyer v. Superior Court, 84 Cal. 327, 390, 24 P. 121, 10 L.R.A. 627, 18 Am.St.Rep. 192, down to the comparatively recent case of Evans v. Superior Court, 14 Cal.2d 563, 580, 96 P.2d 107, it has been consistently recognized that "the operation of the writ of prohibition is excluded only in cases where the action of the inferior tribunal is completed, and nothing remains to be done in pursuance of its void order. *If its action is not completed and ended, its further proceedings may be stayed;* and, if it is necessary for the purpose of affording complete and adequate relief, *what has been done will be undone.*" (Italics added.) Havemeyer v. Superior Court, supra [84 Cal. 327, 24 P. 137, 10 L.R.A. 627, 18 Am.St.Rep. 192]; see, also, Pierce v. Superior Court, 1 Cal. 2d 759, 782, 37 P.2d 453, 460, 96 A.L.R. 1020; 21 Cal.Jur. 581. Here the action of the trial court "in pursuance of its void order" is not "completed and ended," for it has ordered an accounting upon the basis of which a final judgment is to be entered in favor of the plaintiff for the specific amount found to be due in accordance with the terms of the interlocutory judgment. The writ of prohibition is available and should be used to restrain the contemplated action of the trial court in pursuance of its invalid decree. In order to furnish complete and adequate relief, the

writ should direct that the trial court correct its invalid proceedings by permitting Edith W. Crose to participate fully as a party in any action the purpose of which is to determine that plaintiff is entitled to a share in the present trust income.

The majority opinion, it should be noted, does not give validity to the acts of the court below which were in excess of its jurisdiction. Under the law of this jurisdiction, as established by the decisions of this court, the attempt to adjudicate the rights of an absent, indispensable party was futile. Those rights are unaffected by the void decree and the absent party whose interests were thus infringed may attack the decree directly or collaterally. Bank of California v. Superior Court, supra, and cases cited therein. The majority opinion by refusing to issue the writ merely postpones an actual determination of the rights involved in the present case.

The writ should issue.

EDMONDS and TRAYNOR, JJ., concurred.



19 Cal.2d 534

In re ROBINSON'S ESTATE.

ROBINSON v. HILL et al.

L. A. 17573.

Supreme Court of California.

Feb. 16, 1942.

1. Judgment ⇐338

When all parties affected by judgment are actually or constructively before the court with an opportunity to assert their contentions and to appeal from an adverse ruling, the finding of jurisdictional facts by the court may be reviewed only by an appeal or other timely and available direct attack.

2. Judgment ⇐338

The superior court cannot, after time for appeal has elapsed, set aside a judgment or order on ground that the court lacked jurisdiction, when the facts establishing such jurisdiction were found by the court in original proceedings, and all adverse parties were properly served with notice and had opportunity to present their objections.

3. Executors and administrators ⇐29(3)

Where notice of hearing in superior court of Los Angeles county on petition for letters of administration on the estate of a nonresident decedent was given in accordance with law, and there was no contention that heirs did not receive notice or did not have opportunity to attend, and an order was entered granting letters, and such order was unappealed, and the time for appeal therefrom had elapsed, the order was conclusive and could not be set aside in subsequent proceedings on ground that the court lacked jurisdiction of subject matter because decedent had no property in Los Angeles county at time of death.

4. Executors and administrators ⇐29(3)

Under statute providing that, in absence of "fraud" in its procurement, an order of the superior court granting letters of administration, when it becomes final, is a conclusive determination of the court's jurisdiction, except when based upon the erroneous assumption of death, the word fraud refers to extrinsic fraud, and a case of "extrinsic fraud" is not presented when all parties entitled to notice have been notified and have been given an opportunity to appear and contest issuance of letters and when the letters have been issued on a showing of required jurisdictional facts, even though it might thereafter develop that decedent left no property in the county, or that a probate proceeding in another state or county was pending. Probate Code, § 302.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud" and "Fraud".

5. Executors and administrators ⇐29(3)

In proceedings for issuance of letters of administration on the estate of a nonresident decedent, implied findings of the superior court of Los Angeles county that decedent left property in that county and that administrative proceedings were not pending in another state or county, even if erroneous, were not sufficient to disturb finality of order granting letters, where order was otherwise valid.

6. Executors and administrators ⇐32(2)

A motion to vacate an order granting letters of administration on the estate of a nonresident decedent, and which motion was resisted by administrator on ground that there was property of the estate subject to administration in California, could not be construed as a proceeding pursuant to pro-

visions of the Probate Code respecting termination of administration proceedings where there is no property subject to administration. Probate Code, § 1068.

In Bank.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Proceedings in the matter of the estate of William Robinson, deceased, wherein Glen M. Robinson was appointed administrator and Minnie Lee Hill and others made a motion to vacate the order appointing Glen M. Robinson as administrator. From an order granting the motion, Glen M. Robinson, as administrator, etc., appeals, opposed by Minnie Lee Hill and others.

Reversed.

For prior opinion, see 114 P.2d 626.

Otto A. Gerth, of Los Angeles, for appellant.

Laurence B. Martin and Samuel Reisman, both of Los Angeles, for respondents.

SHENK, Justice.

This is an appeal from an order setting aside an order granting letters of administration. Two notices of appeal and two bills of exception were filed by the administrator. They present the same questions for determination and will be considered as one appeal.

On June 1, 1937, Glen M. Robinson, a grandson of the decedent, William Robinson, filed in the superior court in Los Angeles County, a verified petition for letters of administration of the estate of his grandfather. The petition recited that the decedent died on or about the 15th day of December, 1935, in the county of Tippecanoe, State of Indiana; that he was a resident of that state; that he left estate in the county of Los Angeles, State of California, consisting of United States Government bonds of an unknown value believed to be in the possession of Minnie Lee Robinson, a daughter of the decedent and a resident of Los Angeles County; that the heirs of the decedent were D. E. Robinson, a son, aged 57, living in the city of Los Angeles, Minnie Lee Robinson, a daughter, aged 63, living in El Monte, Los Angeles County, and Edward Robinson, aged 65, a son, living in Lafayette, Indiana; and that the decedent left no will. Notice was given in accordance with law and there is no contention that the heirs did not receive actual notice, or that they did not have an opportunity to attend the hearing on the petition. The hearing was held without any objection to the granting of letters as requested, and an order granting the same was entered. No appeal was taken therefrom. On April 14, 1938, Glen M. Robinson qualified and letters of administration were issued to him.

On January 4, 1939, the administrator brought an action in the superior court in Los Angeles County against Minnie Lee Robinson and her daughter, Pauline Mann, and the latter's husband, Carl L. Mann, to recover possession of United States Government bonds of approximately $40,000, or real estate or other property into which the same had been converted, under a claim that such property belonged to the estate of the decedent.

On March 11, 1939, Minnie Lee Robinson (now Minnie Lee Hill) and the Manns served a notice of motion to set aside the probate proceedings and to vacate the order appointing Glen M. Robinson as administrator on the ground that the court in Los Angeles County had no jurisdiction of the subject matter for the asserted reason that the decedent had no property in said county at the time of his death, and for alleged fraud practiced on the court by Glen M. Robinson. The affidavits of the moving parties stated that the decedent was a resident of Indiana at the time of his death and owned no property in California; that no probate proceedings had been commenced or were pending in the State of Indiana, and that certain criminal proceedings had been instituted in Indiana against Minnie Lee Hill and Pauline Mann concerning the alleged conversion of estate property but that the same had been dismissed; and that about six months after the death of William Robinson, Minnie Lee Hill and the Manns moved to California. The administrator opposed the granting of the motion. The affidavits of himself and of D. E. Robinson, son of the decedent living in Los Angeles County, averred that at the time of his death William Robinson was the owner of about $30,000 in Liberty Bonds and $9,000 in cash of which Minnie Lee Hill had obtained possession; that Minnie Lee Hill admitted to her brother in California that she had possession of such property and acknowledged that it was the property of the father's estate; also that she desired to divide the property with D. E. Robinson in equal shares so that Edward Robinson, the brother in Indiana, would receive no part of the estate,

but that D. E. Robinson refused to enter into any such plan, agreement or division; that D. E. Robinson received monthly from Minnie Lee Hill one-third of the income from said bonds from the date of the death of the decedent until July, 1937. It was also averred that Minnie Lee Hill admitted that she had invested a portion of said cash and Liberty Bonds in income-producing real estate, known as Walnut Auto Court, situated in El Monte, California. The motion to set aside the probate proceedings was denied on April 5, 1939, and no appeal was taken from the order denying the same.

On April 10, 1939, Glen M. Robinson filed his first account as administrator wherein he reported to the court the claim of the estate against Minnie Lee Hill and the Manns and filed a description of the property, including the real estate purchased by Minnie Lee Hill and claimed to be a part of the estate. He also reported the commencement of the action in the superior court in Los Angeles County for the recovery of the property, and the filing of a lis pendens. Notice of the hearing on the account and report was given and on May 1, 1939, the court entered an order approving and settling the account and report and no appeal therefrom was taken.

On January 31, 1940, Minnie Lee Hill and the Manns again moved the court for an order setting aside the probate proceedings and vacating the order appointing Glen M. Robinson as administrator. The motion was made on the same grounds as the former motion, and on the additional ground that at the time of the appointment of Glen M. Robinson as administrator there was pending in Hendricks County, Indiana, a proceeding to administer the estate of the decedent which had never been terminated, all of which had not been revealed to the court by said Glen M. Robinson at the time of his application for letters of administration. It was shown that special letters of administration were issued to one Edgar M. Blessing, an attorney, in Indiana, on the petition of Clay D. Robinson, a grandson of the decedent; that the special administrator sought to examine Minnie Lee Hill and Pauline Mann in a proceeding to discover assets in the course of the administration of the estate; that in said proceeding Minnie Lee Hill and Pauline Mann denied any knowledge of estate property; that subsequently they were accused by the State of Indiana of falsely testifying in said proceeding, but for lack of sufficient evidence the criminal proceeding was dismissed.

The administrator also resisted the granting of the second motion to set aside the probate proceedings on the ground that the jurisdictional facts had theretofore been determined by the court in prior proceedings and that said determinations had become final and could not be attacked collaterally, as well as on the ground that the property in the possession of Minnie Lee Hill and claimed to belong to the estate was property of the decedent subject to administration in California. On March 6, 1940, the court granted the motion of January 31, 1940, to vacate the order appointing Glen M. Robinson as administrator, and this appeal is from that order.

[1, 2] The administrator as appellant urges that the prior proceedings are final and conclusive and compel a reversal of the order. He relies on Estate of Estrem, 16 Cal.2d 563, 107 P.2d 36. In that case the superior court in Alameda County ordered the admission to probate of a will of the decedent on a petition alleging that the decedent had died in Belgium, a resident of France, and had left estate in the counties of Alameda and Fresno in the State of California. No appeal was taken from the order admitting the will to probate and the order became final. On a subsequent motion to set aside the order made pursuant to section 473 of the Code of Civil Procedure, it appeared that a later will had been admitted to probate in France by a decree prior in time to the order of the court in Alameda County, and that there was no property of the estate in Alameda County. The appeal in that case was from an order denying the motion. This court rejected the contention that a jurisdictional fact appearing outside the judgment roll of the order sought to be vacated, namely, the fact of an absence of property in Alameda County, could be considered to establish this invalidity of an order otherwise valid on its face. It was said at page 570 and following of 16 Cal.2d, at page 40 of 107 P.2d: "The jurisdiction of the court to render a judgment or order often depends upon the preliminary determination of certain jurisdictional facts. When all parties affected are actually or constructively before it with an opportunity to assert their contentions and to appeal from an adverse ruling, the finding of such facts by the court may be reviewed only by an appeal or other timely and available direct attack. This finding cannot be attacked in proceeding under paragraph 4

of section 473 to have the judgment declared void, nor can it be attacked in any collateral proceeding. In such situations the finding is as conclusive as any other finding of fact by the court in the original proceeding. * * * In the present case the superior court of Alameda county, in admitting the will to probate, necessarily found in accordance with the allegations of the petition that the decedent had left property in Alameda County. The appellants were served with notice of such proceeding and had full opportunity to come in and contest such a finding. If the finding was erroneous, it could have been attacked on appeal. The time for appeal having elapsed, the finding has become conclusive." The court "cannot, after time for appeal has elapsed, set aside a judgment or order on the ground that the court lacked jurisdiction, when the facts establishing such jurisdiction were found by the court in the original proceedings, and all adverse parties were properly served with notice and had the opportunity to present their objections." The order denying the motion to vacate was affirmed. See, also, Security-First National Bank v. Superior Court, 1 Cal.2d 749, 37 P.2d 69.

[3] There is no distinction between the Estrem case and the present case which would justify a refusal to follow the well-settled doctrine of conclusiveness of such an order as is here involved.

[4] The respondents rely on the following italicized language of section 302 of the Probate Code, which reads: *"In the absence of fraud in its procurement,* an order of the superior court granting letters, when it becomes final, is a conclusive determination of the jurisdiction of the court (except when based upon the erroneous assumption of death), and cannot be collaterally attacked." We need observe only that the fraud mentioned in that code provision refers to extrinsic fraud. As indicated in the Estrem decision a case of extrinsic fraud is not presented when all the parties entitled to notice have been notified and have been given an opportunity to appear and contest the issuance of letters, and when as here, the letters have been issued on a showing of the required jurisdictional facts even though it might thereafter develop that the decedent "left" no property in the county or that a probate proceeding in another state or county was pending.

[5, 6] The respondents also rely on Lake v. Bonynge, 161 Cal. 120, 118 P. 535, and Estate of Ivory, 37 Cal.App.2d 22, 98 P.2d 761, as support for their contention that an admission by the adverse party of a fact showing fraud or lack of jurisdiction would be sufficient justification for vacating the order on collateral attack. In Lake v. Bonynge, it was assumed that, on collateral attack, an admission by the adverse party that service of summons was not made on the defendant would be a sufficient basis upon which to decree the invalidity of the judgment. But, as observed in that case, the principle has no application where the record contains no such admission. Here the administrator throughout resisted the motion to set aside the order, and at no time was a statement made by him or on his behalf which could be construed as an admission of fraud such as would require the court to declare the order void. The implied findings that the decedent left property in Los Angeles County and that administrative proceedings were not pending in another state or country, even if admitted to be erroneous, would not be sufficient to disturb the finality of the otherwise valid order. If it should develop that there is no property of any kind belonging to the estate and subject to administration in the State of California, the appropriate course would be the filing of a petition signed and filed by the administrator or on his behalf showing such fact and praying for termination of the proceedings. Section 1068, Probate Code. The motion to vacate the probate proceeding which was resisted by the administrator on the ground that there is property of the estate subject to administration in California may not be construed as a proceeding pursuant to that section.

The order is reversed.

GIBSON, C. J., and CURTIS, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

19 Cal.2d 454

LAUGHARN v. CARTER et al.

L. A. 17905.

Supreme Court of California.

Feb. 10, 1942.

1. Bankruptcy ⇐314(6)

Where both taxes and the penalty imposed for nonpayment thereof are secured by a lien existing at the time of adjudication in bankruptcy of the taxpayer, the section of Bankruptcy Act providing that debts owing the United States or any state or subdivision thereof as a penalty or forfeiture shall not be allowed in bankruptcy proceeding does not come into operation. Bankr.Act § 57, sub. j, 11 U.S.C.A. § 93, sub. j.

2. Bankruptcy ⇐314(6)

Where penalties imposed for nonpayment of commercial vehicle registration and license fees accrued before petition in bankruptcy of corporation owning and operating trucks on California highways was filed, trustee in bankruptcy was liable for the penalties as well as the fees, since upon delinquency the penalties became a part of the taxes secured by the statutory lien for taxes, and hence the collection of penalties as a part of the obligation for taxes was not barred by section of the Bankruptcy Act, prohibiting the allowance in bankruptcy of debts owing to the United States or any state or subdivision thereof as a penalty or forfeiture. Vehicle Code, §§ 378, 379(a, b), St.1937, pp. 2451, 505; Gen.Laws 1937, art. 5135, § 6; Bankr.Act §§ 57, sub. j, 64, sub. a(1, 2), and 67, subs. b, c, 11 U.S.C.A. §§ 93, sub. j, 104, sub. a(1, 2) and 107, subs. b, c.

In Bank.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Hubert F. Laugharn, as trustee in bankruptcy of the Commercial Rock Company, against James Carter, as director, etc., and others, to recover penalties imposed for nonpayment of commercial vehicle registration and license fees, paid under protest. From a judgment in favor of plaintiff, defendants appeal.

Judgment reversed.

Earl Warren, Atty. Gen., and H. H. Linney and R. S. McLaughlin, Deputy Attys. Gen., for appellants.

Howard V. Calverley, of Los Angeles, for respondent.

SHENK, Justice.

This is an appeal by the defendants from a judgment in favor of the plaintiff in the sum of $1,758 paid to the state under protest.

The plaintiff is the trustee of Commercial Rock Company, a bankrupt corporation. The corporation owned and operated twenty-three trucks on the public highways of this state prior to January 1, 1939, and from that date until March 6, 1939, at which time a petition in bankruptcy was filed in the United States District Court for the Southern District of California. On March 28, 1939, the district court appointed receivers who continued to operate the trucks and conduct the trucking business until August 1, 1939, on which date the corporation was adjudicated a bankrupt and the plaintiff herein was appointed the trustee in bankruptcy. On January 1, 1939, the registration fees applicable to the trucks pursuant to section 378 of the Vehicle Code, St.1937, p. 2451, and the vehicle license fees, or "in lieu" tax, as provided by section 6 of the Vehicle License Fee Act, Stats.1935, p. 1312; Deering's Gen.Laws, 1937, Act 5135 became delinquent. On February 5, 1939, the sum of $1758, called a penalty, was added to the amount required by the statute to be paid on the trucks because the corporation had failed to make payment of the registration and license fees, hereinafter called taxes, during the period from January 1, 1939 to February 5, 1939. On May 11, 1939, the receivers tendered to the state the amount of the taxes without the penalties and demanded license plates and registration of the trucks. The defendants refused to comply with the demand unless the penalties which had accrued on February 5, 1939, were also paid. The trucks were operated without the payment of the taxes until after the trustee was appointed when on August 9, 1939, the referee in bankruptcy directed the trustee to pay the penalties under protest and sue to recover the same by the action herein. Judgment was entered for the plaintiff, doubtless on the theory that section 57, sub. j of the Bankruptcy Act, 11 U.S.C.A. § 93, sub. j, avoided the payment of penalties. That section, with an exception not here applicable provides: "Debts owing to the United States

or any State or subdivision thereof as a penalty or forfeiture shall not be allowed * * *" in the bankruptcy proceeding.

The defendants advance two theories, on either one of which it is contended that the judgment is erroneous. First, that the so-called penalties were a part of the taxes; that the whole thereof was secured by a lien which attached prior to the filing of the petition in bankruptcy; that the lien continued until after the adjudication; that the taxes were collectible in bankruptcy as a lien claim, and the fact that they were called penalties is immaterial. And, second, that as the receivers operated the trucks for more than thirty days from the date of the filing of the petition in bankruptcy on March 6, 1939, and for more than thirty days after their appointment as receivers on March 28, 1939, and for more than thirty days before the tender of the taxes without the penalties, the taxes including the penalties were a part of the expense of operating the trucking business.

In support of their position the defendants call attention to the provisions of section 379(a) of the Vehicle Code St.1937, p. 505, to the effect that every registration or transfer fee (and of section 6 of the Vehicle License Fee Act that every license fee), "and any penalty added thereto, from the date the same become due, constitute a lien upon the vehicle for which due." The language just quoted is common to both acts. Attention may also be directed to the provisions of section 379(b) of the Vehicle Code that "The department [of motor vehicles] shall collect such fee and any penalty by seizure of such vehicle from the person or persons in possession thereof, if any, by the sale of such vehicle * * * in the same manner as is provided by law for the seizure and sale of personal property by the assessor for the collection of taxes due on personal property." Section 67, sub. b of the Bankruptcy Act, 11 U.S.C.A. § 107, sub. b, provides that "statutory liens for taxes and debts owing to * * * any State * * * created or recognized by the laws * * * of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy." Section 67, sub. c of the same act provides that when, as here, the statutory lien for taxes due any state is not enforced before the filing of the petition in bankruptcy the same "shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 [104] of this act [title] * * *." Clause (1) refers to costs of administration and clause (2) refers to wages earned within three months.

Again, section 124a of the Judicial Code, 28 U.S.C.A., provides: "Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation."

This court has held that the provisions of section 3627a of the Political Code, that "a penalty shall attach to the tax so levied," clearly means that the penalty becomes a part of the tax, County of Los Angeles v. Morrison, 15 Cal.2d 368, 373, 101 P.2d 470, 129 A.L.R. 443, and that property in the custody of the law (the Insurance Commissioner as liquidator), is not removed from the power of taxation, for the reason that "the percentage penalty for delinquency is as much a part of the tax as the principal amount." Carpenter v. Peoples Mutual Life Ins. Co., 10 Cal.2d 299, 303, 74 P.2d 508, 511.

[1] In the case of State of California v. Hisey, 84 F.2d 802, 805, the Circuit Court of Appeals for the Ninth Circuit stated with reference to the obligation of a receiver in equity to pay a penalty which had become a lien: "If the penalty, as well as the tax, is a lien upon the property in the hands of a receiver, as the statutes of California provide, it is difficult to see how the payment of the penalty can be differentiated from the payment of the lien for the tax. We can see no distinction. The penalty is a part of the tax." It has also been held that where both the penalties and taxes are secured by a lien existing at the time of adjudication in bankruptcy, section 57, sub. j of the Bankruptcy Act does not come into operation. In re Knox-Powell-Stockton Co., 9 Cir., 100 F.2d 979, 983.

In Boteler v. Ingels, 308 U.S. 57, 58, 521, 60 S.Ct. 29, 30, 84 L.Ed. 78, 442, the court said: "The single question presented is sufficiently stated by the petition for certiorari: 'Is a bankrupt's estate liable to penalties imposed by State statutes for

non-payment of automobile license fees where license fees and penalties claims accrued during operations for purposes of liquidation of the business of bankrupt's estate by the Trustee in Bankruptcy?'" In answering the question in the affirmative, it was held that the trustee in bankruptcy was liable for the penalties which accrued while he was operating the business.

[2] For the purposes of this case it is unnecessary to go further than to conclude that upon delinquency the penalties became a part of the taxes; that the taxes then became an outstanding obligation in favor of the state; that the statutory lien securing the obligation attached and was in effect at the time of the filing of the petition in bankruptcy and at the time of adjudication, and that there was nothing in the bankruptcy act which prevented the enforcement of such obligation.

The judgment is reversed.

GIBSON, C. J., and CURTIS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

EDMONDS, J., concurred in the judgment.



49 Cal.App.2d 417

PROVIN et al. v. CONTINENTAL OIL CO. et al.

Civ. 12785.

District Court of Appeal, Second District, Division 1, California.

Jan. 30, 1942.

Rehearing Denied Feb. 20, 1942.

Hearing Denied March 30, 1942.

1. Automobiles ⇐184

Where purchaser of royalty oil from oil lessor employed independent contractor to haul oil, loading rack was constructed on north side of private road about 70 feet east from intersection of private road and north and south four-lane highway, and contractor's oil truck driver, backing west on private road and wishing to go north on highway, turned onto highway so that he was heading south on its east side, and then attempted U turn, when truck was struck by automobile going north, lessor, lessee, and purchaser of oil were not liable for death of automobile occupant on ground that location of loading rack necessitated such improper use of highway by truck driver. Vehicle Code, § 525, St.1937, p. 619; § 526, St.1935, p. 181.

2. Automobiles ⇐184

There is no obligation on part of a landowner to anticipate that users of private roadway leading to state highway will violate Motor Vehicle Act or be guilty of negligence.

3. Automobiles ⇐201(1)

Where purchaser of royalty oil from oil lessor employed independent contractor to haul oil, loading rack was constructed on north side of private road about 70 feet east from intersection of private road and north and south four-lane highway, and contractor's oil truck driver, backing west on private road and wishing to go north on highway, turned onto highway so that he was heading south on its east side and then attempted U turn when truck was struck by automobile going north, improper operation of truck, rather than location of loading rack, was "proximate cause" of accident. Vehicle Code, § 525, St.1937, p. 619; § 526, St.1935, p. 181.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

4. Negligence ⇐56(1), 62(3)

In order to recover damages for injuries it must be made to appear that alleged negligence was proximate cause of injuries sustained and there must be no intervening independent act of another party.

5. Mines and minerals ⇐73

The lessee under an oil lease has an "interest or estate in real property."

See Words and Phrases, Permanent Edition, for all other definitions of "Interest in Real Property" and "Estate in Real Property".

6. Automobiles ⇐184

Where purchaser of royalty oil from oil lessor employed independent contractor to haul oil, loading rack was constructed on north side of private road about 70 feet east from intersection of private road and north and south four-lane highway, and contractor's oil truck driver, backing west on private road and wishing to go north on highway, turned onto highway so that he was heading south on its east side and then

attempted U turn, when truck was struck by automobile going north, lessee, which had nothing to do with construction or maintenance of loading rack and was not owner of surface where loading rack was located would not be liable for death of automobile occupant even if proximate cause of death were improper location of rack. Vehicle Code, § 525, St.1937, p. 619; § 526, St.1935, p. 181.

7. Appeal and error ⇐854(6), 933(4)

A reviewing court will presume that order granting new trial was based on grounds stated in notice to move for new trial, and order will be affirmed if any one of the grounds set forth is sufficient to sustain the motion.

8. Appeal and error ⇐977(3)

There must be a clear showing of abuse of discretion before a reviewing court will reverse an order granting a new trial; this must be manifest abuse of discretion by the trial court.

9. Automobiles ⇐167(1)

An oil truck driver who backed west on private road leading into north and south four-lane highway and, wishing to go north on highway, drove onto highway so that he was heading south on its east side, and then attempted U turn, when truck was struck by automobile going north, was guilty of negligence. Vehicle Code, § 525, St.1937, p. 619; § 526, St.1935, p. 181.

10. Automobiles ⇐224(8)

It is only when a person riding as a passenger in an automobile has actual knowledge or must have known of intoxicated condition of driver that passenger may be charged with contributory negligence in riding with him.

11. New trial ⇐35

A new trial should be granted if the improper admission of evidence as to use of liquor by motorist has prejudiced the jury and influenced its verdict.

12. New trial ⇐99

Whether additional testimony not adduced at trial would have changed verdict, whether verdict might have been to any extent the result of prejudice, and whether new trial would be in the interest of due administration of justice and in securing to plaintiffs of their constitutional right of due process, were questions within sound discretion of trial judge.

13. New trial ⇐99

Where jury evidently based verdict for defendants on finding of negligence of motorist with whom plaintiffs' decedent was riding at time of fatal accident, and evidently gave great weight to evidence that motorist and those riding with him were under influence of liquor, and affidavits of witnesses who did not testify at trial, presented by plaintiffs on motion for new trial, cast grave doubt on truth of testimony of use of liquor, granting of new trial was discretionary.

Appeals from Superior Court, Los Angeles County; Walter Desmond, Judge.

Action by Mary R. Provin and others against the Continental Oil Company and others, arising out of a collision between an automobile and a truck. From a judgment of nonsuit in favor of named defendant, plaintiffs appeal, and from an order granting plaintiffs a new trial except as to named defendant, the other defendants appeal.

Judgment affirmed; order affirmed in part and reversed in part, with directions.

Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for respondents and appellants.

Joseph A. Ball and Frank C. Charvat, both of Long Beach, for defendants and appellants Danaher and Yohann.

Edmund Nichols, Jr., Anderson & Fogarty, Joe Crider, Jr., and Clarence B. Runkle, all of Los Angeles, for defendants and appellants Bixby Co. and Olympic Refining Co.

George L. Greer and James V. Brewer, both of Los Angeles, for defendant and respondent.

DRAPEAU, Justice pro tem.

U. S. Highway 101 in California runs northerly and southerly for the whole length of the state, and follows approximately the shore line of the Pacific ocean. In southern California it divides into two routes, the most westerly one being called U. S. Alternate 101.

It was on U. S. Alternate 101, between the cities of Long Beach and Seal Beach, that a collision between an automobile and a loaded oil tank and trailer occurred, which caused the death of two persons and serious injuries to two others.

And it is with regard to the damages alleged to have been caused by this collision, and the resulting trial of these issues in the superior court that the appeals in this case have to do. Hereafter we will refer to Alternate 101 as the coast highway. Also, while the coast highway at this point runs southeasterly and northwesterly, we will hereafter speak of it as running north and south.

A short distance north of Seal Beach there was located a private road, leading in an easterly direction from the coast highway. At this intersection the level of the coast highway and the private roadway was a few feet above the surface of the adjoining ground. And at this intersection the coast highway was divided into four traffic lanes. Being outside of any specially restricted speed zone, traffic proceeded at a rapid rate of speed.

At the time of the collision owners of the land east of the highway, and upon which was located the private road, were the defendants, Fred H. Bixby Company and Continental Oil Company. Fred H. Bixby Company was the owner of the fee and lessor of an oil lease to defendant Continental Oil Company, as lessee. Oil had been discovered and was being produced upon the leased premises. In the lease was a covenant permitting the lessor, at its option, to take its royalty in oil rather than in cash. Prior to the collision, the lessor had exercised this option, and had contracted with defendant, Olympic Oil Company, to purchase the royalty oil which the defendant, Continental Oil Company, was obligated under the lease to deliver. Hereafter, for the sake of brevity, we will refer to these parties as Bixby, Continental, and Olympic.

Upon the exercise of the option to take it in kind, it became necessary to provide facilities to load the oil at some point upon the real property, so that it might be transported by truck to the refinery of Olympic. Therefore, there was constructed upon the north side of the private roadway, at a point about 70 feet from the coast highway, a loading rack, with pipes leading to it from Continental's oil tanks. At the loading rack these pipes were equipped with valves. In order to load tank trucks and trailers, the drivers thereof would turn from the coast highway into the private roadway, stop at the loading rack, open the valves to turn on the oil, and fill the tanks.

Olympic contracted with the defendant, A. P. Danaher, to truck the oil from the loading rack to Olympic's refinery near Long Beach. Mr. Danaher owned the tank truck and trailer which figured in the collision, which we will hereafter call the "tanker." The defendant, Herbert F. Yohann, was the driver of the tanker.

The collision occurred about 8:30 p. m. on November 17, 1937. The automobile was en route from San Diego to Long Beach. In it were four people; two couples, husbands and wives, returning to their homes in Long Beach from a day's outing. The two men were riding in the front seat of the automobile and the two women were in the back seat.

The defendant truck driver, Herbert F. Yohann, had come south from Long Beach, on the coast highway, driving the tanker. Reaching the intersection of the private roadway, he made a left turn easterly, drove to the loading rack, and filled his tanks.

Another tanker belonging to the defendant, Danaher, was parked on the coast highway. The driver of this tanker was talking to the defendant driver while the loading was going on.

When the tanker driven by Yohann was loaded, he backed it out into the coast highway, while the other driver was out there signaling with a flashlight to traffic coming in both directions. In backing out into the highway, the tanker described a quarter circle, so that when the backing was completed, it stopped, headed south on the coast highway, partly on the shoulder and partly on the most easterly fourth lane. In other words, at the conclusion of this backing process, the tanker was on the east side of the coast highway, and it was headed in the opposite direction from Long Beach, where it was to deliver the oil to the refinery.

Then the tanker started forward, making a right turn, which, if it had been completed, would have been a complete U turn and would have caused the tanker to have been headed north on the coast highway. While this last turn was in progress, the other driver was still signaling with his flashlight. The U turn was not completed, because as the tanker was making it, and just as the front of the tanker reached the center of the highway, the automobile driven by one of the decedents, traveling along the coast highway northward from Seal Beach to Long Beach,

ran into the forward truck of the tanker, with the results above described.

In due time this action was brought by plaintiffs, surviving widow and parents of the decedent who was riding in the front seat of the automobile, and who was not driving.

Continental and Olympic were joined as defendants upon the theory that they were negligent in locating and maintaining the loading rack on their premises, in that the loading rack was so planned, located, and constructed that it was necessary for drivers of tank trucks to back out from the private roadway and then make a complete right hand turn on the coast highway. The driver and truck owner were joined on the theory of negligence and respondeat superior.

A jury was impaneled and sworn to try the facts, and the case proceeded to trial. At the close of plaintiff's case, the trial court granted a motion for a nonsuit as to the defendant, Continental. When the case was finally submitted to the jury a general verdict in favor of all of the defendants was rendered.

Thereafter, motion for a new trial was granted, except as to the defendant, Continental.

All of the parties, except Continental, have appealed.

The plaintiffs appeal from a judgment of nonsuit in favor of Continental; all of the other defendants, except Continental, appeal from the order of the superior court granting a new trial.

All of these appeals can be decided upon a determination of one of the two following interrogatories.

1. In maintaining the loading rack upon the premises of Bixby were Continental or Olympic or Bixby guilty of negligence which was the proximate cause of the injuries complained of by plaintiffs?

2. Did the trial court abuse its discretion in granting the motion for a new trial?

Firstly, with reference to the maintenance of the loading rack: It is conceded by all parties that there is no question of respondeat superior involved in the relationship of any of the parties to the action, except as between the truck owner and his driver.

Therefore, the only theory under which the defendants, Bixby, Continental, or Olympic, can be held responsible in damages, is that they agreed upon, consented to, and constructed and maintained, the loading rack upon the Bixby lands; and that in so doing, they knew the tanker would have to use the loading rack in such a way, and in such a way only, that it would have to back out upon the coast highway in the manner described.

There are many reasons why this contention is entirely untenable.

[1] Concededly, none of these defendants had any right to control or direct the movements of the tanker, nor did they exercise any control over its movements. In the absence of such essential proof, a motion for a nonsuit should have been granted. Withey v. Hammond Lumber Co., 140 Cal.App. 587, 35 P.2d 1080.

A review of the record and inspection of the exhibits showing the intersection where the collision occurred demonstrates that the manner in which the tanker was backed out into the coast highway was not the sole and only way in which this maneuver could have been accomplished. Here the terrain at some time in the past was subject to overflow by waters of the Pacific ocean, and the land was low and marshy. The coast highway and the private roadway were constructed upon an earthen fill, four or five feet above the level of the adjacent low lands. At the intersection itself there were no sharp angles; it was not like a street intersection in a city, with sharp angles at the street lines. It was so wide where the coast highway and the private roadway came together that the witnesses spoke of that point as a "Y". There was no necessity for any vehicle entering or leaving it to make a sharp turn. It was entirely feasible for the tanker to have backed out onto the coast highway so that at the conclusion of the backing it would have been facing Long Beach on its own right hand side of the highway.

It is difficult to visualize a traffic condition on the coast highway at this place when it would not be negligence for a tanker to make a right hand U turn all over the four traffic lanes of the coast highway, starting from the wrong side of the road, and going in a direction opposite that provided by our Vehicle Code. Sections 525 and 526, California Vehicle Code, St.1937, p. 619, St 1935, p. 181.

In the case now under consideration, if the tanker had been backed onto the highway so that it faced north on its own right

hand side of the road, its tail lights would have been plainly visible to north-bound traffic; whereas, under the facts before us, the only thing visible to the oncoming automobile which ran into it were the dark-colored side lights of the truck.

[2] There is nothing in the record in this case which either directly or by inference establishes the fact that any of the defendants except the trucker and his employee had anything to do with the manner in which the tanker backed into the highway, or had any idea in advance that it had, as a matter of necessity, to be so backed. There is no obligation on the part of a landowner to anticipate that users of a private roadway leading to a state highway will violate the Motor Vehicle Act or be guilty of negligence. Schwerin v. H. C. Capwell Co., 140 Cal.App. 1, 34 P.2d 1050; Meloy v. City of Santa Monica, 124 Cal. App. 622, 12 P.2d 1072; Kalis v. Shattuck, 69 Cal. 593, 11 P. 346, 58 Am.Rep. 568; Lucid v. Citizens Investment Co., 49 Cal. App. 257, 193 P. 161.

[3] Moreover, it is established by the record that neither the acts nor conduct of any of these three defendants was the proximate cause of the collision. The right-hand U turn of the tanker which we have described was entirely separate and distinct from any use or maintenance of the loading rack. This turn was made out in the highway, after the tanker was backed up.

[4] In order to recover damages for injuries, it must be made to appear that the alleged negligence which caused such injuries was the proximate cause of the injuries sustained. There can be no intervening independent act of another party. Hale v. Pacific Tel. & Tel. Co., 42 Cal.App. 55, 183 P. 280; Stackpole v. Pacific Gas & Electric Co., 181 Cal. 700, 186 P. 354; Klarquist v. Chamberlain & Proctor, 124 Cal.App. 398, 12 P.2d 664.

The trial court should be directed to render judgment in favor of said defendants, Bixby and Olympic, pursuant to the verdict of the jury.

[5, 6] There is another and additional reason why there is no liability as to Continental. It is true that the lessee of an oil lease has an interest or estate in real property. Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871. What this interest or estate may be is, of course, to be determined from the lease. A reading of the lease makes it evident that the lessor reserved such surface rights as would not interfere with the development and production of oil upon the demised premises. This being the case, it is apparent that the defendant, Continental, was not the owner of the surface where the loading rack was located, and for this and the other reasons we have pointed out, the motion for nonsuit was properly granted.

Continental had nothing to do with the construction or maintenance of the loading rack. This defendant's representative was present at a conference between representatives of the lessor, the refining company and the trucker, at which the location of the loading rack was determined upon. It was explained that Continental was represented at this conference so that the location of the loading rack would not interfere with its rights to drill and produce oil, and so that the loading rack would be located at a place to which the Bixby royalty oil could be conveniently conducted from Continental's storage tanks.

The judgment in favor of Continental should be affirmed.

[7] Secondly, with reference to the order granting the motion for a new trial: This motion was granted pursuant to a notice to move for a new trial, which notice recited all of the usual grounds upon which such motions are made. This court will presume that the order was based upon the grounds stated in the notice, and the order will be affirmed if any one of the grounds set forth is sufficient to sustain the motion. Tasker v. Cochrane, 94 Cal.App. 361, 271 P. 503; Gray v. Robinson, 33 Cal. App.2d 177, 91 P.2d 194; La Rue v. Barr, 208 Cal. 493, 282 P. 10; Phillips v. Powell, 210 Cal. 39, 290 P. 441.

[8] There must be a clear showing of abuse of discretion before a reviewing court will reverse an order granting a new trial; this must be manifest abuse of discretion by the trial court. Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 P. 1019; Kenezleber v. Wahl, 92 Cal. 202, 28 P. 225; Brannock v. Bromley, 30 Cal.App.2d 516, 86 P.2d 1062; Kohlhauer v. Bronstein, 9 Cal.App.2d 166, 48 P.2d 994; Heintz v. Cooper, 104 Cal. 668, 38 P. 511.

[9] As we have already indicated, it was negligence on the part of the truck driver to have backed this heavy tanker so that he had to turn it in the wrong di-

rection upon a fast and heavily traveled through highway. The only way in which the defendant truckers could prevail was to convince the jury that the driver of the automobile was guilty of contributory negligence, and that this contributory negligence was imputed to the survivors of the decedent who bring this action.

When the collision occurred it was a bright, clear night, and the automobile, without slackening its speed, ran right into the tanker. The jury evidently found contributory negligence upon the part of the deceased driver of the automobile and imputed it to the other decedent and to the plaintiffs in this case; because the verdict was in favor of the defendant truckers.

In coming to this conclusion, evidence that the driver of the automobile was under the influence of intoxicating liquor, and that those riding with him knew it, must have been given great weight by the jury.

[10] It is only when a person riding as a passenger in an automobile has actual knowledge or must have known of the intoxicated condition of the driver that the passenger may be charged with contributory negligence in riding with him. Lynn v. Goodwin, 170 Cal. 112, 148 P. 927, L.R.A. 1915E, 588; Smith v. Schwartz, 14 Cal. App.2d 160, 57 P.2d 1386.

The plaintiff widow testified positively that there was no drinking by anyone in the party on the day of the accident. There was found a glass container in the automobile with some wine in the bottom of it. There was testimony that there was a broken pint bottle of whiskey found about the automobile after the accident. Witnesses testified that there was no odor of alcohol on the bodies of the decedents; other witnesses testified that there was. An employee of an undertaking establishment in which the bodies were embalmed testified that he smelled liquor on the bodies of both men, and in a purge emanating from their stomachs.

In support of the motion for a new trial plaintiffs presented the affidavit of the widow of the driver of the automobile (who was in the East and did not testify at the trial) to the same effect as the testimony of the other widow; and presented the affidavit of another employee of the undertaking parlor. If the facts recited in the latter affidavit are true and were testified to by the affiant, grave doubt would be cast upon the truth of the testimony of the undertaker's assistant who did testify.

[11] The use or abuse of liquor is many times an important and controlling factor in the decision of negligence cases involving the operation of motor vehicles. But testimony as to liquor in these cases if improperly admitted can be the means of arousing prejudice in the minds of jurors, which should have no place in a finding as to any fact. Trial judges should at all times be alive to the possibility of this sort of prejudice, and if convinced that such prejudice influenced in any manner the verdict of a jury, there should be no hesitation in making an order granting a new trial.

[12, 13] Whether this additional testimony would possibly have changed the verdict of the jury; whether their verdict may have been to any extent the result of prejudice; whether in the interest of due administration of justice and in the securing to the plaintiffs of their constitutional right of due process of law—these and many other questions are by our law left to the sound discretion of the trial judge who hears the evidence along with the jury. There is nothing in this case which would warrant this court in interfering with the exercise of this discretion by the trial judge in granting the motion for a new trial.

For the reasons heretofore given, the judgment in favor of the Continental Oil Company is affirmed; the order granting the motion for new trial as to Fred H. Bixby Company and Olympic Refining Company is reversed and the trial court is directed to render judgment in their favor, pursuant to the verdict of the jury; and the order granting the motion for a new trial as to the other defendants is affirmed.

YORK, P. J., and DORAN, J., concurred.

49 Cal.App.2d 463

TRABUE PITTMAN CORPORATION, Ltd., et al. v. BOARD OF SUPERVISORS OF LOS ANGELES COUNTY et al.

Civ. 13363.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1942.

Appeal and error ⇐1194(1)

Where Supreme Court denied a petition for hearing of original order by which District Court of Appeal refused to assume jurisdiction of an application for writ of mandate, District Court of Appeal was thereafter powerless to grant a rehearing of petition for order vacating the order denying the application for the writ.

Application for writ of mandate by Trabue Pittman Corporation, Ltd., against Board of Supervisors of the County of Los Angeles and others. On petition for rehearing of petition for order vacating order of October 8, 1941 and supplement to petition for rehearing.

Petition denied.

Holbrook & Tarr and Bernard G. Hiss, all of Los Angeles, Louis Ferrari, Edmund Nelson, and G. D. Schilling, all of San Francisco, and Claude I. Parker, of Los Angeles, for petitioners.

J. H. O'Connor, Co. Counsel, S. V. O. Pritchard, Asst. Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, all of Los Angeles, for respondents.

PER CURIAM.

In considering the "Petition for Rehearing of Petition for Order Vacating Order of October 8, 1941 * * *," and the document entitled "Supplement to Petition for Rehearing," filed January 28, 1942, in the above matter, this court refuses to take jurisdiction of the cause, as it did in the matter of the original application for a writ of mandate made to this court on October 1, 1941.

This court is powerless at this time to grant a rehearing by reason of the fact that the Supreme Court has denied a petition for a hearing of the original order made herein on October 8, 1941, at which time this court refused to assume jurisdiction of the matter.

No written opinion is necessary in a matter such as this, where the court refuses to assume jurisdiction, and for that reason no opinion has been filed in the proceeding until this memorandum opinion was written, and this is being written only because of the fact that the attorneys for petitioners have stated that the Superior Court will not consider a petition herein made by them because of its belief that the refusal by this court to take jurisdiction is a decision that there is no merit in any part of the various petitions herein. This court refused to issue the original writ only because it believed that the application originally made to it should have been made to the Superior Court, if it was at all proper to make it anywhere.



49 Cal.App.2d 450

SOMMERFIELD v. MIRATTI et al.

Civ. 13348.

District Court of Appeal, Second District, Division 3, California.

Jan. 30, 1942.

Hearing Denied March 30, 1942.

1. Innkeepers ⇐14¼

Where for a period of about twelve years an uncarpeted tile stairway in hotel had been waxed weekly by hotel employees, whether hotel and manager had full and complete knowledge of the condition of the stairway at the time of the fall of business invitee was for the jury.

2. Innkeepers ⇐14¼

In action for injuries received by the business invitee of a hotel when, notwithstanding her use of the handrail, she slipped on a waxed uncarpeted tile stairway, mere evidence that invitee at some unknown time previous to her fall knew that the steps were slippery did not require holding as a matter of law that invitee had such full knowledge of the condition of the stairs as to make her use of them contributory negligence.

3. Innkeepers ⇐14¼

That stairways in public places such as hotels are frequently smooth and somewhat slippery does not mean that the public are required to use them at their own risk, regardless of the care exercised by them in such use or the apparent possibility of using them safely by the use of proper care.

4. Innkeepers ⇐14¼

In action by business invitee of a hotel for injuries received when she slipped on waxed, uncarpeted, tile stairway, use of the stairs in view of her knowledge in the past of the slippery condition did not constitute contributory negligence as a matter of law, since the invitee had the right to assume that hotel in exercise of ordinary care for the safety of its invitees would discover and remove the danger.

5. Appeal and error ⇐930(4)

In action by business invitee of a hotel for injuries received when she slipped on waxed, uncarpeted, tile stairway, on question of invitee's contributory negligence, the appellate court in support of a verdict for the invitee would presume that from the conflicting testimony the jury found that invitee made such inspection as a reasonably prudent person would make under the circumstances, used ordinary care in attempting to use the stairs with the aid of the handrail and with rough crepe rubber soles on her shoes, and that the fact that the stairway was more slippery than usual was unknown to invitee.

6. Innkeepers ⇐14¼

If to a person of ordinary prudence it appears that in spite of the danger of falling while using a passageway provided for use of hotel invitees he could safely use the passageway by taking available precautions and he exercised ordinary care in using the passageway, he is not guilty of contributory negligence as matter of law in his action against the hotel for injury received in a fall.

7. Innkeepers ⇐14¼

In action by business invitee of a hotel for injuries received when she slipped on waxed, uncarpeted, tile stairway where invitee had no reason to believe that stairs presented any danger which she could not avoid by using them with ordinary care, the fact that invitee chose to use the stairway instead of an elevator was not negligence of invitee.

Appeal from Superior Court, Santa Barbara County; Atwill Westwick, Judge.

Action by Fern Sommerfield against Frank Miratti, Jr., and Frank Miratti, Incorporated, for injuries received in a fall on a hotel stairway. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Jennings & Belcher, of Los Angeles, and Schauer, Ryon & McMahon and Robert W. McIntyre, all of Santa Barbara, for appellants.

W. P. Butcher and J. F. Goux, both of Santa Barbara, for respondent.

SHAW, Justice pro tem.

The defendants Frank Miratti, Inc., a corporation, and Frank Miratti, Jr., appeal from a judgment in favor of plaintiff. At all times material here, the defendant corporation maintained and operated a hotel and the other defendant named was its president and general manager and resided in the hotel. In this hotel there was a stairway leading up from the main lobby floor to a mezzanine floor upon which was situated a ladies' rest room. The plaintiff, who was a business invitee of the defendants, ascended this stairway went to the rest room, and on her return started down the stairs to the lobby. On the second step her feet slipped out from under her and she fell, sliding and bumping, to the bottom of the stairs, and thus received personal injuries for which she sued and recovered in this action. In her complaint she alleged that the defendants negligently caused the steps to be slippery and unsafe for use by waxing and polishing them. In addition to some denials the defendants alleged that the plaintiff was guilty of contributory negligence in her use of the stairs.

On this appeal the defendants do not deny the sufficiency of the evidence to show negligence on their part, so that matter need not be discussed. They make but two contentions: first, that plaintiff knew the condition of the stairway before and when she used it and for that reason she assumed the risk and was guilty of contributory negligence as a matter of law in using it; and second, that because of this contributory negligence the court should have directed a verdict for defendants. Our conclusion that the first contention cannot be sustained eliminates the second from consideration.

In support of their contention defendants cite and rely chiefly upon Mautino v. Sutter Hospital Ass'n, 1931, 211 Cal. 556, 296 P. 76, where the court held that a nurse using a hospital floor which she knew to be waxed and slippery was guilty of contributory negligence as a matter of law. The nurse was not an employee, but an invitee, of the hospital, and, in stating the rule regarding the liability of the owner or occupant of land or buildings to an invitee, the court there used this language, upon which defendants rely, taken from another authority: "An owner or occupant of land who by invitation, express or implied, induces or leads others to go upon premises for any lawful purpose is liable for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them. * * * The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. * * * There is no liability for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant." 211 Cal. 560, 561, 296 P. 77. It appeared from the testimony of the plaintiff in that case that she had been using the floor on which she fell for a day and part of the next day immediately prior to her fall, that during all that time she had noticed that the floor was so slippery that she could not keep her feet, and that she had complained of this condition to the head nurse. After stating this testimony, the court said, regarding the contributory negligence of plaintiff there: "It is clear from the plaintiff's testimony that she had *full knowledge* of the condition of the floor * * *. It does not appear that the defendant's knowledge thereof was superior to that of the plaintiff. If it was negligence for the defendant to maintain the floor in the condition described by the plaintiff, there appears to be no escape from the conclusion that it was negligence for the plaintiff, with *full knowledge* of such condition, to continue in the use thereof." 211 Cal. 560, 296 P. 77. (Emphasis ours.)

[1-3] The evidence in the present case does not require us to hold, as a matter of law, that the plaintiff had *full knowledge* of the condition of the stairs at the time she fell, or that defendants' knowledge thereof was not superior to hers. The steps were made of red composition tile and had no carpet or other covering upon them. The whole surface was waxed and a new application of wax was made once a week. This was done by an employee of the corporate defendant, upon the order and under the supervision of the other appealing defendant, and this course of action had continued for a period of some 12 years immediately preceding the accident. The jury could properly infer from these facts that both appealing defendants had full and complete knowledge of the condition of the stairway at the time in question.

The plaintiff was familiar with the hotel and had used the steps many times during a period of four or five years before the date of the accident, and on these occasions she had always used the handrail and kept her eyes on the steps, but had never slipped on them. She had also then observed the condition of the steps; and on these occasions, as she testified "I knew the steps were slippery and that is why I used the handrail.

Q. And you knew that at all the time previously, is that true? A. That is right."

Nowhere does it appear how long before the accident her last previous use of the stairs and observation of this condition occurred. A considerable period of time may have intervened. The plaintiff had heard that three or four other people had also slipped on the steps. This she heard before her own fall, but how long before, or when these persons had fallen, is not shown. There is nothing in all this to compel a finding that plaintiff knew the stairs had, in past times, been so slippery that she could not, even by taking proper precautions, safely use them. Stairways in public places are quite frequently smooth and somewhat slippery, especially where they have no covering upon the treads, but the public are not for that reason required to use them at their own risk, regardless of the care exercised by them in such use, or the apparent possibility of using them safely by the use of proper care.

[4] But even if plaintiff had observed or been informed that on previous occasions the stairs were so slippery as to be unsafe for use, such knowledge on her part would not require her to expect that the situation would remain the same forever. She might properly assume that defendants, who were charged with the duty of exercising ordinary care for the safety of those whom they invited there (Mautino v. Sutter Hospital

Ass'n, supra; Tuttle v. Crawford, 1936, 8 Cal.2d 126, 130, 63 P.2d 1128; Dingman v. A. F. Mattock Co., 1940, 15 Cal.2d 622, 624, 104 P.2d 26), would in due time discover and remove any danger which she saw at any particular time (see De Verdi v. Weiss, 1936, 16 Cal.App.2d 439, 60 P.2d 879), especially a danger of this kind, which was not due to the plan or construction of the building, not easily changed, but merely to the manner of performing the periodical task of cleaning and caring for the building. In other words, knowledge of a condition existing at some unknown time in the past is not that "full knowledge" of a present condition which the plaintiff in Mautino v. Sutter Hospital Ass'n, supra, had.

Regarding her knowledge of the conditions at the time of the accident and her conduct then, plaintiff testified that she went up the stairs, without slipping, and that she put her hand on the handrail as she started down, and was looking down at her feet. She was wearing at this time shoes with new crepe rubber soles, having a rough surface. To a question, "Did you realize at that time when you were going up—anything when you went up the steps to indicate that they were slippery?" she replied, "Only that they were very shiny and glossy and red." She further testified:

"Q. Did your foot fly off of the step? A. Yes, it did * * *

"Q. Did you notice whether that was any more slippery, the condition of that step was any more slippery than any other steps that you had noticed on previous occasions, of these stairs? A. I did when my foot went out from under me.

"Q. And not before? A. No, sir."

She also testified:

"Q. Did you notice that the stairs were slippery when you went up there? A. I did not notice that they were slippery when I went up. I knew that they were slippery.

"Q. You knew that they were slippery? A. Yes, sir.

"Q. From past going up and down those stairs you knew that they were slippery, didn't you? A. Well, yes."

[5, 6] From all this testimony it was possible for the jury to find and in support of the verdict we must presume they did find that, while plaintiff knew these stairs had been slippery in the past, the past condition was such that she could safely use them by putting her hands on the handrail, that on this occasion the stairs were more slippery than they had previously been but plaintiff did not notice this fact and it was not obvious to her on such inspection as a reasonably prudent person would make under the circumstances, and that she used ordinary care in attempting to use the stairs with the aid of the handrail and with rough crepe rubber soles on her shoes. Possibly the evidence would have supported contrary findings on some or all of these matters, but we cannot interfere with the jury's conclusions, based, as they are, on sufficient evidence. The mere fact that there is some danger of falling in using a passageway provided for the use of an invitee does not in every case convict him of contributory negligence for using it with knowledge of the condition. The question is whether he used ordinary care in so doing, and if to a man of ordinary prudence it would appear that in spite of the danger he can by taking available precautions safely use the passageway, he is not negligent in using it with those precautions. See Christy v. Ulrich, 1931, 113 Cal.App. 338, 342, 298 P. 135; Roseberry v. Edward F. Niehaus & Co., 1913, 166 Cal. 481, 137 P. 232; Tuttle v. Crawford, supra.

[7] Defendants call attention to the fact that there was an elevator, of the passenger operated variety, which the plaintiff could have used in going from the mezzanine floor to the lobby and contends that since by so doing she could have avoided the danger of falling on the steps, the choice of the dangerous route instead of a safe one was itself negligence. A sufficient answer to this argument is that upon the finding (which we must presume the jury made) that the plaintiff had no reason to believe the stairs presented any danger which she could not avoid by using them as she did, the rule for which defendants contend is not applicable.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concurred.

49 Cal.App.2d 497

CLARK v. ABRAMS et al.

Civ. 13271.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1942.

1. Appeal and error ⇐1011(1)

Trial court's action on conflicting evidence will not be disturbed on appeal.

2. Deeds ⇐211(1)

Where plaintiff sought to set aside a conveyance on ground that grantor was mentally incompetent to execute the instrument, burden was upon plaintiff to establish by a preponderance of evidence that grantor was mentally incompetent to execute the instrument at time of signing it.

3. Evidence ⇐63

The presumption is always that a person is sane.

4. Deeds ⇐211(1)

Evidence justified refusal to set aside conveyance on ground that grantor was mentally incompetent.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Leona Clark against Emanuel Abrams and another to set aside a conveyance and a gift by an allegedly incompetent grantor and donor. From a judgment for defendants, plaintiff appeals.

Affirmed.

Osborn, Burum & Shortridge, of Bakersfield, and Ames Peterson, of Los Angeles, for appellant.

Emanuel Abrams, in pro. per., and Potter & Potter, of Los Angeles, for respondents.

STEPHENS, Justice, pro tem.

Appeal was taken herein from a judgment in favor of defendants.

Plaintiff was the daughter of Mabel Pearl Abrams, who was deceased at the time of bringing the action, and defendant Frank Rouse was administrator of her estate, being sued in his representative capacity only; defendant Emanuel Abrams was the surviving husband of said decedent. Plaintiff was the daughter of decedent by a prior marriage.

It is alleged that some six or seven months prior to her death decedent executed a deed conveying certain real property to defendant Abrams and herself as joint tenants; that at the time of the execution of said deed "the said Mabel Pearl Abrams was mentally incompetent to sign or execute said instrument, by reason of the fact that she was then, and had been for many months prior thereto, in an intoxicated, inebriated and debilitated state and condition, by reason of her continual consumption of excessive amounts of alcoholic liquors, and that the said defendant Emanuel Abrams knew of her condition at said times and procured her to sign or execute said conveyance while she was in such state of intoxication, inebriety and mental incompetency; and that by reason of said intoxication, inebriety and mental incompetency the said Mabel Pearl Abrams could not and did not know or understand that she had signed or executed said deed"; that by reason of the said "purported joint tenancy deed" defendant Abrams claims title to said real property, is in possession thereof and refused to turn over said real property or the rents collected therefrom to defendant Rouse, as administrator; that said Rouse, as administrator, has refused to bring any action on behalf of the estate or to join plaintiff therein, and has demanded that he be made a party defendant herein; and that for these reasons he is made a defendant in his representative capacity as administrator. A second cause of action is set forth, attacking a claimed gift of personal property upon exactly the same grounds.

[1] In her specifications of error appellant sets forth nine findings of fact and nine conclusions of law, but makes no contention that the findings are not supported by substantial evidence. Portions of the testimony are quoted and authorities cited in support of the apparent contention that the trial court did not give sufficient weight to the evidence presented by her, or required too high a degree of proof on her part. It is of course a thoroughly established rule in this state that where, upon a question of fact, the testimony in the court below involves a substantial conflict, the action of the trial court will not be disturbed. Bright v. Zabler, 43 Cal.App.2d 706, 111 P.2d 387; 10 Cal.Jur. 1172, and cases there cited.

[2] The burden was upon appellant to establish by a preponderance of the evidence that "said Mabel Pearl Abrams was mentally incompetent to sign or execute said instrument" at the time of signing it. There was no direct evidence that upon that day she was intoxicated or that she had even taken one drink. The only testimony of anyone who had seen her on that day was that of the notary public, a disinterested witness, who testified that she was not intoxicated, that she was perfectly normal and that he did not observe any smell of liquor on her breath, and defendant Abrams, who corroborated this testimony. No evidence was presented which could support a finding that defendant Abrams procured deceased to sign the deed while intoxicated.

The case was tried solely on the theory that deceased had mentally deteriorated to the point where she was incapable of knowing what she was doing. Appellant relies upon the testimony of several witnesses who testified to habitual and excessive drinking by decedent over a period of many months, both prior to the signing and subsequently, and up to the date of her death, resulting in her general mental deterioration. Two physicians who had treated her at various times testified to the effect upon her of the excessive use of liquor when they had seen her (though not at or immediately near the date of signing); but upon cross-examination one of them said: "I can't go so far as to say she was mentally completely deranged, no. She was able to answer questions. She was able to respond to various things, but her whole mental attitude was uncooperative and appeared in an intoxicated state." The other physician, in answer to a request for his opinion as to how far her mind was normal, said: "Well, her mind was very keen. It was surprising to me * * *. The mental condition, however, at least at the time that I spoke to her, was very clear." Again, in answer to the question, "In your opinion was she at that time sane or insane?" he replied: "Absolutely sane." This was about two months after the signing.

[3, 4] At least two witnesses (in addition to defendant Abrams) were produced by defendants who testified strongly that decedent's mind was normal and even unusually keen in business matters. It must be borne in mind that the presumption is always that a person is sane. Estate of Perkins, 195 Cal. 699, 235 P. 45, and cases there cited.

It therefore clearly appears that there was a substantial conflict in the evidence, and consequently the action of the trial court will not be disturbed.

The judgment is affirmed.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.



49 Cal.App.2d 594

PEOPLE v. HARINCAR.

Crim. 3526.

District Court of Appeal, Second District, Division 2, California.

Feb. 9, 1942.

1. Criminal law ⇐997

A motion by a defendant to vacate a judgment of conviction upon which he was also found to be an habitual criminal was in its legal effect a petition for a "writ of error coram nobis".

See Words and Phrases, Permanent Edition, for all other definitions of "Writ of Error Coram Nobis".

2. Criminal law ⇐997

Where information charged defendant with forgery and with prior conviction of felonies in other states, and defendant knew that such prior offenses did not amount to felonies under California law, upon defendant's conviction under a plea of guilty to the information, and a finding that by reason of the prior convictions he was an habitual criminal, defendant's failure to avail himself of statutory remedies which would have given relief precluded issuance of a writ of error coram nobis to vacate conviction. Pen.Code, § 644.

3. Criminal law ⇐997

Where defendant was convicted upon his plea of guilty to an information charging him with forgery and with prior convictions of felonies in other states and he was found to be an habitual criminal, a delay of five

years by defendant in filing motion to vacate judgment, alleging that the prior offenses did not amount to felonies under California law, was unreasonable and precluded the issuance of a writ of error coram nobis. Pen.Code, § 644.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Joseph Harincar entered a plea of guilty to an information charging forgery and prior conviction of felonies in other states, and judgment of conviction was entered upon the plea. From an order denying his motion to vacate the judgment, defendant appeals.

Affirmed.

Joseph Harincar, in pro. per.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

W. J. WOOD, Justice.

Defendant has appealed from an order of the trial court denying his motion to vacate the judgment of conviction.

Defendant was charged by information with the crime of forgery. It was also charged that he had suffered three prior convictions in the states of Iowa and Minnesota, and that in the case of each prior conviction he had served a term of imprisonment therefor in the state prison. He pleaded not guilty and denied the prior convictions, but thereafter withdrew this plea and entered a plea of guilty and also admitted the prior convictions. The court found him to be an habitual criminal and sentenced him accordingly. The judgment of conviction was entered October 1, 1936, and no appeal was taken therefrom.

A motion was filed by defendant on September 22, 1941, to vacate the judgment entered in 1936, certified copies of the prior convictions being filed with the motion. Defendant claims that if the prior crimes had been committed in California only one of them would have come within the classification of crimes enumerated in section 644 of the Penal Code. The trial court was therefore asked to "relieve the defendant of that portion of the judgment declaring the defendant to be an habitual criminal."

[1] Although defendant's motion is designated a motion to vacate the judgment, it is in legal effect under the practice of this state a petition for a writ of error coram nobis. In People v. Vernon, 9 Cal. App.2d 138, 49 P.2d 326, 328, it is held that the writ of error coram nobis "is nothing more nor less than a motion to vacate a judgment," and that the remedy provided by the writ could be designated by "the more simple and appropriate name of a motion to vacate the judgment."

[2] The issue now presented by defendant was squarely before the court in People v. Moore, 9 Cal.App.2d 251, 49 P.2d 615, 617, where the defendant petitioned the court in which he had been convicted for the issuance of a writ of error coram nobis. Moore had admitted four prior convictions and was sentenced as an habitual criminal. He appealed and the judgment was affirmed. In his petition for the writ thereafter filed he claimed that three of the four prior convictions with which he had been charged were not felonies in California, and that he was ignorant of the legal effect of these prior convictions at the time he was sentenced in this state. The court held that even if it be conceded that three of the four prior convictions were not felonies in California, nevertheless the writ of error coram nobis did not furnish a remedy under the circumstances, and that since defendant had omitted to avail himself of the remedies afforded by statute and the judgment had become final, "there would be no further legal recourse by any form of judicial review." The decision in the Moore case was cited with approval in People v. Lumbley, 8 Cal.2d 752, 760, 68 P.2d 354.

The facts in the Moore case were more favorable to the party seeking the writ than are the facts shown by the record now before us, for it appears that petitioner at the time he was sentenced was aware of the true facts as to his prior convictions and as to their legal effect on a conviction in California. His counsel then stated that the prior convictions "were nothing but petty larcenies under our laws at the present time."

[3] An additional reason for affirming the order may be found in the unreasonable delay on the part of defendant in filing his motion. People v. Lumbley, supra.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

49 Cal.App.2d 308

PEOPLE v. BOLANOS.

Cr. 3510.

District Court of Appeal, Second District, Division 1, California.

Jan. 26, 1942.

Hearing Denied Feb. 19, 1942.

1. Torts ⇐10

An intentional interference with the advantageous economic relations of others by the members of labor organizations is not tortious unless violence is used or the object sought to be accomplished has no reasonable relevance to labor conditions.

2. Indictment and information ⇐71

An amended indictment for attempted extortion by agent of labor union to cause labor trouble among employees of named person charged a public offense and was not defective as uncertain, indefinite and ambiguous. Pen.Code, §§ 518, 519, subd. 1; §§ 950–952.

Appeal from Superior Court, Los Angeles County; B. J. Scheinman, Judge.

Louis Bolanos was indicted for attempted extortion. From a judgment sustaining defendant's demurrer to the amended indictment, the People appeal.

Reversed with directions to overrule demurrer.

Earl Warren, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and John F. Dockweiler, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., and Alexander H. Van Cott, all of Los Angeles, for appellant.

George Stahlman and Harry Duckett, both of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal by the people from a judgment in favor of respondent Louis Bolanos rendered after his demurrer had been sustained to an amended indictment found and presented by the Los Angeles County Grand Jury on July 16, 1941, accusing respondent of having committed the crime of attempted extortion, to-wit:

"That on or about the 20th day of June, 1941 * * * said defendant, Louis Bolanos, did willfully, unlawfully, feloniously, and by wrongful use of force and fear, attempt to obtain the sum of Two Thousand Dollars ($2000) * * * from one Mrs. E. P. Wood, as follows, to-wit:

"The said Louis Bolanos, who was then and there an organizer and business agent of a labor union, did then and there willfully, unlawfully and feloniously threaten the said Mrs. E. P. Wood, who was then and there the sole stockholder and owner of the Table Linen Supply Co., a corporation, that the said defendant, Louis Bolanos, would, as the organizer and business agent of said labor union, cause and promote unrest, discord, dissatisfaction, strife, trouble, and labor strikes, among the employees of said Mrs. E. P. Wood and said Table Linen Supply Co., and that, by reason thereof, he would disrupt and destroy the business and property of the said Mrs. E. P. Wood and said Table Linen Supply Co., and thereby prevent the rendering of service to customers thereof, and thereby destroy the value of the plant, business and property of said Mrs. E. P. Wood and said Table Linen Supply Co., all of which the said defendant, Louis Bolanos, did then and there willfully, unlawfully, feloniously, and by wrongful use of force and fear, threaten unless the said Mrs. E. P. Wood paid over to him, the said defendant, the sum of Two Thousand Dollars ($2000) for his own personal use and benefit;

"That said defendant, Louis Bolanos, at the time when he made the said threats * * * did not intend to call or cause the calling of any strike, legal or otherwise, or to * * * organize in a labor union * * * all or any of said employees, or to perform or promote any service or activity on behalf of said employees or on behalf of the labor union for which he * * * was then an organizer and business agent * * * or any of them, but, on the contrary, said defendant did intend to and did willfully, unlawfully, corruptly and feloniously, then and there threaten that he * * * would then and thereafter do said unlawful injury to the property of the said Mrs. E. P. Wood and said Table Linen Supply Co. * * * for the purpose of obtaining and extorting money and property from the said Mrs. E. P. Wood by means of fear induced by said wrongful threats as aforesaid, and for the personal use and benefit of him, the said defendant."

The demurrer to said amended indictment was made upon the following grounds:

"I. That said amended indictment does not substantially conform to the require-

ments of Sections 950, 951, 952 of the Penal Code * * * in that:

"A. Said amended indictment does not contain a statement of the acts constituting the offense in ordinary and concise language in such manner as to enable this defendant, who is a person of common understanding, to know what is intended thereby.

"B. That said amended indictment purports to charge one offense, to-wit, that of attempted extortion, a felony. That said amended indictment in attempting to charge said above described offense does not do so in the words of the enactment describing the offense or declaring the matter to be a public offense, and it does not do so in any words sufficient to give the accused notice of the offense of which he is accused.

"II. That said amended indictment is uncertain, indefinite and ambiguous. * * *

"III. That the facts stated in said amended indictment do not constitute a public offense in that it is not made to appear by the charging part (thereof) by any allegation whatsoever, that the defendant threatened to do any unlawful injury to the person or property of said Mrs. E. P. Wood or the Table Linen Supply Company, or any relative of said Mrs. E. P. Wood or member of her family."

Section 518 of the Penal Code defines extortion as "the obtaining of property from another, with his consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right."

Section 519 provides as follows: "*Threats which may constitute extortion.* Fear, such as will constitute extortion, may be induced by a threat, either: 1. To do an unlawful injury to the person or property of the individual threatened or of a third person * * *."

[1] Neither the rights of workmen to strike, nor to negotiate with employers for the purpose of averting a strike are involved in this prosecution. It is conceded by appellant, quoting from the opinion in McKay v. Retail Automobile Salesmen's Local Union No. 1067, 16 Cal.2d 311, 319, 106 P.2d 373, 378, that, "under the law as it has developed in recent years, an intentional interference with the advantageous economic relations of others by the members of labor organizations is not tortious unless violence is used or the *object sought to be accomplished has no reasonable relevance to labor conditions.*" (Italics added.)

[2] It is clearly set forth in the amended indictment that respondent Bolanos attempted to commit extortion by threatening to do an unlawful injury to the property of Mrs. E. P. Wood and the Table Linen Supply Company, it being specifically alleged that in order to accomplish such unlawful injury he would "cause and promote unrest, discord, dissatisfaction, strife, trouble, and labor strikes among the employees of said Mrs. E. P. Wood and said Table Linen Supply Company, and that, by reason thereof, he would disrupt and destroy the business and property of the said Mrs. E. P. Wood and the said Table Linen Supply Company, and thereby prevent the rendering of service to customers thereof, and thereby destroy the value of the plant, business and property," unless he received from Mrs. Wood the sum of $2,000 "for his own personal use and benefit."

Manifestly, it is an unlawful injury to inflict damage upon property in the manner alleged in the amended indictment.

"It was not necessary for the prosecution to set forth in the indictment the express manner in which * * * damage to property was to be brought about by defendants. It was held in People v. Sanders, 188 Cal. 744, 749, 207 P. 380, 382, that a distinction is to be drawn between indictments which directly charge a defendant with a crime and those indictments which charge extortion through threats. In that case the defendant was charged with extortion by threatening to accuse the complainant of a crime, and in ruling that the exact crime threatened need not be set forth in the indictment the court said: 'In the latter class of cases no such technical accusation is required as in the former for several obvious reasons, some of which are that the indictment or information cannot go beyond the terms of the threatened accusations, and the accusations need only be such as to put the intended victim of the extortion in fear of being accused of some crime. The more vague and general the terms of the accusation, the better it would subserve the purpose of the accuser in magnifying the fears of his victim, and the better also it would serve to protect him in the event of the failure to accomplish his extortion, and of a prosecution for his attempted crime.' In People v. Lavine, 115 Cal.App. 289, 292, 1 P.2d 496, 497 [in which *certiorari* was denied by the Supreme Court

of the United States, 286 U.S. 528, 52 S.Ct. 500, 76 L.Ed. 1270], the defendant was charged in the indictment with the crime of extortion in that he obtained the sum of $75,000 by threatening 'to expose certain secrets' concerning four persons named in the indictment. The indictment was held sufficient." People v. Peppercorn, 34 Cal. App.2d 603, 606, 94 P.2d 80, 81.

Respondent Bolanos places reliance upon the case of People v. Schmitz, 7 Cal.App. 330, 94 P. 407, 419, 15 L.R.A.,N.S., 717. That case is easily distinguishable from the one here under consideration. In the Schmitz case, although the indictment used the words "unlawful injury," facts were set forth showing that the threatened injury was not in fact unlawful. In the instant case, the facts alleged in the amended indictment are sufficient to show the threatened injuries to have been unlawful.

An analysis of the facts alleged in the amended indictment clearly indicates that it substantially conforms to the requirements of sections 950, 951 and 952 of the Penal Code; that the facts so alleged constitute a public offense, and that said indictment is not vulnerable to the charge that it is uncertain, indefinite and ambiguous.

For the reasons stated, the judgment is reversed and the trial court is directed to overrule the demurrer.

DORAN and WHITE, JJ., concurred.



49 Cal.App.2d 306

Ex parte SCHEFSTAD.

Cr. 2225.

District Court of Appeal, First District, Division 2, California.

Jan. 26, 1942.

Criminal law ⇐228

Under Penal Code provisions relating to time of commitment, where accused was arrested on charge of having committed a crime in another state and was brought before the justice court which without examination committed the accused "until he can be tried or examined" and examination was delayed more than six days without accused's consent, accused was entitled to be discharged from custody. Penal Code, §§ 861, 1551 et seq., § 1551.2.

Habeas corpus proceeding by Finn Schefstad.

Petitioner discharged.

Charles J. Janigian, of San Francisco, for petitioner.

Francis P. Healey, Dist. Atty., of Richmond, and J. Vance Porlier, Deputy Dist. Atty., of Martinez, for respondent L. E. Jones, Chief of Police of Richmond.

SPENCE, Justice.

Petitioner seeks his release on habeas corpus.

On December 20, 1941, petitioner was arrested by the police department of the city of Richmond without the service of a warrant of arrest. On December 23, 1941, a complaint was filed in the justice's court charging that petitioner had committed the crime of murder in the city of New Orleans, State of Louisiana. A warrant of arrest was thereupon issued. It appears that petitioner was then arrested under said warrant and that he was brought before the justice's court on said December 23, 1941. No examination was had but a commitment was signed by the justice committing petitioner "until he can be tried or examined."

Petitioner filed his petition herein on January 2, 1942. The writ was issued and the return was thereafter filed on January 12, 1942. The district attorney relied upon section 1551 et seq. of the Penal Code in justification of the detention of the petitioner.

Petitioner contends that he is entitled to his release upon two grounds: first, that the complaint was insufficient; and second, that he has not been given an examination and that his examination has been delayed more than six days without his consent. It appears unnecessary to discuss the first ground as we believe that petitioner is entitled to his release upon the second ground.

Section 1551.2 of the Penal Code provides that, "Proceedings for the commitment of a person charged under sections 1551 and 1551.1 of this code shall be similar to those provided in this code for the commitment of a person charged with a

public offense in this State * * *." Section 861 of the Penal Code provides, "The examination must be completed at one session, unless the magistrate, for good cause shown by affidavit, postpone it. The postponement cannot be for more than two days at each time, nor more than six days in all, unless by consent or on motion of the defendant."

In Ex Parte Rosenblat, 51 Cal. 285, at page 287, the court said: "We are inclined to the belief that a person thus arrested, with a view to his being surrendered on requisition expected to arrive, is entitled to his discharge if his examination is not brought on before the magistrate within six days." While the quoted portion of the opinion in the cited case was dicta, we see no escape from the conclusions stated therein under the code sections above mentioned.

The petitioner is discharged.

NOURSE, P. J., and STURTEVANT, J., concurred.



49 Cal.App.2d 403

WRIGHT v. REDWOOD THEATRES, Inc., et al.

Civ. 6608.

District Court of Appeal, Third District, California.

Jan. 29, 1942.

Hearing Denied March 27, 1942.

1. Limitation of actions ⇐13

A person fraudulently inducing another to delay bringing suit until after expiration of the statutory period is "estopped" to take advantage of the defense that the cause of action is barred, but it must appear that the fraudulent misrepresentation was one of fact, unless a confidential relationship existed, that misrepresentation was relied on and that diligence to ascertain the truth was used.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

2. Estoppel ⇐95

An "estoppel" may arise from silence as well as from words or conduct, but that occurs only where there is a duty to speak and where party having such duty remains silent with knowledge of the circumstances, and there must be something willful or culpable in the silence and circumstances must make it reasonably probable that person seeking to set up estoppel has suffered prejudice by the other's unreasonable acquiescence.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

3. Limitation of actions ⇐13

Where theater corporation against which personal injury action was brought denied in answer that it operated theater, failure of the corporation, theater manager, or corporation which actually operated the theater to inform plaintiff of the true facts did not "estop" them from setting up statute of limitations as a bar to plaintiff's supplemental complaint bringing in the second corporation as a party defendant, notwithstanding that plaintiff did not discover true facts until after trial was had and statute of limitations had run. Code Civ.Proc. § 340, subd. 3.

4. Pleading ⇐126

In personal injury action against theater corporation, denial in answer that corporation operated theater near which injury occurred was plain enough to put the fact in issue, as against claim that denial was a "negative pregnant".

See Words and Phrases, Permanent Edition, for all other definitions of "Negative Pregnant".

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by Annie S. Wright against the Redwood Theatres, Incorporated, and others, to recover damages arising out of personal injuries sustained when the plaintiff slipped while walking on a sidewalk in the vicinity of a theater operated by one of the defendants. Judgment for the defendants, and the plaintiff appeals.

Judgment affirmed.

Hearing denied; HOUSER and CARTER, JJ., dissenting.

Carlin & Fuidge, of Marysville, for appellant.

Butler, Van Dyke & Harris, of Sacramento, for respondents.

TUTTLE, Justice.

This action was brought to recover damages arising out of personal injuries. The

trial court sustained a demurrer to the supplemental complaint without leave to amend. From a judgment for defendants, this appeal is now prosecuted.

On April 18, 1939, plaintiff was walking on a sidewalk in the city of Marysville, in the vicinity of the State Theatre, and while so walking, plaintiff slipped upon some slippery substance and was injured.

On November 8, 1939, plaintiff filed an action against Redwood Theatres, Inc., a corporation, and Harry Brown. The complaint alleged substantially as follows: "That defendant Redwood Theatres, Inc., was a Nevada corporation doing business in California, and that through its agents and employees it was operating the State Theatre in Marysville; that defendant Harry Brown was the manager of that theatre; that plaintiff had received injuries on the 18th day of April, 1939, while walking on the sidewalk in the vicinity of that theatre; that the two named defendants had negligently caused a slippery substance to be placed on the sidewalk along which plaintiff was walking and in front of the theatre, upon which substance plaintiff slipped, fell, and was injured."

To this complaint defendants filed an answer, denying all the foregoing allegations, but admitting the corporate capacity of defendant Redwood Theatres, Inc., and that defendant Brown was the manager of State Theatre.

The case came on for trial. Witnesses were sworn, exhibits were introduced, and plaintiff rested; whereupon, the defendants moved for a nonsuit as to each of them. Thereupon, the case was reopened, one witness was recalled and testified further on the part of plaintiff. Thereupon, counsel for plaintiff moved the court for permission to amend her complaint "to conform with the proof and to file an amended and supplemental complaint, by substituting the National Theatres Syndicate of California as a party defendant, in the place and stead of Redwood Theatres, Inc." Thereupon, the minutes show that the trial court granted a nonsuit as to both defendants, and also granted the motion of plaintiff to file an amended and supplemental complaint, bringing in, for the first time, the respondent herein, as party defendant.

The demurrer to the supplemental complaint set up, as a bar, section 340, subdivision 3, of the Code of Civil Procedure, which limits the time for commencing such an action to one year after the injury, which in this instance, and as alleged in said complaint, occurred on April 18, 1939.

The supplemental complaint was filed August 23, 1940. It set forth facts which, appellant contends, now estop defendants from availing themselves of the statute of limitations. Those allegations are as follows:

"That subsequent to the 18th day of April, 1939, and prior to the commencement of the herein action, plaintiff caused negotiations to be commenced looking toward the settlement of her injuries and damages with certain persons acting for and in behalf of, and under the authorization of said defendant corporations; that said persons allowed counsel for plaintiff to believe that defendant Redwood Theatres, Inc., was not only the owner, but the operator of said theatre as well, when in truth and in fact, it was well known to said person and to said defendant corporations at said time and at all times herein mentioned, and unknown to plaintiff or her counsel, that while defendant Redwood Theatres, Inc., or its assignee, Marysville Theatres, Inc., a corporation, was the owner of the real property and the improvements thereon constituting said theatre, that defendant National Theatres Syndicate of California was the lessee and operator of the business therein conducted.

"That George M. Mann is the president of defendant Redwood Theatres, Inc., and the president of defendant National Theatres Syndicate of California, a corporation; that L. S. Hamm is the secretary of defendant Redwood Theatres, Inc., a corporation, and of defendant National Theatres Syndicate of California, a corporation; that M. C. Sousa is the treasurer of defendant Redwood Theatres, Inc., and of defendant National Theatres Syndicate of California, a corporation; that said defendant corporation and each thereof maintain a joint office located in the same building with the same telephone number in the City of San Francisco; that the major portion of the stock of said defendant corporations and each of them is owned by said George M. Mann; that service of original summons and complaint herein was made on the aforesaid M. C. Sousa who, as aforesaid, is an officer of both said defendant corporations; that at all times during the pendency of the action on the original complaint herein, defendant National Theatres Syndicate of California and the officers thereof well knew of the existence

of said action, of the cause of action therein contained, and of the error in which it and they had allowed plaintiff to fall.

"That upon issue being joined on the original complaint the cause was duly noticed to be set on February 15, 1940, and would have been tried prior to April 18, 1940, but upon the request of counsel for defendant, and to suit his convenience, and for no other reason, the matter was set for trial and trial was had on the 20th day of May, 1940, at which time, and no sooner, did plaintiff discover that the lessee and operator of said building and the entity primarily liable herein is the defendant National Theatres Syndicate of California.

"That by reason of the premises defendant National Theatres Syndicate of California induced plaintiff to rely, and intended that plaintiff should rely, and she did rely on the apparent fact that defendant Redwood Theatres, Inc., was the operator of said business; that all the foregoing occurred and transpired prior to the 17th day of April, 1940; that plaintiff will suffer damage by reason of said conduct on the part of said defendant National Theatres Syndicate of California if said defendant be allowed to plead the bar of the Statute of Limitations, which in fair dealing and good conscience it should not be allowed so to do."

[1] It is the rule that: "If one by fraudulent acts or misrepresentations induces another to delay bringing suit upon his cause of action until after the expiration of the statutory period, he is estopped to take advantage of the defense that the cause of action is barred. To have this effect it must appear that the misrepresentation was one of fact, unless there exists a confidential relationship between the parties, that the misrepresentation was relied on, and that diligence to ascertain the truth was used." 16 Cal.Jur., pp. 576-577, sec. 172.

In Robbins v. Law, 48 Cal.App. 555-562, 192 P. 118, 121, it is said: "Where no confidential relation exists, it is the duty of one setting up the estoppel to show, not only reliance upon the fraudulent misrepresentation, but also diligence in using the means at command to ascertain the truth, or by inquiry. In this connection it must appear that in relying upon it he acted as a reasonably prudent person would act, and was not guilty of negligence or carelessness. Thus it is held in Moore v. Boyd, 74 Cal. 167, 15 P. 670, that where the statute of limitations runs from the date of the discovery of the fraud the statute will commence to run from the date that the fraud should have been discovered by a man of ordinary prudence under the circumstances and with the means of knowledge readily available to him. See, also, 25 Cyc. 1216, 1213, and cases cited; 16 Cyc. 738, and cases cited."

[2] In the case before us defendants are claimed to be estopped, not by any misrepresentations they may have made, but by their failure to disclose the facts. In other words, estoppel is based upon their silence, and the following principle of law is therefore involved: "An estoppel may arise also from silence as well as from words or conduct. But this is only where there is a duty to speak, and where the party upon whom such duty rests has an opportunity to speak, and, knowing that the circumstances require him to speak, remains silent. The ground upon which the estoppel in such case rests is that the conduct of the party constitutes an implied representation of the truth of the state of facts in question. And as in other cases, there must be something wilful or culpable in the silence, which allows another to place himself in an unfavorable position on the faith or understanding of a fact which the person remaining silent can contradict; and the circumstances attending the entire transaction must be such as to make it reasonably probable that the person seeking to set up the estoppel has suffered prejudice by the other's unreasonable acquiescence." 10 Cal. Jur., sec. 16, pp. 631, 632.

In Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655-674, 93 P. 1021, 1029, it is said: "A mere passive acquiescence where one is under no duty to speak does not raise an estoppel."

As stated in the case of Newhall v. Hatch, 134 Cal. 269-274, 66 P. 266, 268, 55 L.R.A. 673: "Mere silence on the part of a party will not create an estoppel unless he was under some obligation to speak, and a party invoking such estoppel must show that it was the duty of the other to speak, and that he has not only been induced to act by reason of such silence, but that the other had reasonable cause to believe that he would so act."

[3] Turning to the facts alleged, we do not believe them sufficient to establish an estoppel. Plaintiff sued the Redwood Theatre, alleging that it negligently caused a slippery substance to be placed upon the

sidewalk in front of the State Theatre. After the one year statute of limitations had run, the trial was had. It was then disclosed that said theatre was operated by National Theatres, and plaintiff concluded that she had commenced an action against the wrong party. To excuse her mistake, she states that defendants "allowed" her to believe that Redwood Theatres operated the theatre. It is not charged that plaintiff was led to believe such fact by any positive act of defendants, nor is it alleged that the question was ever put to either defendants as to which corporation was operating the theatre. The defendants were under no duty to volunteer the information. "It is a general principle that if the means of knowledge be at hand, and equally available to both parties, and the subject-matter be open to inspection of both alike, and there be no fiduciary or confidential relation, and no warranty of the facts, the injured party must show that he has availed himself of the means of information existing at the time of the transaction before he will be heard to say that he was deceived by the misrepresentations of the other party. The fraud must have been practiced under such circumstances as to leave a reasonable inference that the injured party was deceived, and if the circumstances attending the transaction are such as to put a reasonable person upon inquiry, there can be no presumption of deceit." Champion v. Woods, 79 Cal. 17-20-21, 21 P. 534, 535, 12 Am.St. Rep. 126.

Here, the means of knowledge open to plaintiff was open at all times. A mere inquiry would suffice. The case of Phillips v. Aluminum Company of America, 256 Pa. 205, 100 A. 750, 751, while not involving estoppel, has the following to say concerning the duty to speak in a situation where the suit has been brought against the wrong party: "Defendant might have volunteered the statement that the wrong party had been sued, and for that matter it might have disclaimed all responsibility in connection therewith. But, as this was prior to the practice act of May 14, 1915 (P.L. 483), we cannot say that defendant was under any legal duty to give such notice."

[4] Furthermore, the answer of defendants Redwood Theatres and Brown, filed January 31, 1940, which was several months prior to the running of the statute, denied that Redwood Theatres operated the State Theatre. Appellant questions the foregoing statement, claiming that the denial is a negative pregnant. We believe the denial was plain enough to put the fact in issue. This should have put plaintiff upon inquiry regarding the real situation.

The judgment is affirmed.

THOMPSON, Acting P. J., concurred.



49 Cal.App.2d 265

LEADER v. ATKINSON et al.

Civ. 13211.

District Court of Appeal, Second District, Division 2, California.

Jan. 22, 1942.

Hearing Denied March 19, 1942.

1. Automobiles ⇐245(39)

Generally, whether automobile driver was negligent in failing to see an object in the road in front of him in time to avoid striking it is for the jury, and the matter becomes a "question of law" for the court only where the object is so plainly visible that reasonable minds could not differ as to the duty of the driver to see it.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

2. Automobiles ⇐150, 245(39)

Generally, failure of automobile driver to look at all in order to discover an object in the road in front of him constitutes negligence as a matter of law; but, where driver testifies that she did in fact look, whether she looked with proper care becomes a question for the determination of the jury.

3. Automobiles ⇐245(6)

In action for injuries sustained by police officer when struck by an automobile at night near the scene of a recent automobile collision, which still blocked one-half of boulevard, forcing automobiles to use the other half thereof, and upon which police automobile's spotlight was focused, whether driver was negligent in failing to see police officer in time to avoid striking him was for the jury under conflicting evidence.

4. Appeal and error ⇐1064(1)

In action for injuries sustained by police officer when struck by automobile at night near the scene of a recent automobile collision, which was still blocking one side of boulevard forcing automobiles to use the other half thereof, instruction that it is the duty of automobile driver where the view is obstructed to see persons on the road in front of his automobile, thus in effect instructing that driver was guilty of negligence as a matter of law if she did not see police officer on boulevard in front of her automobile, was prejudicially erroneous.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Vernon Leader against Eleanor Estelle Atkinson and others for personal injuries sustained by plaintiff, who was a police officer, when struck by defendants' automobile. From a judgment for plaintiff, defendants appeal.

Judgment reversed.

Hearing denied; CARTER, J., dissenting.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, and White McGee, Jr., all of Los Angeles, for appellants.

Joseph L. Fainer and Thomas Connell, both of Los Angeles, for respondent.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover damages for injuries which he suffered when struck by defendants' automobile. The driver of the car, defendant Eleanor Atkinson, who has since become Mrs. Wallis, was a minor at the time of the accident. The other two defendants are the parents of Mrs. Wallis, both of whom signed their daughter's application for a driver's license. Plaintiff recovered a judgment, from which defendants have appealed.

Between the hours of 8 and 9 o'clock in the evening of January 19, 1940, an accident occurred involving two automobiles on the north side of Venice Boulevard near its intersection with Vineyard Boulevard in the city of Los Angeles. As a result of this accident the two automobiles were left on the north side of the boulevard so that other cars passing used the south half of the boulevard. Plaintiff, a police officer, went to the scene of the accident with Officer Heinemann. They parked their car close to the curb on the south side of Venice Boulevard, facing west. Officer Heinemann began taking pictures and at the time plaintiff was injured was thus engaged, standing near the front ends of the wrecked cars. There was a sharp conflict in the testimony concerning a number of the circumstances, and especially concerning the actions of plaintiff at the time he was struck by defendants' car. Plaintiff testified he was in the center of the street directing traffic with a flashlight. A witness presented by defendants testified that plaintiff left the curbing and walked without pausing until he came in contact with the left front fender of defendants' car.

[1-4] It is contended that the court erred in instructing the jury as follows: "It is the duty of the driver of an automobile where the view is obstructed to see persons on the road in front of his automobile." This instruction is so prejudicially erroneous as to require a reversal of the judgment. As a general rule it is the function of the jury to determine whether a driver of a motor car has been negligent in failing to see an object in the road in front of him in time to avoid striking it. The matter becomes a question of law for the court only in cases where the object in the road is so plainly visible that reasonable minds could not differ as to the duty of the driver to have seen it. Prato v. Snyder, 12 Cal.App.2d 88, 96, 55 P.2d 255. From the evidence presented in the case under review the jury could have concluded that the boulevard was dark and was partly obstructed by other vehicles in such manner as to divert the attention of the driver of defendants' car; and that the spotlight of the police car was turned on the wrecked cars in such manner as to confuse the vision of the drivers of vehicles passing by. If the jury had credited the testimony of defendants it could have concluded that plaintiff walked without stopping from the police car to the center of the street; that upon his arrival at the center of the street he was struck by the car driven by Mrs. Wallis; and that Mrs. Wallis could not properly be charged with negligence in failing to see him in time to avoid striking him. Although it is a general rule that the failure to look at all constitutes negligence as a matter of law, where, as in the present case, the driver testifies that she did in fact look, the question whether she looked with proper care becomes a question for the determination of the jury. The criticised in-

struction made it the unqualified obligation of the driver of defendants' car to see plaintiff in front of her automobile. The instruction took from the jury the right to determine whether from all the circumstances shown in evidence defendant driver could see plaintiff in time to avoid striking him. In effect the court instructed the jury that defendant driver was guilty of negligence as a matter of law if she did not see plaintiff on the boulevard in front of her car.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concurred.



49 Cal.App.2d 340

HARRIS v. CURTIS PUB. CO. et al.

Civ. 2937.

District Court of Appeal, Fourth District, California.

Jan. 27, 1942.

1. Libel and slander ⇐15, 81, 86(2), 89(1)

A publication within statute defining libel as false and unprivileged publication by writing which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation, is "libelous per se", and in such case it is unnecessary to allege matters of innuendo, inducement or special damage. Civ.Code, § 45.

See Words and Phrases, Permanent Edition, for all other definitions of "Libelous Per Se".

2. Libel and slander ⇐81, 86(2), 89(1)

Where publication is not libelous per se, matters of innuendo, inducement, or special damage must be alleged in complaint.

3. Libel and slander ⇐19

In interpreting language of publication charged to be a libel, court should construe words used in light of whole scope and apparent object of the writer, and consider not only actual language used but sense and meaning which may fairly be presumed to have been conveyed to the readers.

4. Libel and slander ⇐15, 100(7)

When language is used concerning a person or his affairs which from its nature necessarily must or presumably will, as its natural and proximate consequence, occasion him pecuniary loss, its publication prima facie constitutes cause of action and prima facie constitutes a wrong without allegation or evidence of damage other than that which is implied or presumed from fact of publication, and such language is "libelous per se".

5. Libel and slander ⇐19

In construing effect of language alleged to be libelous, it is necessary to consider the publication as a whole.

6. Libel and slander ⇐15

A magazine article narrating facts with respect to absence of students' savings bank system in certain city's schools and attributing to school board president statement that students should spend their money and let the government take care of them when they became old, followed by assertion in article that city included several hundred Communists, was not "libelous per se". Civ. Code, § 45.

7. Libel and slander ⇐82

A complaint for libel is insufficient where publication does not defame an ascertainable person.

8. Libel and slander ⇐112(2)

Evidence that magazine made extensive investigation of facts with respect to absence of students' savings bank system in certain city's schools, and, on being informed that school board president had stated that students should spend their money and let the government take care of them when they became old, inquired of school board president as to truth of statement and received no reply, established that magazine article reporting such statement was "privileged" within statute defining "privileged publications". Civ.Code, § 47, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Privileged Publication".

9. Libel and slander ⇐51(4)

"Malice", within statute defining "privileged publication" as one made in communication without malice to person interested therein by one who is also interested, must

be express or actual. Civ.Code, § 47, subd. 3; § 48.

See Words and Phrases, Permanent Edition, for all other definitions of "Malice".

10. Libel and slander ⇐51(4)

"Malice", within statute defining "privileged publication" as one made in communication without malice to person interested therein by one who is also interested, may not be inferred from the communication or publication, but may be inferred where charge is false and is libelous per se and where defendant publishes it without having probable cause for believing it to be true. Civ.Code, § 47, subd. 3; § 48.

11. Libel and slander ⇐51(4)

A newspaper publication concerning one holding public office is a "communication between interested persons" within statute defining "privileged publication" as one made in communication without malice to person interested therein by one who is also interested. Civ.Code, § 47, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Communication Between Interested Persons".

12. Evidence ⇐50

Judicial notice may be taken of fact that overwhelming majority of citizens are interested in the educational systems of the nation and the various states, and in opinions and theories used in connection with education and training of the young people of the nation, and are interested in questions affecting education and proper training of the youth of the nation.

13. Libel and slander ⇐51(4)

An article in national magazine narrating facts with respect to absence of students' savings bank system in certain city's schools, and setting forth alleged statement of school board president giving reason for failure to have such system, was a "communication between interested persons" within statute defining "privileged publication" as one made in communication without malice to person interested therein by one who is also interested. Civ.Code, § 47, subd. 3.

14. Libel and slander ⇐112(2)

Evidence that magazine made extensive investigation of facts with respect to absence of students' savings bank system in certain city's schools, and, on being informed that school board president had stated that students should spend their money and let the government take care of them when they became old, inquired of school board president as to truth of statement and received no reply, and that, although magazine subsequently printed another article referring to statement of school board president, he was not referred to in subsequent article by name or otherwise, established that first article was printed without "malice" within statute defining "privileged publication" as one made in communication without malice to person interested therein by one who is also interested. Civ.Code, § 47, subd. 3; § 48.

15. Libel and slander ⇐51(4)

The "malice" referred to by statute defining "privileged publication" as one made in communication without malice to person interested therein by one who is also interested is malice in popular conception of the term as a desire or disposition to injure another founded upon spite or ill will. Civ. Code, § 47, subd. 3; § 48.

16. Libel and slander ⇐123(6)

Evidence that magazine made extensive investigation of facts with respect to absence of students' savings bank system in certain city's schools, and, on being informed that school board president had stated that students should spend their money and let the government take care of them when they became old, inquired of school board president as to truth of statement and received no reply, and that, although magazine subsequently printed another article referring to statement of school board president, he was not referred to in subsequent article by name or otherwise, was insufficient to require submission to jury of issue of malice. Civ.Code, § 47, subd. 3; § 48.

17. Libel and slander ⇐120(1)

A letter, which was sent to defendants by plaintiff's counsel, and which did not request retraction of alleged libel, but stated that retraction could not atone for "outrage" committed, and that plaintiff would appeal to courts unless proper and substantial compensation were made by defendants, was insufficient to authorize recovery of punitive damages, and hence evidence of defendant's financial resources was properly excluded. Civ.Code, § 48a.

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action for libel by W. J. Harris against the Curtis Publishing Company and others.

From a judgment for defendants, plaintiff appeals.

Affirmed.

Joseph Scott, J. Howard Ziemann, and Cuthbert J. Scott, all of Los Angeles, for appellant.

Macdonald & Pettit, Alexander Macdonald, and John L. Rowland, all of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action for libel. At the conclusion of the defendants' case they moved for a directed verdict on the grounds that the complaint does not state a cause of action, that the evidence is not sufficient to show that the article in question is a libel upon the plaintiff, and that the evidence discloses without conflict that the article in question was privileged in that it was a communication without malice to a person interested by another also interested. This motion was granted and a verdict in accordance with such a direction was returned by the jury. The plaintiff has appealed from the judgment which followed.

The first question requiring consideration is whether the complaint states a cause of action. So far as material here, the complaint alleges that the plaintiff is a painter and decorator doing business in the city of Laguna Beach and is the president of the school board of that city; that the defendants maliciously and knowing it to be false and unprivileged and with the intent and design to injure, disgrace and defame the plaintiff and to bring him to discredit and obloquy, published the article in question; that the plaintiff has always conducted himself in his business and in his official position with honesty and fidelity and with concern for the welfare and proper ideals of citizenship of the school children of said city, and has at all times enjoyed the esteem and respect of his fellow citizens; that said publication was false and defamatory and unprivileged and by means thereof the defendant is and has been greatly injured and prejudiced in his reputation and has also lost gains and profit which would otherwise have accrued to him in his business to his damage in the sum of $20,000; that said publication was knowingly false, defamatory and unprivileged and was made by the defendants through ill will and malice toward plaintiff and with the intent to injure him in his professional standing and reputation and to discredit and defame him, to bring him into public discredit, contempt and ridicule, by reason whereof he asks for exemplary and punitive damages in the sum of $20,000; and that a timely demand for a retraction was duly served upon one of the defendants pursuant to section 48a of the Civil Code, but no retraction was forthcoming within the time allowed by that section. The article in question, as set forth in the complaint, appeared in the December 2, 1939, issue of the Saturday Evening Post as one of a number of articles under the heading "We See by the Papers." The article reads as follows: "Laguna Beach, Calif.: Schools in this Southern California beach town are in their sixth semester without a students' savings-bank system. Such systems, with the children operating their own banks, making deposits and withdrawals and using regular bank as main depositories, are usual in about 2,000 California public schools. They were started thirty years ago by the Bank of America, to teach children thrift and ordinary banking procedure. But a few weeks after being established here in 1937, the local school board ordered them out under a policy of 'not permitting any organization to use the schools for advertising purposes.' Carl E. Benson, plumber and board member, who introduced the resolution, said recently: 'I think it's wrong to let big corporations into our schools.' W. J. Harris, painter and decorator, board president, addressing the Rotary Club here, said: 'Why should kids save, anyway? We are going to have old-age pensions, and kids should spend their money and let the government take care of them when they are old.' Laguna Beach includes several hundred Communists, some of whom are movie stars who commute the fifty-seven miles daily to Hollywood."

[1, 2] "Libel is a false and unprivileged publication by writing * * * which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injury him in his occupation." Civ.Code, sec. 45. A publication falling within the terms of this statute is a libel per se, and in such a case it is unnecessary to allege in the complaint matters of innuendo, inducement or special damage. Bates v. Campbell, 213 Cal. 438, 2 P.2d 383. Where the publication is not libelous per se, the matters referred to must be alleged in order to state a cause of action. Grand v. Dreyfus, 122 Cal. 58, 54 P. 389; Vedovi

v. Watson & Taylor, 104 Cal.App. 80, 285 P. 418; Edwards v. San Jose Printing & Pub. Soc., 99 Cal. 431, 34 P. 128, 37 Am.St. Rep. 70; Pollock v. Evening Herald Pub. Co., 28 Cal.App. 786, 154 P. 30.

[3, 4] The complaint here alleges nothing in the line of innuendo, inducement or special damage and its sufficiency depends upon whether or not the publication in question is libelous per se. In Bettner v. Holt, 70 Cal. 270, 11 P. 713, it was held that in interpreting the language of a publication charged to be a libel a court should construe the words used in the light of the whole scope and apparent object of the writer, and considering not only the actual language used but the sense and meaning which may fairly be presumed to have been conveyed to the readers. In Rosenberg v. J. C. Penney Co., 30 Cal.App.2d 609, 86 P.2d 696, 702, the court quotes with approval the rule thus laid down in Newell on Slander and Libel: "'When language is used concerning a person or his affairs which from its nature necessarily must, or presumably will as its natural and proximate consequence, occasion him pecuniary loss, its publication prima facie constitutes a cause of action and prima facie constitutes a wrong without any allegation or evidence of damage other than that which is implied or presumed from the fact of publication; and this is all that is meant by the terms "actionable per se", etc. Therefore the real practical test by which to determine whether special damage must be alleged and proven in order to make out a cause of action for defamation is whether the language is such as necessarily must or naturally and presumably will occasion pecuniary damage to the person of whom it is spoken.'"

In Noral v. Hearst Publications, Inc., 40 Cal.App.2d 348, 104 P.2d 860, 863, the court said: "Charges of libel against a publication which has reported or commented upon matters involving public policy should be viewed with caution. It is in such matters that the freedom of the press is of paramount concern. Without such freedom, the march of progress might be stayed or the venom of alien cultures might stealthily undermine cherished landmarks. 'It is far better for the public welfare that some occasional consequential injury to an individual, arising from general censure of his profession, his party, or his sect, should go without remedy, than that free discussion on the great questions of politics, or morals, or faith, should be checked by the dread of embittered and boundless litigation.' Ryckman v. Delavan, 25 Wend., N. Y., 186, 199."

[5] In construing the effect of language alleged to be libelous it is also necessary to consider the publication as a whole. Stevens v. Snow, 191 Cal. 58, 214 P. 968.

[6] Applying these rules to the publication before us we are of the opinion that it is not libelous per se. The article as a whole is a narration of asserted facts with respect to the absence of a students' savings bank system in the Laguna Beach schools and the policy of the board under which such a savings system was ordered out of the schools after having been once established. The portion which the appellant claims to be libelous per se as to him is the latter part, in which he is stated to have said: "Why should kids save, anyway? We are going to have old-age pensions, and kids should spend their money and let the Government take care of them when they are old," and the final sentence to the effect that Laguna Beach contains several hundred Communists, some of whom are movie stars who commute to Hollywood. In support of his contention that this matter is libelous per se, it is first argued that the statement attributed to the appellant had a natural tendency to injure his reputation generally and with respect to his occupation since he was no mere citizen but the president of a school board and, as such, supervisor of the daily conduct of hundreds of children, and that in addition to its presumed effect there is evidence of its actual effect in his own testimony that he recalled many instances, after the publication of the article "where people that I had been on hailing signs with, simply turned their heads the other way when they saw me coming down the street." Regardless of any question as to the sufficiency of this evidence we are here concerned only with the allegations of the complaint. With respect to the final sentence of the published article it is further argued that it, read in connection with the rest of the article, was libelous per se because it was intended thereby to refer to the appellant as a Communist, as shown by the fact that the statement previously attributed to him expresses a view which would be approved by the average Communist.

Viewed as a whole, the article in question is a criticism of the policy of this school board in eliminating the students' savings bank system. Inferentially, at least, the reasons for that policy are criticized, including one which may be implied from the statement attributed to the appellant to the effect that children should spend their money and let the government take care of them in their old age. That statement is, in itself, but the expression of a political or economic point of view and it is a part of an entire article which is a comment upon a matter of public policy. Moreover, the point of view thus attributed to the appellant was one which was, at the time, quite prevalent. That point of view had recently found widespread expression in this state through popular movements of very considerable strength as, for example, in the "Epic" campaign with its program of production for use and extensive pension systems, in the Townsend plan with its clubs in every locality, and in the so-called "Ham and Eggs" campaign of the year before. The views attributed to the appellant were closely associated with the general views widely spread through California through these movements, as well as by other means, and they are practically identical with a part of the points of view represented by those movements. On the day this is written the newspapers report that a justice of the peace in a city a few miles from Laguna Beach has just held that the state law requiring grown sons and daughters to support their parents is unconstitutional, saying: "It is the duty of the state to care for indigent persons." The point of view to which we have been referring was not entirely absent in the national scene at and prior to the time this article was published, where it found much encouragement in the general attitude, policies and teachings of the national government as these were interpreted and accepted by a large part of our population.

With these circumstances in mind and considering the article as a whole, the criticized portions should be construed in the light of the apparent object of the writer and the meaning that would naturally be conveyed to the readers, with the effect upon them that may reasonably be anticipated. We are unable to hold that in commenting upon such a question of public policy the inclusion of a statement attributing to a public official economic views of a sort which were then held and accepted by a large part of our population is, in itself and per se, a holding of that person up to hatred, contempt or ridicule or that it would presumably cause him to be shunned or avoided, or that it necessarily must or presumably will have a natural tendency to injure him, and much less that it will presumably and as a proximate consequence cause him pecuniary loss. In our opinion, this case is a good example of the class of cases where a mere setting forth of the language used is not sufficient and where a further explanation by way of innuendo, inducement and allegation of special damage is required in order to disclose just how and why it is claimed that the language alleged to be libelous has injuriously affected the complainant in a legal sense.

The appellant himself recognizes that matters of broad general policy were involved in the publication in question since he alleges in his complaint that at all times as president of this school board he has had, "concern for the welfare and proper ideals of citizenship of the school children." In Snavely v. Booth, 6 W.W.Harr. 378, 36 Del. 378, 176 A. 649, 654, the court said: "We have been referred to no authority, nor have we been able, in an extended search, to find authority, holding that criticism of mere opinion or theory is actionable defamation." The statement in question not only related to a matter of public policy of general interest but it was not of such a character that injury must be presumed from the language itself and without the necessity for explanation and specific application.

[7] With respect to the final sentence of the published article it does not necessarily or presumably appear that it refers to this appellant. The article, as a whole, refers to the city of Laguna Beach as well as to its school system. It makes a general reference to the entire school board, and a specific reference to things allegedly said by the appellant and also by another member of that board, and follows this by another general statement. The fact that the concluding sentence is in such general terms is a further indication that the intent and purpose of the article was to criticize a point of view and policy being carried out in that community rather than to attack any individual. Not only is there no direct charge that the appellant is a Communist, whatever the precise meaning intended by that word which has very generally been loosely applied to persons of almost every

conceivable point of view, but such a charge is not necessarily to be implied. If it could be so implied there would still be a question whether that alone is libelous per se. The necessity for pleading innuendoes where the charge is that a person has been accused of being a Communist seems to be recognized in Gallagher v. Chavalas, 48 Cal.App.2d ——, 119 P.2d 408, and in the cases there cited. Moreover, a complaint for libel is insufficient where the publication does not defame an ascertainable person. Noral v. Hearst Publications, Inc., supra.

The precise question here presented is new, which is not surprising since attacked publications are usually not alike nor even similar, and since there have been so few cases involving an attack upon political or economic opinions or theories, especially where they were not accompanied by charges of criminal or traitorous acts. Naturally each case of this nature must be considered in reference to its own facts and surrounding circumstances. We conclude, upon the particular facts here involved, that this publication was not libelous per se and that the complaint failed to state a cause of action.

[8-10] Nor do we think the appellant is in any better position if the complaint be held sufficient, since the evidence disclosed without substantial conflict that the publication was privileged under section 47 (3) of the Civil Code. The answer alleged, among other things, that this publication was privileged under this section; that it was published in the honest belief that all statements therein were true; and that there was no malice or intent to injure the plaintiff. That section of the code provides that a privileged publication is one made "In a communication, without malice, to a person interested therein, * * * by one who is also interested." The malice referred to in this statute must be express or actual. Davis v. Hearst, 160 Cal. 143, 116 P. 530. While such malice may not be "inferred from the communication or publication" (sec. 48, Civ.Code), it has been held that actual malice may be inferred "where the charge is false and is libelous per se and the defendant publishes it without having probable cause for believing it to be true." Snively v. Record Publishing Co., 185 Cal. 565, 198 P. 1, 6.

[11] It is first contended that this publication was not a communication between interested persons within the meaning of this statute. It has been held that a newspaper publication concerning one holding public office comes within the purview of this statute. Snively v. Record Publishing Co., supra. The appellant argues that this was so held in that case only as to comments concerning a local officer by a newspaper published and circulated in that particular community. He then cites several Wisconsin cases as holding that a newspaper having a wide circulation had no direct or legitimate interest in certain conduct of an officer in a small community in which there was but "an inconsequential portion of its circulation" and argues that a similar rule should be here applied. In those cases there was a direct attack upon the personal fitness of the plaintiff for a local office which was largely and mainly circulated among persons who resided elsewhere and who had no direct interest in the way the office was conducted. Assuming that the same rule would be applied in this state it does not follow that such rule should be so extended as to be made applicable in the instant case.

[12, 13] There is a wide difference between a publication respecting a matter of purely local concern which is mainly circulated outside the interested area and to people having no interest therein, and one involving a matter of public policy or economic theory which, while arising in a local community, is directly connected with and may vitally affect the habits, modes of living and economic views of people throughout the nation. There is a marked distinction between the making of such a purely local attack and a comment upon political views and policies the effect of which cannot, from their nature, be confined to any locality. There was evidence here that the respondents were interested in the educational systems of the nation and the various states, and in the opinions and theories used in connection with the education and training of our young people and that some of the readers of the Post were also interested in such matters. We may take judicial notice of the fact that the overwhelming majority of the citizens of this country are interested in such matters and in questions which affect the education and proper training of our youth. Regardless of individual views thereon, the question of whether or not thrift should be taught or encouraged in the schools is one of practically universal

interest and not a local matter of interest only to the inhabitants of any particular community. If the matter of whether or not one is a Communist is material here it is equally a matter of general rather than purely local interest. Without further discussion, we hold that this publication was a communication between interested persons within the meaning of the statute.

[14] The appellant next contends that actual or express malice appears because the evidence discloses a lack of probable cause for believing the statements contained in the publication to be true, and because a similar statement was republished in the January 20, 1940, issue of the Post. It is argued that lack of probable cause is shown by evidence that the Bank of America, in reply to a letter of inquiry from the editor of the Post, requested that the matter be dropped; that the reporter sent by the Post to investigate the matter, interviewed but five people; that this reporter wrote and sent in the article just as it was published except that the last sentence thereof consisted of a statement from an official of the Bank of America as to their object in setting up school banks, and that the editor of the Post eliminated that sentence and substituted the final sentence as it was published; and that when he sent the article in this reporter wrote a letter to the editor in which he suggested that on account of its trivial background they might not want to use the article, and further stated that "While the board members are 'radical' and 'liberal' * * * they are not Communists."

The things just mentioned are not sufficient to establish a lack of probable cause for believing that the statements published were true. Moreover, there is evidence that no one connected with the defendants was personally acquainted with the appellant or had any ill will toward him or desire or intent to injure him; that the statements in question were honestly believed to be based upon information received from reliable sources, and were reasonably and honestly believed to be true; that no one connected with the publication had knowledge of any facts which would cause him to question the truth of the statements made in the article or the reliability of the sources of information; and that a very considerable investigation was made before the article was published.

With regard to the origin of the article and the investigation made, the evidence is as follows. In June, 1939, the editor of the Post received a letter from a lady in Laguna Beach referring to the absence of a savings plan in the schools of that city and stating that a letter from the school board had been made public in which a bank was requested to desist from all activities in that direction as "some of the board members were opposed to large corporations and they didn't believe in saving, either." The editor replied to the lady expressing interest, requesting a clipping or other information about the matter, and stating that it should be worth an editorial. On July 14, 1939, this lady replied, enclosing a clipping from a local newspaper. This clipping stated that a resident of Laguna Beach had written to the Bank of America asking why that city was the only city of its size on the south coast which did not have school savings, and then set forth what purported to be a copy of a part of a letter in reply written by that bank which contained the statement, after a reference to the fact that they had been asked to discontinue the savings system, "The reasons given me were that several of the school board members were 'opposed to large corporations and one was opposed to saving in any and all forms'." On July 20, 1939, the editor of the Post wrote to the bank and after referring to the portion of the bank's letter appearing in this clipping, stated that before commenting on the matter editorially he would like to know whether the matter in the letter was an accurate statement of the attitude of a majority of the Board of Education. He also stated that he was writing to this appellant asking him the same question, and that while he could appreciate the bank's desire not to stir the matter up it was a matter which, if true, "demands national publicity." The bank replied that it did not wish to embarrass the board members, who were their neighbors and friends, "because their ideas and opinions were not wholly in accord with ours" and suggested that the matter be dropped. On July 20, 1939, the editor also wrote to this appellant calling his attention to the clipping he had received and stating that before commenting on the matter editorially they would be glad to have his statement as to whether his views and the views of the majority of the board had been accurately represented in the clipping. The appellant testified that he received this letter and that he never replied thereto. On August 23, 1939, the editor wrote to a reporter in San

Francisco who had previously written for the Post and asked him to go to Laguna Beach and investigate this matter. On August 28, 1939, this reporter sent in the article as above described, which was accompanied by a letter which stated that in the article he had set out the uncontrovertible facts. The final paragraph of this letter stated that there were in Laguna Beach "400 or so communists—or in many cases so-called communists" and that "a few movie stars commute the 57 miles to Hollywood daily."

The evidence not only discloses a rather extensive investigation for the purpose of learning the truth of the statements which were later made concerning the appellant, but that evidence in its entirety discloses, without substantial conflict, that the respondents had probable cause for believing that the statements attributed to the appellant had been made by him. They were so informed directly and indirectly after a considerable effort to learn the truth, including a direct inquiry made to the appellant who refused to answer, although a denial on his part would in all probability have prevented the publication at least insofar as it concerned him.

[15,16] It is further contended that actual malice appears because, so it is said, a similar statement was republished in the January 20, 1940, issue of the Post. In that issue, under the heading "Children and Money," an article from the December issue of the Journal of the National Educational Association was reprinted with the following comment: "How the usual Students' Savings Bank System was barred from the schools of Laguna Beach, California, one ground being that "kids should spend their money and let the Government take care of them when they are old' was described here recently." This appellant was not mentioned in that article and we agree with the observation of the trial court "if there was malice on the part of Mr. Stout, I am inclined to think he would not have overlooked the opportunity to have mentioned Mr. Harris by name in the January 20th article. Actually, he disregarded the name 'Harris' in that article and that is pretty good evidence to me that Mr. Harris as an individual did not mean very much to him." The article of January 20, 1940, is a further indication that respondents' sole interest was in the broad question of thrift in the schools and that any reference to individuals was merely incidental and without any feeling against or intent to injure or to reflect upon any certain person. In Siemon v. Finkle, 190 Cal. 611, 213 P. 954, 957, the court said: "The malice referred to by this section of the Civil Code [Sec. 47, subd. 3] is malice in the popular conception of the term; that is to say, as a desire or disposition to injure another founded upon spite or ill will." In our opinion, the only reasonable inference which may be drawn from the evidence in its entirety is that the communication here in question was one made without malice to a person interested therein by one who was also interested. This being true, there was no question in that regard which should have been submitted to the jury.

[17] Appellant's final contention is that the court erred in excluding evidence of the financial resources of the respondents, it being argued that such evidence was admissible on the issue of punitive or exemplary damages. Section 48a of the Civil Code provides that no more than actual damages shall be recovered in an action of this nature unless a retraction be demanded by serving a notice specifying the statements claimed to be libelous and requesting that the same be withdrawn, and unless such a retraction is not published in the manner provided after such a request for withdrawal is made. The appellant contends that a letter written by his counsel to the respondents was a substantial compliance on his part with this section, and that no retraction or withdrawal having been published within the time allowed the evidence in question was admissible. On December 22, 1939, appellant's counsel wrote a letter to the respondents calling attention to the publication in question, stating that he was advised by the appellant that there was not a word of truth in the statement attributed to him in the article, that the appellant felt that the publication was particularly damaging to him because of his official position and responsibilities in the educational field, and then saying: "No mere retraction, therefore, for a statement of this kind could possibly atone for the outrage committed by such unwarranted publication. I am instructed by Mr. Harris to say that unless proper and substantial compensation is made by you, that he will appeal to the courts for satisfaction and vindication." This is the only demand or request made upon the respondents and it clearly appears that it contains no request for a retraction or that the published

matter be withdrawn as provided for in the statute. On the other hand, it rather clearly appears from this letter that no retraction was desired and that nothing less than financial compensation would be accepted. No substantial compliance with the statute appears and the court's ruling was proper.

For the reasons given the judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.



49 Cal.App.2d 736

PEOPLE v. NICOLAYSEN.

Cr. 1788.

District Court of Appeal, Third District, California.

Feb. 2, 1942.

Criminal law ⇐1182

Where no brief in behalf of accused was filed and no appearance made for him at the time case was called for hearing, conviction was affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Stanislaus County; Gustav B. Hjelm, Judge.

Jerry Nicolaysen was convicted of the crime of burglary of the second degree, and of the crime of grand theft, and he appeals.

Judgment affirmed.

No appearance for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

The appellant was convicted in the Superior Court of Stanislaus County of the crime of burglary of the second degree, a felony, and of the crime of grand theft, a felony.

The transcript on appeal was filed in this court November 15, 1941. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on February 2, 1942. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code the judgment is affirmed.



49 Cal.App.2d 736

PEOPLE v. NICOLAYSEN.

Cr. 1789.

District Court of Appeal, Third District, California.

Feb. 2, 1942.

Criminal law ⇐1182

Where no brief in behalf of accused was filed, and no appearance made for him at the time case was called for hearing, conviction was affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Stanislaus County; Gustav B. Hjelm, Judge.

Jerry Nicolaysen was convicted of the crime of violation of section 4532 of the Penal Code, providing the punishment for escape or attempted escape by one charged with or convicted of a felony, and he appeals.

Judgment affirmed.

No appearance for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

The appellant was convicted in the Superior Court of Stanislaus County of the crime of violation of section 4532 of the Penal Code, a felony.

The transcript on appeal was filed in this court November 15, 1941. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on February 2, 1942. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code the judgment and the order are affirmed.

49 Cal.App.2d 274

BRACEY et al. v. GRAY et al.

Civ. 6681.

District Court of Appeal, Third District, California.

Jan. 22, 1942.

1. Mortgages ⇐38(1)

In action to recover realty and damages for its detention, conflicting evidence supported finding that plaintiffs were owners of realty and entitled to its possession, as against contention that transfer under which plaintiffs claimed title was in fact a mortgage rather than a deed.

2. Mortgages ⇐138

A properly executed trust deed is effective to convey legal title to trustee, so far as it is necessary to convey it to purchaser at trustee's sale, free of all right or estate of trustor or anyone claiming under or through trustor.

3. Homestead ⇐95
Mortgages ⇐372(1)

A conveyance by trustee under trust deed relates back to estate of trustor at time trustor executed trust deed and transfers to purchaser entire estate then vested in trustor, thereby completely extinguishing homestead declaration filed subsequent to trust deed.

4. Homestead ⇐128

Where trust deed was valid lien on realty when single woman acquired title to realty, homestead declaration was filed after such woman was subsequently married, and her husband executed quitclaim deed to parties claiming title through trustee's sale under trust deed, no homestead rights could be asserted against such parties, and judgment could be entered in their favor, in their action to recover realty and damages for its detention, against wife, without any judgment being entered against husband.

Appeal from Superior Court, Butte County; Warren Steel, Judge Assigned.

Action by Arthur Bracey and others against John Gray and others to recover possession of realty and damages for its detention. From adverse orders and judgments, defendants appeal.

Affirmed.

John Gray and Dora Stuart Gray, in pro. per., for appellants.

Coyle E. Bybee, of Chico, for respondents.

TUTTLE, Justice.

Plaintiffs brought this action to recover possession of certain real property, and damages arising out of its detention. Upon the stipulation of defendant John Gray and plaintiffs, the action was dismissed as to him. The cause was afterward tried, and on January 17, 1939, judgment was entered in favor of plaintiffs and against defendants. On March 9, a new trial was granted as to defendant Dora Stuart Gray. Thereafter, and on May 1, 1939, judgment was entered in said action against defendant Dora Stuart Gray for restitution of the premises. Defendants appeal from said judgments, and from an order of the court denying their motion to vacate the judgment last rendered. They also appeal from an order granting their motion for new trial which was entered January 17, 1939. The case is before us upon a bill of exceptions.

The premises in question were owned on November 1, 1928, by one Alice Anderson who, on said date, executed a deed of trust covering the same, to Title Insurance and Trust Company, as trustee, for the benefit of State Mutual Building and Loan Association, to secure the payment of $2,250. Thereafter, said Alice Anderson conveyed the property to Dora Stuart, a single woman, and who subsequently married defendant John Gray, and who is now Dora Stuart Gray, another defendant herein. Upon default in the payment of said indebtedness, the said trustee sold said property under said deed of trust. At such sale, said association became the purchaser thereof. On July 5, 1935, said association, for the sum of $1,500, executed a quitclaim deed to said property, to plaintiffs.

[1] The chief contention made by appellants is that the evidence is insufficient to establish any title or right to possession in plaintiffs, for the reason that it shows the transfer to plaintiffs to have been a mortgage. While there is a conflict in the evidence upon the question, we are satisfied that there is ample testimony to support the finding that plaintiffs were the owners and entitled to the possession of the property. Arthur Bracey testified in part as follows:

"My wife's niece came—Dora Stuart Gray—she came and said they had lost it—the property described in the deed. That was in June, 1935. We talked to her and kinder found out that there was something in it. We wanted to find out for sure there was something in it. Whether the property was down there or not. Sometimes talk but there is nothing to it. So we went to the Grass Lake Bank and found out we could get the money to buy it and we got in touch with a man named Parker through Mr. Mellencamp and he got in touch with Los Angeles, the Building and Loan Association, and we got the deal through. Mr. Parker was president of the bank in Chico. Mr. Mellencamp handled the transaction for us. We borrowed the money from the bank at Grass Lake and gave a mortgage on our farm in Waterloo Township. I kind of half-way think this quitclaim deed was sent to us directly from the State Mutual Building and Loan Association. It either came that way or through Mr. Mellencamp. We received it about July 15th, 1935. We took care of the recording of it in Butte County. We sent it and paid the fee. The deed came to the bank and was delivered to me. Question: Did you purchase this property outright for yourself and Mrs. Bracey? Answer: Well, we bought it. Question: You bought it for yourself? Answer: Yes. Question: Did you purchase this property outright for yourself? Answer: We intended to sell it. Question: You later intended to sell the property? Is that what you mean? Answer: Yes sir. Question: When you bought this property did you buy it for anyone else? Answer: No, no. Question: Was this property then for yourself and wife? Answer: Yes sir. Question: Has anyone else got any interest in this property? Answer: No, not the slightest. Question: State whether or not you bought the property as an investment? Answer: No, we didn't do that. We bought it. If them people wanted to buy it back, or someone else, why we would sell it. Question: Who do you mean? Answer: Why, the Grays. Question: Did you buy this property for the Grays? Answer: Oh, no, no. We never had any agreement verbal or otherwise between us relative to borrowing the $1,500. It was not borrowed for them. There was no conversation between us and Dora Stuart Gray and John Gray that we would purchase the property for them. They nor either of the Grays are indebted to us in any sum. The quitclaim deed was not taken as security for any debt of the Grays. They did not owe us any money. I did not know the Grays existed before this property deal came up. There has never been any agreement between the Grays and us that they should assume our obligations to the Farmers' State Bank at Grass Lake. We do not hold this quitclaim deed from the State Mutual Building and Loan Association in trust for the Grays. There was no agreement between the Grays and us that they should pay our obligation to the Farmers' State Bank."

His wife corroborated his version of the transaction.

The action was dismissed as to defendant John Gray on December 21, 1938, and in consideration thereof said defendant executed and delivered to respondents a quitclaim deed to the property involved. This should have, and did end the litigation, so far as that defendant was concerned. The case was tried on December 28th, and judgment was entered against appellants on January 17, 1939. Thereafter, appellant, Dora Stuart Gray moved for a new trial, and the motion was granted. The case was again tried on March 9, 1939. The latter appeared with counsel. John Gray was not a party, and did not participate in said trial. Judgment was entered as set forth in the first paragraph hereof.

[2-4] The position of appellants seems to be that the court had no jurisdiction to enter the judgment of May 1st. It is contended that, as there was a homestead declared upon the property, the husband was a necessary party, and that judgment should have also been ordered against him. The deed of trust was a valid lien upon the property when appellant Dora Stuart Gray acquired the property as a single woman. The homestead declaration was filed after she was married. A properly executed deed of trust is effective to convey the legal title to the trustee, so far as it is necessary to convey it to the purchaser at the trustee's sale, free of all right or estate of the trustor, or anyone claiming under or through her. The conveyance of the trustee relates back to the estate of the trustor at the time she executed the trust deed, and transfers to the purchaser the entire estate then vested in the trustor, thereby completely extinguishing the homestead which was filed subsequent to the deed of trust. That is the precise situation here. 13 Cal.

Jur. § 83, page 512. Not only is any assertion of appellants' homestead right precluded by law, but appellant John Gray has no rights which he could assert, for the reason that he had, previous to trial, conveyed his interest in the property to respondents. The contention is without merit.

Numerous other points are urged as grounds for reversal, but we do not deem them worthy of extended comment. Respondents established the fact that they were the legal owners of the property, and entitled to the possession thereof.

The appeal is devoid of any substantial merit, and, accordingly, the orders and judgments are affirmed.

THOMPSON, Acting P. J., concurred.



49 Cal.App.2d 313

MEANLEY v. McCOLGAN, Franchise Tax Com'r.

Civ. 11901.

District Court of Appeal, First District, Division 1, California.

Jan. 27, 1942.

1. Taxation ⇐104, 219

Where legatee accepts legacy requiring legatee to pay an annuity to a third person regardless of whether legacy produces sufficient income, the total income from legacy is taxable to legatee and not to annuitant, since annuity in such case constitutes a "bequest" exempt from taxation as to annuitant. St.1935, pp. 1094, 1095, § 7(b) (3).

See Words and Phrases, Permanent Edition, for all other definitions of "Bequest".

2. Taxation ⇐363½

Where corporate stock was bequeathed to legatee on condition that legatee pay third person an annuity of $1,800, annually for life, regardless of whether income received from stock bequeathed was sufficient to pay annuity, and legatee accepted legacy and made required annual payments to annuitant, legatee could not deduct the payments from the total income from legacy in computing her state income tax. St.1935, pp. 1094, 1095, § 7(b) (3).

3. Statutes ⇐226

Where certain provisions of state income statute were copied from federal statute which had been judicially interpreted by federal courts prior to state's adoption thereof, federal decisions constituted not only argumentative authority, but were conclusive on proper interpretation of state statute so adopted. St.1935, pp. 1094, 1095, § 7(b) (3).

4. Taxation ⇐58

The 1937 amendment to state income tax statute providing that annuity payments by legatee to third person are taxable to annuitant if actually made from income is not retroactive and does not affect taxable years 1935–36. St.1937, pp. 1831, 1844, § 12(d) (2).

5. Taxation ⇐104

The provision of income tax statute that amounts received as annuity under annuity or endowment contract shall be included in gross income, except that there shall be excluded from gross income, the excess of amount received in taxable year over amount equal to 3 per cent. of aggregate premiums or consideration paid for annuity until aggregate amount excluded equals aggregate premiums or consideration paid, does not apply to annuities created by will, but only to purchased contractual annuities. St. 1935, pp. 1094, 1095, § 7(b) (2, 3).

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Nackey S. Meanley against Charles J. McColgan, as Franchise Tax Commissioner, etc., to recover income taxes paid under protest. From a judgment against plaintiff after sustaining of defendant's general demurrer to the complaint without leave to amend, plaintiff appeals.

Affirmed.

Irve C. Boldman, of San Diego, for appellant.

Earl Warren, Atty. Gen., and H. H. Linney and Valentine Brooks, Deputy Attys. Gen., for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action to recover the amount of deficiency assessments of personal income taxes paid by her under protest for the taxable years 1935 and 1936. The defendant Franchise Tax Commission-

er filed a general demurrer to the complaint, which was sustained without leave to amend. From the judgment subsequently entered plaintiff prosecutes this appeal.

The amended complaint alleged that Nackie H. Scripps died testate on November 16, 1930; that by her will, duly admitted to probate, certain shares of stock were bequeathed to plaintiff subject to the provision that "the bequests contained in this paragraph are subject to the condition that the legatees taking the same shall pay to my aunt, Alice J. Scull, during the lifetime of Alice J. Scull, the sum of one hundred and fifty dollars per month, payable monthly"; that plaintiff was also named as residuary legatee; that, pursuant to this provision, the stock was duly distributed to plaintiff; that Alice J. Scull, on the date of the testatrix's death, was eighty-three years of age; that the value of the life interest was fixed in the estate at $6,025.14; that the dividends received by plaintiff from the stock bequeathed to her have been far in excess of $150 per month; that plaintiff has paid that sum to the annuitant each month; that for the taxable year 1935 plaintiff received in dividends the sum of $11,265 from the stock and paid the annuitant the sum of $1,800; that for the taxable year 1936 plaintiff received the sum of $14,400 in dividends from the stock and paid the annuitant the sum of $1,800; that in her income tax reports for those two years plaintiff claimed a deduction for the $1,800 paid each year to the annuitant; that the commissioner refused to allow these deductions; that the tax thereon was paid under protest and this action instituted.

The legal problem involved can be stated as follows: Where property is bequeathed to a legatee on condition that the legatee pay a third person an annuity for life of $1,800 a year, and the terms of the bequest are such that the annuity must be paid whether or not the income of the trust is sufficient to pay the annuity, and the legatee accepts the legacy and pays to the annuitant $1,800 each year, can the legatee deduct that $1,800 from the total income from the legacy in computing her state income tax?

Appellant, in her opening brief, recognizes that the question is not whether the $1,800 should be taxed, but whether it should be taxed to the annuitant or to appellant. It is argued that the $1,800 should be taxed to the annuitant and not to appellant. She states that the federal government has permitted her the $1,800 deduction. It is urged that appellant has no beneficial interest in the $1,800 paid to Miss Scull; that appellant is the mere collector or conduit through which the $1,800 passes to Miss Scull; that it is the policy of the act to tax the person having the beneficial interest in the income. Several Board of Tax Appeal cases are cited which undoubtedly contain language which supports appellant, but they all appear to be cases where either the annuity was to be paid out of the income of the legacy (in the instant case appellant was required to pay the $1,800 to Miss Scull whether or not the legacy produced that amount of income), or cases where the annuity was based on a contract.

[1] Respondent Franchise Tax Commissioner urges that, where a legatee accepts a legacy which requires her to pay a third person an annuity regardless of whether the legacy produces such income, the total income from the legacy is taxable to the legatee and not to the annuitant. This conclusion follows, according to respondent, from the provisions of section 7(b) of the Personal Income Tax Act, as that section read in 1935 and 1936. The section then provided that: "The following items shall not be included in gross income and shall be exempt from taxation under this act: * * * (3) The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income)." Stats. of 1935, page 1090, at page 1094, Deering's Gen.Laws, 1935 Supp., Act 8494, pages 1968, 1972. It is urged that identical language in the federal statute from which the above section was copied, has been interpreted to exempt the recipient of the income and to require the tax to be levied on the payor. We agree with these contentions.

In Burnet v. Whitehouse, 283 U.S. 148, 51 S.Ct. 374, 75 L.Ed. 916, 73 A.L.R. 1534, a will directed the executors to pay a fixed annuity to an heir whether there was income from the estate or not. The court held that, although the annuity was actually paid from income, the heir could not be required to pay a tax on the portion received by him because the annuity was a bequest and therefore exempt. The court distinguished its earlier decision in Irwin v. Gavit, 268 U.S. 161, 45 S.Ct. 475, 69 L. Ed. 897, in which it had been held that in-

come from a trust created by will was taxable to the recipient, on the ground that in that case the heir was to receive income only if income was earned. The Burnet case stands squarely for the proposition that where the annuitant is to receive his payment regardless of whether income is earned, the annuity constitutes a bequest within the meaning of the income tax law, and the payment is not taxable to the annuitant. There is no escape from the conclusion that under the rule of the Burnet case, supra, the payment to Miss Scull not being dependent on the devised stock earning income, could not be taxed to her.

The next step was taken by the Supreme Court in Helvering v. Pardee, 290 U.S. 365, 370, 54 S.Ct. 221, 78 L.Ed. 365. In that case, by will, trustees were directed to pay an annuity of $50,000 a year to the wife of the testator. The payment of this amount was made a charge on the principal of the estate if the income therefrom was not sufficient. The trustees paid the amount from income and sought to deduct the same from the trust's income tax. The Supreme Court held that the trust could not deduct the income. It was pointed out that such income was not taxable to the annuitant under the rule of the Burnet case, supra, and that it must, therefore, be taxable to the trust.

[2-4] Under the rules of these cases, the payments to Miss Scull not being dependent upon whether the stock bequeathed to appellant earned income, but being an absolute charge on appellant, the $1,800 paid to Miss Scull cannot be claimed by appellant for the years in question as a deduction. These cases were all decided prior to 1935 when the state income tax law was adopted. The provisions of our statute applicable to the present problem were copied from the federal statute. Under such circumstances the federal decisions constitute not only argumentative authority, but are conclusive on the proper interpretation of our statute. Holmes v. McColgan, 17 Cal.2d 426, 110 P.2d 428; Union Oil Associates v. Johnson, 2 Cal.2d 727, 43 P.2d 291, 98 A.L.R. 1499. It should be pointed out that in 1937 the state act was amended to expressly provide that payments are taxable to the annuitant if they are actually made from income. Stats. of 1937, page 1831, 1844, section 12(d)(2), Deering's Gen.Laws, 1937, Act 8494. This amendment is not retroactive, and does not affect the taxable years 1935–1936 here involved.

[5] In her reply brief appellant advances another argument which requires mention. It is urged that if the payments to Miss Scull can be held to be property "acquired by * * * bequest, devise, or inheritance," within the meaning of section 7(b)(3) of the Personal Income Tax Act, supra, the entire value of that gift was received by her prior to the years here involved. This argument is predicated on the following reasoning: The annuity to Miss Scull was appraised in the estate for inheritance tax purposes at $6,025.14. She was paid at the rate of $1,800 a year. She actually received more than $6,025.14 prior to the effective date of the Income Tax Act in 1935. It is therefore urged that she received the full value of her gift, tax free, before the taxable years here in question. This argument is predicated upon the provisions of section 7(b)(2) of the 1935 act. This provision was copied directly from an amendment to the federal act added in 1934, Revenue Act 1934, § 22(b)(2), 26 U.S.C.A. Int.Rev.Code, § 22(b)(2). So far as pertinent here, that section provides as follows: "Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this act in respect of such annuity increased by the amount which would have been excluded from gross income in respect of such annuity had this act been in effect continuously from and after the date at which payments under such annuity were first received equals the aggregate premiums or consideration paid for such annuity."

Under this section the annuitant receives the capital value of his annuity, tax free, but is taxable on the income thereof, arbitrarily fixed at 3 per cent. The payor of the annuity is taxable on the balance as on a capital investment. But when the capital value of the annuity has been paid to the annuitant, the entire amount of each payment is thereafter taxable to the annuitant.

The complete answer to appellant's arguments predicated on this section is that the section has no application to annuities created by will, but applies, by its very terms, only to purchased contractual annuities.

As will be observed, the section above-quoted provides that: "Amounts received as an annuity *under an annuity or endowment contract*" (italics added) shall be included in gross income as therein provided. The section refers to the "aggregate premiums or consideration paid for such annuity." By its very terms, the section clearly demonstrates that it was intended to apply only to annuities arising under contracts. The provision, as clearly demonstrated by the report of the Federal Ways and Means Committee in 1934, was intended to reach a specific abuse, namely, the large scale investment of assets in annuities which were not taxed under pre-existing law until the purchase price was fully recovered. The section has no application to annuities created by will, where such abuse obviously could not exist. This is clearly established by such decisions as Irwin v. Gavit, supra; Burnet v. Whitehouse, supra; see, also, Helvering v. Butterworth, 290 U.S. 365, 54 S.Ct. 221, 78 L. Ed. 365; Helvering v. Schaupp, 8 Cir., 71 F.2d 736; Commissioner of Internal Revenue v. Widener, 3 Cir., 33 F.2d 833; Codman v. Commissioner of Internal Revenue, 1 Cir., 50 F.2d 763.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concurred.



49 Cal.App.2d 376

RIETZ v. HOVDEN FOOD PRODUCTS CORPORATION.

Civ. 11757.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1942.

Rehearing Denied Feb. 28, 1942.

Hearing Denied March 27, 1942.

1. Novation ⇦1

Where written agreement for sale of four presses to corporation was never amended or modified so as to release corporation from obligation to pay for all such presses, but contract was intended to and did remain in full force and effect at all times, there was no valid "novation" and hence no valid written contract between seller and another corporation, which exchanged two presses owned by it to buyer for two of purchased presses. Civ.Code, § 1531.

See Words and Phrases, Permanent Edition, for all other definitions of "Novation".

2. Sales ⇦17

Where a corporation exchanged two presses to another corporation for two presses purchased by it from individual, who subsequently delivered such presses to first corporation at buyer's direction, there was no valid contract between such corporation and seller, as there was no "consideration" for any promise by it to pay for presses so delivered, because seller was already legally obligated to make such delivery and buyer was already legally obligated to pay seller for presses delivered.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

Appeal from Superior Court, Monterey County; Henry G. Jorgensen, Judge.

Action by Carl A. Rietz against the Hovden Food Products Corporation for the purchase price of two presses. Judgment for plaintiff, and defendant appeals.

Reversed.

John Milton Thompson, of Monterey, and Orrick, Dahlquist, Neff & Herrington, of San Francisco, for appellant.

Mueller & Westover, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff recovered judgment against defendant for the alleged purchase price of two presses. Defendant appeals from said judgment.

Defendant presents numerous contentions on this appeal but the determinative question under the unusual situation presented by the record is whether there was any valid written contract between the plaintiff and defendant for the purchase of said presses.

Plaintiff was engaged in the manufacture and sale of machinery under the fictitious name of Process Machinery Company. Defendant was a corporation engaged in fish canning at Monterey. The president of the defendant corporation, hereinafter called the Hovden Company, was K. Hovden, who

was also the president of Mazama Fisheries Corporation, hereinafter called the Mazama Company. The last mentioned corporation was organized for the purpose of acquiring the "Mazama" and operating said vessel in the fish reduction industry at Neah Bay, Washington.

In April, 1936, plaintiff entered into a written contract with the Mazama Company, by which it agreed to sell and deliver to said corporation four "presses" and one "disintegrator." The entire purchase price was $13,650, which was payable $3,412.50 upon the execution of the agreement, and the balance in equal monthly installments commencing on July 15, 1936, and ending on October 15, 1936. Delivery was to be made on or before May 22, 1936.

The above mentioned machinery was ordered for installation on the "Mazama" and said machinery was to be shipped to the Commercial Boiler Works in Seattle for that purpose. In May, 1936, it developed that plaintiff would be unable to make delivery of said equipment by May 22nd as provided in the written agreement. The northern fishing season was to open shortly and the Mazama Company arranged with the Hovden Company to obtain from the Hovden Company two presses which the Hovden Company had acquired a short time before. In return, the Mazama Company agreed with the Hovden Company to cause two of the four presses covered by its written contract with plaintiff to be delivered by plaintiff to the Hovden Company as soon as said presses were completed. This arrangement appears to have been agreeable to all concerned.

Pursuant to this arrangement the Hovden Company shipped its two presses from its plant at Monterey to Seattle for installation on the "Mazama" and the Mazama Company instructed plaintiff to deliver to the Hovden Company at plaintiff's plant in Oakland two of the four new presses covered by the written contract between plaintiff and the Mazama Company. Two new presses were thereafter shipped by plaintiff to Seattle and the two remaining new presses were delivered by plaintiff on June 15, 1936, to the Hovden Company at plaintiff's plant in Oakland. These last mentioned new presses were installed in the Hovden Company's Monterey plant in place of the two presses which it had removed and sent to Seattle for installation on the "Mazama."

The Mazama Company made the initial payment upon the written contract and also paid in advance the payment due on July 15, 1936, making a total payment of $5,971.87 upon said written contract. Thereafter the Mazama Company appears to have had financial difficulties. It did not make the payment due on August 15, 1936, or any further payment. Later in 1936, it was adjudicated a bankrupt. Plaintiff assigned, "for the purposes of collection only" its claim against the Mazama Company and plaintiff's assignee sought his remedy on the written agreement in the bankruptcy court. He was unsuccessful, and in 1937, plaintiff charged off as a bad debt in his income tax return the entire balance due on this written contract with the Mazama Company. It was not until February, 1940, that plaintiff filed his complaint in this action seeking to recover the alleged purchase price of two presses from the Hovden Company.

This action was brought upon the theory that a valid written contract for the purchase of said two presses was entered into between plaintiff and the Hovden Company in June, 1936. The claim that such contract existed was based solely upon two letters, one written by an employee of plaintiff on June 1, 1936, and one written in reply thereto by an employee of the Hovden Company on June 3, 1936. After the above mentioned arrangement for the exchange of two presses had been made between the Mazama Company and the Hovden Company, plaintiff instructed his employee Harris that he "should ship two of these to the Commercial Boiler Works and that the Hovden Food P lucts would call with a truck for the other two, and they would go to Monterey."

The first of the two letters above mentioned was written by Harris, plaintiff's employee, on June 1, 1936, and read in part as follows: "On June 12th we will bill four presses to the Commercial Boiler Works, Seattle, shipping two of them to Seattle and holding two for your truck to take to Monterey. If this is not as you understand it, please notify the writer, otherwise we will deliver according to this schedule."

To this letter, Wood, an employee of the Hovden Company, sent a reply under date of June 3rd, which read in part as follows: "We note that there appears to be some confusion in the matter of the four presses. * * * In regard to the

second paragraph of your letter, you will bill two presses only to the Mazama Fisheries Corporation, care Commercial Boiler Works, Seattle, Washington, and bill ourselves at Monterey for the other two, and we will arrange to have a truck call on June 15th to pick up these two presses if they will be ready by that time. Kindly advise."

The position of plaintiff in this case is based entirely upon the use of the word "bill" in these letters and particularly in the last mentioned letter written by the employee of the Hovden Company. Plaintiff apparently takes the position that the word "bill" has a plain and unambiguous meaning and that said last mentioned letter constituted a written authorization to plaintiff to charge the two presses to the Hovden Company upon delivery of said presses. Defendant takes the position that the word "bill" has more than one accepted meaning; that it is frequently used with respect to delivery or shipping instructions (Illinois Fuel Co. v. Mobile & Ohio Ry. Co., 319 Mo. 899, 8 S.W.2d 834), and that it clearly appears from said correspondence that the parties were not discussing charges or payment but were merely discussing delivery or shipping instructions. In this connection, it may be stated that on cross-examination, plaintiff was questioned concerning said correspondence and the use of the word "bill" by his employee Harris in the letter of June 1st. He testified: "That was Mr. Harris' letter there and that is his wording. I had no control over that. He has quite obviously slipped in his verbiage. He used the wrong words." Harris testified that he had nothing to do with charging for the presses and that "All I was instructed to do was where to ship them and I sent the bill of lading for the last two presses to Hovden and I shot two of them up north with a bill of lading."

The trial court sustained objections to a direct question relating to the sense in which the word "bill" was used in said correspondence, saying "* * * the letter is the best evidence, and it is a simple word that the court can understand." There was other evidence, however, tending to show the sense in which said word was used. It appeared that no bill or statement was ever sent to the Hovden Company for said two presses; that the books of the plaintiff showed the purchase price of all the equipment to be a charge against the Mazama Company only; that the books of the Mazama Company showed the entire obligation to be owing by it to plaintiff; that plaintiff had assigned for collection his claim for the entire unpaid balance under his written agreement with the Mazama Company; that plaintiff had furnished all information for the purpose of the attempted recapture of all four presses and that a written petition for that purpose had been filed in the bankruptcy proceeding setting forth as an existing obligation of the Mazama Company the entire unpaid purchase price for said equipment; that plaintiff had testified in said proceeding that "there was no other purchaser other than the Mazama Fisheries Corporation"; that plaintiff had charged off in his income tax return as a bad debt owing by the Mazama Company the entire unpaid balance of the purchase price; and that the correspondence and other business dealings between plaintiff and the Hovden Company during the several years following delivery of said two presses, including acknowledgment in full of payment of the account of the Hovden Company with plaintiff, shows that neither plaintiff nor the Hovden Company considered that the amount of the purchase price of the presses to be a charge against the Hovden Company.

The trial court did not find specifically that any written contract had been entered into by plaintiff and the Hovden Company, but did find certain facts in the nature of probative facts with respect to said correspondence. Furthermore, there were no findings on the issue of the bar of the statute of limitations. The trial court entered judgment against the Hovden Company for an amount equal to the full price of the two presses based upon the price per press which had been agreed upon at the time of the making of the written contract between plaintiff and the Mazama Company.

We believe that it is apparent from what has been said that this litigation was the result of an afterthought which developed when it appeared that plaintiff had suffered a loss by reason of the bankruptcy of the Mazama Company. The result of the judgment is to place upon the Hovden Company the obligation for the full price of the two presses which it had accepted, by agreement with the Mazama Company, in exchange for its two presses which it had delivered to the Mazama Company. Said exchange was made as a matter of accommodation to the Mazama Company and was necessitated by plaintiff's failure to deliver the four presses within the time re-

quired in his written agreement with the Mazama Company. Immediately after making said exchange in 1936, plaintiff's employee wrote to the Hovden Company on behalf of plaintiff thanking the Hovden Company for its "courtesy extended on this equipment," but almost four years later, plaintiff instituted this action based upon the ambiguous wording of the above mentioned correspondence of June, 1936.

[1, 2] Regardless of the sense in which said employees may have intended to use the word "bill" at any place in said correspondence, we are of the opinion that there was no valid written contract between plaintiff and the Hovden Company. There was nothing in said correspondence or in any other evidence in the record to show that the written agreement between plaintiff and the Mazama Company was ever amended or modified so as to release the Mazama Company from its obligation to pay for all four presses but, on the contrary, the uncontradicted evidence showed that said contract was intended to remain and did remain at all times in full force and effect. There was therefore no valid novation, Civil Code, sec. 1531; United States Gypsum Co. v. Snyder-Ashe Co., 139 Cal.App. 731, 34 P.2d 767; Blumer v. Madden, 128 Cal.App. 22, 16 P.2d 319; Anglo-California Trust Co. v. Wallace, 58 Cal.App. 625, 209 P. 78; American Paper-Bag Co. v. Van Nortwick, 7 Cir., 52 F. 752, 3 C.C.A. 274; Williston on Contracts, Rev.Ed., sec. 1869, page 5253, and there was no consideration for any alleged promise on the part of the Hovden Company to pay for said presses as plaintiff was already under a legal obligation to make delivery of said presses at the direction of the Mazama Company and the Mazama Company was already under the legal obligation to pay plaintiff for the same. Tipton v. Tipton, 133 Cal.App. 500, 24 P.2d 525; Ellison v. Jackson Water Co., 12 Cal. 542; Parrino v. Rallis, 116 Cal.App. 364, 2 P.2d 515.

We have thus far discussed this appeal solely from the standpoint of whether or not there was a valid written contract on the part of the Hovden Company to pay for said presses. Defendant also contends that there could be no implied contract under the circumstances. Plaintiff does not answer this contention but rests upon the claim that there was a valid written contract by reason of said correspondence. We therefore deem it unnecessary to discuss this last mentioned contention of defendant further than to state that in our opinion, said contention must be sustained.

The views which we have expressed necessitate a reversal of the judgment and it appears unnecessary to discuss the remaining contentions of defendant.

The judgment is reversed.

NOURSE, P. J., and STURTEVANT, J., concurred.



49 Cal.App.2d 301

GALE v. GALE.

Civ. 11990.

District Court of Appeal, First District, Division 2, California.

Jan. 26, 1942.

Hearing Denied March 23, 1942.

1. Divorce ⇐145

Denial of plaintiff's requests for continuances because of plaintiff's absence on day when divorce suit was called for trial and for purpose of taking depositions, the latter of which requests was not made until conclusion of trial, was not an abuse of discretion, where plaintiff had shown no interest in the case and, by reasonable diligence, could have shown before conclusion of trial that a proper ground for continuance existed on day when case was set for trial.

2. Divorce ⇐145

Courts are liberal in granting continuances in divorce suits because of public interest in preserving integrity of the marriage status, but the law requires that parties be held not only to the exercise of good faith, but also to exercise of due diligence with respect to continuances.

3. Divorce ⇐145

An application for a continuance in a divorce suit need only be made at the earliest practicable date.

4. Divorce ⇐151

Denial of plaintiff's motion for new trial in divorce suit on ground that plaintiff's requests for continuances were improperly overruled was not an abuse of discretion, where plaintiff failed to take advantage of

opportunity to make a proper showing for a continuance before trial was completed.

5. Action ⇐6

Where in divorce suit cross-complaint asked for declaratory judgment that parties had never been husband and wife and expressly asked that plaintiff be enjoined from assuming or using the name in which suit was originally commenced, enjoining plaintiff from using such name was not reversible error.

6. Divorce ⇐286

Whether property referred to in pleadings in divorce suit was husband's separate property was for trial court's determination, and its conclusion on such question could not be disturbed.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Suit for divorce by Angie V. Gale against William V. Gale, wherein defendant filed a cross-complaint. From a judgment for defendant, plaintiff appeals.

Affirmed.

Hearing denied; TRAYNOR, J., dissenting.

John E. McCall, Roland T. Williams, and Alfred B. Hunter, all of Los Angeles, for appellant.

Nat A. Rosenstein, of Los Angeles, for respondent.

McWILLIAMS, Justice pro tem.

This is an appeal from a judgment rendered in favor of the defendant and cross-complainant. The principal questions involved are whether or not the trial court abused its discretion in refusing a continuance of the trial by reason of the absence of the appellant and, subsequently, in refusing a motion for a new trial based on the same ground. The respondent following the service upon him of a complaint for divorce promptly filed an answer in which he denied all the allegations of the complaint including the allegation of the marriage of the parties. The case was originally set for trial for April 17, 1940. By reason of the illness of the appellant the trial was continued to April 30. On that date appellant's attorney presented to the court a telegram received by him from one Frank T. Doyle, an attorney in New Orleans, in which city Mrs. Gale was then residing, which telegram stated that appellant was still ill and suggested that the action be dismissed without prejudice and re-filed when appellant had recovered. Pursuant to the suggestion the case was dropped from the calendar.

On October 24, 1940, an amended answer and also a cross-complaint were filed on behalf of respondent. The cross-complaint alleged that the appellant and cross-defendant was claiming to be the wife of the cross-complainant and that her claim was without foundation although conceding that the parties had lived together over a period of years. This had occurred, according to the pleading of respondent, in California and Louisiana which states do not recognize common-law marriages. The cross-complainant asked for a declaratory judgment decreeing that the parties were not and never had been husband and wife, and enjoining appellant from using the name of Angie V. Gale in which name she had brought suit. Cross-complainant also asked that his title be quieted to certain real and also to personal property including the sum of approximately $13,000 in cash, most of which property, both real and personal, stood in the names of the parties in joint tenancy. An answer to the cross-complaint was filed on December 2, 1940. On December 12, respondent and cross-complainant filed a notice of motion to set the case for trial. On December 19, appellant's attorney, Roland T. Williams, filed a notice of motion for an order permitting him to withdraw as her attorney. The notice of motion was supported by an affidavit in which he recited the history of the litigation. The affidavit also set forth the fact that since the case had been dropped from the calendar on April 30 of that year he had received no word from his client, although numerous letters and telegrams had been sent by him to her. On November 28, affiant said, he wrote to Attorney Doyle at New Orleans requesting his cooperation in securing answers from appellant to his letters. On November 28, the affidavit recited, affiant wrote to one Leo W. Seal, a resident of Mississippi and the brother-in-law of the appellant, informing Seal of the urgent necessity of cooperation by her. This message, according to a reply which Williams said he had received from Seal on December 7, was delivered to appellant.

At the hearing of the motion to set, an early trial date was requested. The court's attention was called to the notice of motion of Attorney Williams to withdraw from the

case and to the fact that that motion had been set for hearing on January 19; also to the fact that plaintiff was still residing in New Orleans and to the resulting difficulty of effecting service on her in the event that Williams' motion was granted. The possibility was also explained to the court of Dr. Gale, respondent, being called into service in the medical corps of the army owing to his having theretofore held a commission in that corps. The case was thereupon set for trial for January 3. Notice of trial was sent to Attorney Williams by mail on December 23. The notice was received by him on the following day. On December 26, Williams telegraphed to his client in New Orleans that the case was set for trial for January 3, adding "Advise at once."

When the case was called for trial on January 3, Attorney Williams asked for a continuance on the ground of the absence of appellant. He supported his application with a telegram received by him from Attorney Doyle of New Orleans which merely stated that it would be impossible for Mrs. Gale to be in California until April or May but giving no reason therefor, and inquiring whether it would be possible to have the case dismissed without prejudice. The request for a continuance was denied and the case proceeded to trial. The taking of testimony began on Friday, January 3, and was concluded on Tuesday, January 7. At the conclusion of the trial and before the final submission of the case, counsel for Mrs. Gale requested a continuance for the purpose of taking her deposition and also the deposition of Mr. Seal. The motion was denied on the ground that appellant had had ample opportunity to take the depositions prior to the trial. Judgment was rendered in favor of respondent and cross-complainant on January 16. By its decision the court found, and by its judgment decreed, that the parties were not and never had been husband and wife. It also found and decreed that there was no community property, and that with one minor exception appellant had no right, title or interest in or to any of the real or personal property described in the cross-complaint.

A motion for a new trial was thereafter made by appellant. It was supported by a number of affidavits, including affidavits by appellant and her physician, to the effect that between December 20 and the 31st she had been ill and confined to her bed, and that by January 1 she was only well enough to call at the residence of Attorney Doyle, who lived across the street from her, for the purpose of apprising him that her case was set for trial for the following day. The showing made by appellant with respect to her illness was uncontradicted by respondent, whose reply affidavit was limited in its scope to a consideration of the history of the litigation. The motion for a new trial was denied. This ruling appellant assigns as error.

[1-3] We are of the opinion that no sufficient showing of abuse of discretion by the trial court has been made, either in its denial of the continuance requested or in the denial of the motion for a new trial, as to justify the interference of this court. In so holding we have in mind that in divorce actions courts are liberal in granting continuances because of the interest of the public in preserving the integrity of the marriage status. But the law also requires that parties be held not only to the exercise of good faith but also to the exercise of due diligence. Barnes v. Barnes, 95 Cal. 171, 179, 30 P. 298, 16 L.R.A. 660. The situation must be considered in the light of appellant's complete lack of interest in her case as that lack of interest is shown in the affidavit of her own attorney offered in support of his application for leave to withdraw from the case and which, we may assume, the court took into consideration in passing on the motion. Moreover even though appellant by reason of her illness may not have had the opportunity to have made a proper showing for a continuance on the day her case came on for trial on January 3, it would appear that such showing could, by the exercise of reasonable diligence, have been made before the taking of the evidence was concluded on January 7. Had a proper showing been made by that time it may reasonably be assumed that the court would have granted a continuance since the law only requires that an application for a continuance be made at the earliest practicable date.

[4] With respect to the denial of the motion for a new trial we are also of the opinion that no showing has been made that will justify us in interfering with the action of the trial court. Since, as pointed out above, appellant could have made a proper showing for a continuance before the trial was completed, we cannot say that the court abused its discretion in denying a

new trial after appellant had failed to take advantage of that opportunity.

[5] Certain relatively minor contentions are also advanced by appellant. Thus she claims that the court erred in enjoining her from using the name in which the action was originally begun by her. Since the cross-complaint expressly asked that appellant be enjoined from assuming or using the name of Angie V. Gale as well as asking for general equitable relief, we are of the opinion that, in view of the state of the pleadings and the circumstances shown on the trial, no reversible error was committed by the trial court in granting this relief.

[6] With respect to the status of the property referred to in the pleadings which was decreed to belong to respondent, the question whether or not it was his separate property was a matter to be determined by the trial court which heard the testimony. With its conclusion on that subject we may not interfere.

The judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



49 Cal.App.2d 324

SALLEE et al. v. DANERI et al.

Civ. 6523.

District Court of Appeal, Third District, California.

Jan. 27, 1942.

Hearing Denied March 27, 1942.

1. Life estates ⇐11

A life tenant possesses a somewhat free hand in manner in which he uses land, and his right of enjoyment is limited only by such action as results in injury to the inheritance. Civ.Code, § 818.

2. Waste ⇐20

Injury to inheritance by life tenant which, under the common law, would be termed "waste", can only be proved, with a few possible exceptions, by evidence of acts which have resulted in substantial depreciation of market value of property. Civ. Code, § 818.

See Words and Phrases, Permanent Edition, for all other definitions of "Waste".

3. Waste ⇐20

The burden of proving depreciation in market value of land as a result of alleged wrongful acts of waste by life tenant rests on remainderman, who must establish that fact by satisfactory evidence, even though life tenant may not use what might appear to be the best of care in cultivation and care of property. Civ.Code, § 818.

4. Waste ⇐20

In remaindermen's action against life tenant's estate for waste, evidence supported finding that there had been no waste, but that cutting of timber complained of had improved land rather than depreciated its value. Civ.Code, § 818.

5. Appeal and error ⇐1011(1)

Reviewing court is bound by conclusion of trial court drawn from conflicting evidence.

6. Life estates ⇐13

Where life tenant had right to sell timber on land since cutting of timber improved land rather than depreciated its value, and purchaser had right to store cut timber on land, remaindermen had no right to take possession of cut timber on taking possession of land, and purchaser could recover from remaindermen for conversion of timber. Civ.Code, § 818.

Appeal from Superior Court, Amador County; A. L. Pierovich, Judge.

Action by Harvey Sallee and others against John J. Daneri, as administrator of the estate of Merle Wetmore, and another, wherein a cross-complaint was filed. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Hearing denied; SHENK, HOUSER, and CARTER, JJ., dissenting.

Frank L. Murphy, of Sacramento, for appellants.

Allen L. Martin, of Jackson, and Leon French, of San Francisco, for respondent Jones.

Snyder & Snyder, of Jackson, for respondent John J. Daneri.

THOMPSON, Acting Presiding Justice.

This is a suit to recover damages for alleged injury to land which is now in the

possession of appellants who are remaindermen by virtue of the will and the decree of distribution in the matter of the Estate of Clara N. Wetmore, deceased.

The appellants allege two causes of action. The first cause is against the administrator of the Estate of Merle Wetmore, deceased. Mr. Wetmore was the husband of Clara N. Wetmore. He went into possession of the premises involved in this suit in March, 1919, as a life tenant, remaining thereon until his death, which occurred February 19, 1939. It is alleged that Merle Wetmore committed acts constituting waste and injury to the inheritance by failing to cultivate and maintain the land and premises in accordance with good husbandry in Amador County. Appellants alleged that Mr. Wetmore permitted the farm to grow to weeds; that he cut down, removed and sold trees; that he failed to make necessary and reasonable repairs to the buildings, so that they became dilapidated; that he permitted strangers to come upon the property and to cut down the trees and sell the wood.

The second cause of action alleged that Joseph R. Jones was permitted to wrongfully enter upon the premises without appellants' consent and to cut down trees and convert the timber to his own use.

The portion of the complaint which is based on a demand for treble damages was stricken out and a claim only for ordinary damages remains.

A cross-complaint was filed by respondent Jones which alleges conversion by appellants of a quantity of cut wood belonging to him and situated upon the premises at the time of possession thereof by appellants. By stipulation of counsel, these damages were fixed at $1,200.

The trial court entered judgment against the appellants and in favor of respondents, John J. Daneri and cross-complainant Joseph R. Jones. It was ordered that respondent Daneri have judgment against appellants for his costs of suit and that respondent Jones recover upon his cross-complaint against appellants $1,200 damages, together with his costs of suit.

The findings of the court determine that Merle Wetmore, the life tenant, did not commit any act upon the land resulting in injury to the inheritance or causing a depreciation of the market value of such property; that Merle Wetmore did not neglect to properly cultivate the land nor did he permit the farm property to grow to weeds or allow the pasture land to be overgrown with brush, or unlawfully permit the cutting and sale of trees. On the contrary the court found that Mr. Wetmore followed the usage and custom of the district in keeping with good husbandry, in his cultivation and care of the property.

It is further found that Joseph R. Jones entered upon the premises of appellants by permission of Merle Wetmore and that with his consent he cut down a number of growing trees situated on the land; that the cutting of these trees was not wrongfully or wantonly committed and did not constitute acts of waste on the part of Jones, but on the contrary that such cutting of trees resulted in the improvement of the property, and was consistent with the usage and custom of the district in accordance with good husbandry, and actually resulted in an increase in the value of the land. It is found that on March 1, 1939, at which time appellants were in possession of the premises, that Jones was the owner of a quantity of cut wood of the value of $1,200, which was stored on the premises with consent of Merle Wetmore. The court further found that on March 1, 1939, while appellants were in possession and control of the cut wood they converted the same to their own use, to the damage of cross-complainant Jones in the sum of $1,200.

This appeal from the judgment in favor of respondents raises the question as to whether Merle Wetmore, as the life tenant of the property, committed acts which were detrimental to the inheritance within the meaning of section 818 of the Civil Code, and therefore compensable in damages.

A life tenant, under the provisions of section 818 of the Civil Code, may use the land in the "same manner" that the owner of a fee simple may use it, provided that he does not thereby injure the inheritance. The provisions of that section read as follows:

"The owner of a life estate may use the land in the same manner as the owner of a fee-simple, except that he must do no act to the injury of the inheritance."

[1-3] The plain meaning of the foregoing language indicates that the life tenant possesses a somewhat free hand in the manner in which he uses the land, and his right of enjoyment is limited only by such action as results in injury to the inherit-

ance. Injury to the inheritance, which under the common law would be termed "waste" can only be proved, with the possible exception of a few instances, by evidence of acts which injuriously affect the market value of the property. The owner of an estate in reversion may not subject a life tenant to damages for every act which does not meet with the approval of the reversioner. Section 818 of the Civil Code requires that there be an injury to the "inheritance." As indicated, the question as to whether the tenant has committed acts of waste or injury to the inheritance is determined by proof only of conduct which has resulted in substantial depreciation of the market value of the land. Richards v. Silveria, 97 Cal.App. 166, 275 P. 478. The burden of proving depreciation in market value of the land, as a result of the alleged wrongful acts of waste rests upon the remainderman, who must establish that fact by satisfactory evidence, even though a life tenant may not use what might appear to be the best of care in the cultivation and care of the property.

[4] We are of the opinion that, although Merle Wetmore, the life tenant, may have failed to maintain the buildings in first-class repair, there is substantial evidence in support of the finding that the cutting of timber had the effect of improving the land rather than to depreciate its value, and that appellants have therefore failed to prove that any such act on his part resulted in decreasing the market value of the inheritance.

Evidence bearing upon the market value of appellants' property was introduced by the testimony of George A. Kirkwood, the State Inheritance Tax Appraiser for Amador County and by the testimony of Thomas W. Burke, a rancher, who owned considerable property in Amador County.

Mr. Kirkwood testified that he appraised this farm land in 1930, as a part of the Estate of Eleanor Easton, deceased. He said that the land was worth in 1939, which is the time involved in this suit, the same value that it was when he first appraised it in 1930. This value he fixed at $25 an acre for the open farm land and $10 an acre for the wooded land. He stated that, in his opinion, the cutting and removing of the timber and the clearing of the land increased its market value. The testimony of Mr. Kirkwood is in part as follows:

"Q. You appraised that same land in 1930, in the estate of Eleanor Easton? A. I did, yes sir.

"Q. At that time what did you fix as the market value of the different classes of land there? A. As near as I remember about the same as I did now.

"Q. Twenty-five dollars for open farm land and ten dollars for what we generally speak of as wooded land? A. Yes.

"Q. Mr. Kirkwood, have you observed that some wood has been cut off of that land? A. Yes, I noticed those.

"Q. Would that, the cutting and removing of that wood and clearing of that land decrease the market value of the land or would it increase the market value of the land? A. I would say it increased it."

Mr. Burke, who stated he was familiar with land values in the farming district, testified as follows:

"Q. What effect did the cutting of that wood off on that land, if any, did it depress the value or increase it? A. No, it increased the value of it in my estimation."

On cross-examination Mr. Burke testified that "Land without wood is more valuable, has more value in my estimation" in spite of the fact that such wood was worth $2 a tier on the ground.

[5] We are aware of the fact that respondents' evidence bearing upon the relative market value of the premises in question, as evaluated in 1919, at which time Merle Wetmore became the life tenant, as compared with the market value in 1939, is far from conclusive. The appraisals made by Mr. Kirkwood were not for the purpose of assessing taxes and apparently were not based upon thorough investigation. The testimony given by Mr. Burke is not entirely satisfactory since he admitted that he had not dealt in sales of farm land for a number of years, and his appraisal of $20 per acre for ranch land in that vicinity was at variance with the appraisals upon such land which were made by Mr. Kirkwood. However, the opinions and conclusions of Mr. Gordon and Mr. Barsotti, two witnesses who testified for appellants, is also subject to the same criticism. Mr. Gordon made his appraisal for loan purposes only. The evidence offered by appellants, bearing upon the market value of this farm land, had the mere effect of creating a conflict in this respect.

The conflict was resolved in favor of respondents, and we are bound by the conclusion of the trial court in that regard. We cannot assume that the deteriorated condition of the buildings on the premises necessarily depreciated the market value of the property, where substantial testimony was introduced indicating that the cutting of timber and the clearing of the land resulted in an increase of that market value. The evidence is also far from convincing regarding the condition of the buildings at the time Merle Wetmore went into possession of the property as life tenant. It is true that there is some evidence indicating that the land was not properly cleared after the cutting of timber thereon, but there were also a number of witnesses who testified to the clearing of the land. The evidence in that respect was also conflicting. There appears to be substantial evidence to support the findings that Merle Wetmore in accordance with good husbandry followed the usage and custom in his cultivation and care of the land and property employed by farmers in that vicinity.

It follows that since we must assume Merle Wetmore, the life tenant, committed no act detrimental to the inheritance, but on the contrary, that the property and the inheritance benefited by the cutting of timber and the clearing of the land, the sale of this timber by Merle Wetmore was not a wrongful act subjecting him to damages, and the contract between the respondent Jones and Merle Wetmore was therefore valid and inforcible.

Although we still follow the rule of the common law as applied in England in regard to "waste" as affecting the "inheritance," the strictness of the enforcement of that rule is not applicable in this country because of the difference in the conditions which exist, especially with respect to the cutting of timber. The cutting of timber in this country has in many instances the effect of improving the inheritance, by converting woodland into arable soil. 21 A. L.R. 1015, section VIII.

[6] It follows from our conclusions that Merle Wetmore did have the right to sell timber to respondent Jones, and that Jones was rightfully upon the property for the purpose of cutting such timber. This being true, Jones had the right to store the cut timber upon the premises, and the appellants were not within their rights in taking possession of this personal property and converting the same to their own use. The respondent Jones was entitled to recover damages upon his cross-complaint for the value of the converted wood.

There is substantial evidence to support the findings of the trial court. The appellants have failed to prove an injury to the inheritance within the meaning of section 818 of the Civil Code.

Because of our foregoing conclusions, we deem it unnecessary to answer other issues raised on this appeal.

The judgment is affirmed.

TUTTLE, J., concurred.



49 Cal.App.2d 360

VITRUVIAN CORPORATION v. LAUBISCH et al.

Civ. 11991.

District Court of Appeal, First District, Division 2, California.

Jan. 28, 1942.

Hearing Denied March 27, 1942.

1. Appeal and error ⇐1011(1)

Trial court's finding of facts on conflicting evidence is binding on appellate court.

2. Mortgages ⇐270, 319(3)

In action to set aside trust deed and trustee's sale thereunder and to quiet title to property covered thereby, evidence sustained finding that one of defendants gave trustee over $5,000 in consideration of assignment by trustee of note and beneficial interest under deed of trust in property covered thereby, and that there had been no agreement that such payment should be in satisfaction or discharge of deed of trust.

3. Mortgages ⇐38(1)

The principle that transaction will be deemed to create mortgage where its purpose is to create lien on property as security for payment of lien, regardless of language used in instruments executed, did not apply where trial court found sufficient evidence, not inherently improbable, that one of defendants had paid trustee a certain sum in consideration of assignment by trustee of note and bene-

ficial interest under deed of trust and that there had been no agreement that the payment should be in satisfaction of deed of trust.

4. Usury ⇐117

Where trial court found on sufficient evidence that one of defendants had paid trustee a certain sum in consideration of assignment of note and beneficial interest under deed of trust, and that there was no agreement that payment was made in satisfaction of deed of trust, claim of plaintiff, suing to set aside deed of trust and trustee's sale thereunder, that transaction amounted to a loan at usurious rate of interest which must therefore be held to be void, could not be sustained.

5. Appeal and error ⇐995

Where trial court's findings on conflicting evidence were sustained by substantial evidence, appellant's contention that testimony of one of appellees was inherently improbable, and should therefore be disregarded by appellate court, was proper one for consideration of trial court, but, having been rejected by trial court, could not avail in appellate court.

6. Mortgages ⇐270

In action to set aside a trust deed and trustee's sale thereunder, contention that there was no consideration for assignment of trust deed, and therefore no right to foreclose thereunder, could not be sustained, in view of testimony that, because title to property had not been searched before purchase of property was consummated, the assignment of trust deed was then taken as measure of precaution.

7. Mortgages ⇐268

Where purchaser of property took assignment of deed of trust, there was no "merger" of the two where no merger was intended; question of merger being one of intention.

See Words and Phrases, Permanent Edition, for all other definitions of "Merger".

Appeal from Superior Court, Los Angeles County; Charles C. Montgomery, Judge pro tem.

Action by Vitruvian Corporation against T. C. Laubisch and others to set aside a trust deed and a trustee's sale thereunder, and also to quiet title to property covered by the trust deed. Judgment for defendants, and plaintiff appeals.

Affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellant.

Robert E. Ford, of Los Angeles, for respondents J. Thomas Russell, Julia Burke Moore, and Robert E. Fennell.

Earl Oakley, of Los Angeles, for respondent T. C. Laubisch.

McWILLIAMS, Justice pro tem.

This is an action to set aside a trust deed and the trustee's sale that occurred thereunder, and also to quiet the title to the property covered by the trust deed. Judgment was rendered in favor of defendants and plaintiff appealed.

The property involved had been acquired by appellant in 1933. At that time it was encumbered by the deed of trust referred to under which the Beverly Hills National Bank and Trust Co. was the trustee. On June 19, 1939, appellant conveyed the property subject to the deed of trust to one Neal V. Dow who, appellant claims, took the property as its trustee. The indebtedness, to secure which the deed of trust had been given, not having been paid when it fell due, the trustee gave notice of its intention to sell the property on January 18, 1940.

[1] On January 17, the day before the sale was scheduled to occur, a Miss Wilhelminia E. Stowell, the assistant secretary of appellant, called upon J. Thomas Russell, one of the respondents, in regard to the impending sale. The purpose of her visit and the conversation that ensued is a matter of dispute between the parties. Appellant in its brief correctly states that the question as to what occurred at that interview presents substantially the only conflict in the evidence in the case. Appellant contends that at the interview between Russell and Miss Stowell she informed Russell of the pendency of the foreclosure proceeding and requested on behalf of appellant, of which her brother was president and manager, that he loan a sufficient sum to pay off the indebtedness, offering as security for such loan a deed to the encumbered property. Miss Stowell explained in her testimony that appellant was a closed corporation and that she had authority from her brother to refinance the loan. According to Miss Stowell, Russell inquired of her when the loan would be

repaid. Her answer was that she might have the money in a few days or that she might not have it for thirty days or possibly for a year. She further testified that Russell agreed to make the loan and stated that his fee for his services in so doing would be $100. Russell's version of the conversation between them was altogether different. He testified that Miss Stowell informed him that the property which she said was then occupied by her sister, a Mrs. Fitch and her husband, was to be sold on foreclosure sale the following day. She explained that Neal V. Dow who held title to the property was unable to prevent the sale. She expressed a desire, according to Russell's testimony, to buy the property for her sister, Mrs. Fitch. She told Russell that the property was worth between $15,000 and $20,000. She further stated, according to Russell, that she was expecting to receive $20,000 from an escrow in the near future and that if Russell would pay off the mortgage indebtedness and thereby prevent the sale she would procure a deed to the property from Dow, the record owner, and would thereafter buy the property from Russell at a price that exceeded the mortgage indebtedness by $1,500. Russell testified that he accepted the proposition of Miss Stowell. Although Russell at that time had not seen the property he had the opinion of its value as given him by Miss Stowell. In addition he testified that he had inquired as to its value from a friend, W. T. Stockman by name, who had told him that the property was worth nine or ten thousand dollars. The lower court accepted Russell's version of what occurred at this interview and by its finding to that effect we are of course bound. That finding is largely determinative of the case.

Following the conversation between Russell and Miss Stowell, the former, who according to his testimony had had but little experience in such matters, called in one Hutson, a friend of his who was in the real estate business, to assist in closing the deal. The mortgage indebtedness which then amounted to $5058.64 was paid to the bank by Russell on January 18, the day on which the sale was scheduled to occur. He also, at the suggestion of Hutson, then requested and was given an assignment of the trust deed and of the note which it secured. A deed from Dow running to Julia Burke Moore, the nominee of Russell, as grantee, was delivered to him. An escrow was also opened with the bank under which Miss Stowell agreed to purchase the property from Julia Burke Moore within thirty days for the sum of $6,615.64, being $1,500 in excess of the amount of the mortgage indebtedness plus estimated escrow charges and other incidental expenses. Miss Stowell did not perform the conditions of the escrow and it lapsed.

On February 22, 1940, Miss Moore, the grantee, served a demand for possession of the property on its occupants, Miss Stowell and Mr. and Mrs. Fitch. Possession being refused an ejectment action was begun by Miss Moore. An answer was filed on behalf of appellant which alleged that the sum paid to the bank by Russell on January 18, had been paid as a loan and that the deed from Dow to Moore was in legal effect a mortgage to secure the repayment of the sum paid by him to the bank. The alleged connection of appellant with the property appears to grow out of an unrecorded deed to appellant that was executed by Dow on the same day that appellant had deeded the property to Dow. The lower court found that appellant did not inform any of the respondents of the execution or of the existence of this deed prior to the commencement of this action. That court also found it was not true that appellant was the owner of the property at the time this action was commenced.

Following the filing by appellant of its answer, Russell, whose experience on the subject involved in the litigation concededly was limited notwithstanding the fact that he was an attorney, called in W. J. Stockman, a more experienced attorney, to assist him with the litigation. Stockman advised a foreclosure by trustee's sale. The trustee originally named in the trust deed having expressed a desire to be relieved of its duties as trustee and having refused to proceed with a sale, an order of court was secured whereby Stockman was substituted as trustee. He thereupon gave notice that a sale under the trust deed would be held on September 3. On the day appointed and before the property was offered for sale, appellant caused a notice to be read aloud, notifying those present that the deed of trust under which the property was being sold "had been fully paid, satisfied and discharged" by the original payment made by Russell on January 18, and also notifying the persons present that appellant was the owner of the property covered by the deed of trust. The property

was bought in by respondent T. C. Laubisch who bid $8,000 therefor. The lower court found that at the time of this sale the obligation secured by the deed of trust had not been paid and was in default. The trustee's deed to Laubisch contained the usual recitals to the effect that the requirements of the trust deed relative to a sale on foreclosure had been complied with. The deed of trust itself contained the customary provisions making the recitals in any deed given by the trustee following a foreclosure sale conclusive proof of the truthfulness of its recitals with reference to matters or facts affecting the regularity or validity of the sale.

The lower court found on adequate evidence that appellant had been in possession of the property from January 17, 1940 but that it had made no offer or tender either to Laubisch, Russell, or Moore, to do equity prior to the commencement of this action.

[2] Appellant's first contention is that two of the findings made by the lower court are not supported by the evidence. One of those findings is to the effect that Russell had paid the trustee the $5,058.64 in consideration of the assignment by the trustee of the note and its beneficial interest under the deed of trust in and to the property covered thereby. The other finding objected to is to the effect that there had been no agreement that the said sum should be paid to the trustee in satisfaction, or payment, or discharge of the deed of trust. This contention of appellant with reference to those two findings is submitted by it without argument on a mere reference to the testimony taken on the trial. In the circumstances it is sufficient to say that in our opinion the findings are fully supported by the evidence.

[3] Appellant's principal contention upon which, in its different aspects, appellant's case on appeal is largely based, is that the payment by Russell to the Beverly Hills National Bank and Trust Co., the original trustee, amounted to a loan and that the deed from Dow to Moore was in legal effect but a mortgage given to secure the loan. Appellant cites numerous cases which hold in substance that when the purpose and effect of a transaction is to create a lien on certain property as security for the payment of a loan the transaction will be held to constitute a mortgage regardless of the language used by the parties in the instruments executed by them. The principle of law referred to is of course a settled one. However, it has no application to the situation here presented in view of the testimony and the findings of the lower court. The contention is based upon the testimony given by Miss Stowell which was rejected by that court which made findings in accordance with the opposing testimony of Russell.

[4] All of the subsidiary arguments which are made by appellant and which are predicated upon an acceptance of the testimony of Miss Stowell must likewise fall for the same reason. Thus, the claim of appellant that the transaction between Miss Stowell and Russell amounting, as he says, to a loan of money at a usurious rate of interest which must therefore be held to be void, cannot be allowed. The same is true of the contention that the deed taken by Julia Burke Moore being in legal effect but a mortgage her only remedy was its foreclosure.

[5] Appellant is not aided in its argument by its insistence that the testimony of Russell that he had purchased the property is inherently improbable and that it should therefore be disregarded by this court. That argument was a proper one for the consideration of the lower court. But having been rejected by that court it cannot avail in this court. We may add that not only was the testimony given by and on behalf of respondents with respect to the questioned transaction not inherently improbable but that in certain material respects it constitutes a much more reasonable explanation of that transaction than does the testimony offered on behalf of appellant.

[6] Appellant argues that there was no consideration for the assignment of the trust deed and that therefore neither Russell nor Julia Burke Moore had the right to foreclose. Hence, says appellant, Laubisch has no title to the property involved. But testimony was given that since the title to the property had not been searched before the transaction was consummated an assignment of the trust deed was then taken as a measure of precaution. In view of this testimony appellant's contention must fall.

[7] Appellant's last contention is that when on January 18, 1940, the deed from Dow and the assignment of the deed of trust were given to Julia Burke Moore, the two merged. The answer to this contention appears from a consideration of the

circumstances of the case which indicate clearly that no such merger was intended. It is, of course, a long settled principle of law that the matter of merger in circumstances such as those here presented is a question of the intent of the parties. 18 Cal.Jur. 75.

The judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



49 Cal.App.2d 410

H. G. FENTON MATERIAL CO. v. CHALLET et al.

Civ. 2739.

District Court of Appeal, Fourth District, California.

Jan. 29, 1942.

Rehearing Denied Feb. 27, 1942.

Hearing Denied March 27, 1942.

1. Injunction ⇐61(2), 114(3)

Where parties have covenanted not to engage in any competing business, injunction will ordinarily issue only against parties to the covenant or their privies, and one who is in no sense a party cannot properly be restrained from carrying on the competing business, though he may properly be restrained from aiding the covenanter in violating the covenant, from employing the covenanter in a way involving breach of the covenant, or from engaging in a competing business in partnership with or as agent or employee of the covenanter.

2. Injunction ⇐61(2)

Where a contract agreeing not to engage in a competing business is valid, the court may enjoin the party allegedly violating the terms of the contract not only from violating the terms of the contract but also from employing or combining with others to accomplish the same result.

3. Corporations ⇐1
Injunction ⇐114(2)

The rule that a stranger to a restrictive covenant not to engage in a competing business can properly be enjoined from engaging in business with a covenanter so as to result in a breach of the covenant applies to corporations, but ordinarily a corporation should not be enjoined from conducting a business independently of the covenanter unless the circumstances are such that the corporation must be regarded as the alter ego of the covenanter or a mere instrumentality by means of which the covenanter seeks to evade the covenant.

4. Torts ⇐12

An action will lie for unjustifiably inducing a breach of contract.

5. Injunction ⇐114(2)

A contracting party may enjoin a stranger to the contract from unlawfully interfering with his business or his rights under the contract where the acts complained of would result in irreparable damage for which he has no adequate remedy at law.

6. Injunction ⇐210

Generally, the power of a court over its orders and decrees in suits for injunctive relief is the same as that which it exercises over its other orders or decrees as a court of equity. Code Civ.Proc. § 526.

7. Injunction ⇐189

Where trial court enjoined defendants from violating agreement with plaintiff not to engage in rock and gravel or concrete manufacturing business within certain area and from being in codefendants' employ in erection of rock plant and from assisting them and enjoined codefendants from employing either defendant in connection with rock plant or its business and from aiding or abetting defendants to violate agreement, trial court did not abuse its discretion in refusing to enjoin codefendants from operating or proceeding with construction of plant and from selling or agreeing to sell any sand, rock, or gravel products therefrom, in view of evidence supporting trial court's determination that codefendants did not conspire with defendants to breach agreement.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by the H. G. Fenton Material Company against Paul Challet and others to enjoin defendants from operating or constructing a certain rock and gravel plant and from selling rock or gravel therefrom. From a judgment granting plaintiff partial injunctive relief, plaintiff appeals.

Affirmed.

Hearing denied; CURTIS, HOUSER, and CARTER, JJ., dissenting.

Charles C. Crouch, of San Diego, and George W. Crouch, of Los Angeles, for appellant.

Benjamin F. Tyler and Luce, Forward, Lee & Kunzel, all of San Diego, for respondents.

GRIFFIN, Justice.

This is an action by plaintiff and appellant H. G. Fenton Material Company, a corporation, against defendants and respondents Paul Challet and Germaine Challet, husband and wife, and G. W. Billings and A. W. Billings, to enjoin respondents from operating or constructing a certain rock and gravel plant and from selling rock or gravel therefrom. Appellant, for a long time prior to the commencement of this action, had been engaged in the business of producing sand, rock and gravel for building and construction purposes and in operating several such plants in San Diego County. Some time prior to July 23, 1938, the respondents Paul Challet and Germaine Challet, under the name and style of Challet Concrete Service of San Diego, were engaged in a similar business in that county and were operating at a plant located in Otay Valley. Appellant and the Challets on July 23, 1938, entered into a written agreement appertaining to the sale of the Challet property and a ready-mix cement plant located thereon. Clause VI of the contract, signed by both Mr. and Mrs. Challet, is the important provision, as far as this appeal is concerned, and reads as follows: "Seller, as a part of his sale, sells to Buyer and the Buyer purchases from the Seller the whole of the rock, sand, concrete and materials business now and heretofore operated by Seller, including the good will and full benefit thereof and Seller hereby covenants, promises and agrees to and with the Buyer that he will not either directly or indirectly, alone or with others, enter upon or engage in the rock, sand, gravel or concrete manufacturing business within the county of San Diego or city of San Diego, in the State of California, so long as the Buyer, or any person deriving title to the good will from him, carries on a like business therein, nor in any event, within a period of ten years from this date. Seller further agrees to submit no bid or bids on outside public works, contracts or projects where in so doing he would be in direct competition with the Buyer, within San Diego County, within the period of time above specified."

After the execution of the contract the possession of the premises and plant were surrendered to the appellant and the respondents Challet retired from the business. It is apparent from the evidence that notwithstanding the covenants so made by the respondents Challet, on or about October 25, 1939, and with the intention of engaging in the rock, sand, gravel and concrete manufacturing business within the county of San Diego in competition with the appellant, they purchased for $2,000, in Mrs. Challet's name, a tract of land containing such a deposit of rock, sand and gravel. The tract was near to one of the plants of the appellant. Mrs. Challet claims that the money with which she purchased the property was her separate funds. The respondents Billings had been engaged in the trucking business in San Diego County since 1930. They claimed that for several years they had contemplated going into the sand and gravel business in order to find work for their trucks, and had bought a steam shovel and bunkers about two years prior to the commencement of the present action; that a few months prior to March, 1940, one of the respondents, A. W. Billings, heard that Mrs. Challet had purchased the gravel land in Otay Valley; that he called upon her for the purpose of negotiating a lease of the land; that no one invited him to contact her and he had not previously discussed with either Mr. or Mrs. Challet the possible use of the land; that he made a proposition to them to lease the land for the purpose of erecting a plant thereon and producing sand and gravel; that a few days later the lease was entered into; that before the execution of the lease, there was no discussion between the parties as to the employment of Paul Challet or in regard to any connection on his part with the enterprise. The lease was dated March 30, 1940, extended over a period of 99 years, and designated Germaine Challet as the lessor and Billings Truck Company, a copartnership, as the lessee. By its terms Mrs. Challet leased the property for the purpose of the lessees' taking out, producing and removing sand, gravel, rock and other products thereof, and for which the lessees agreed to pay her 7½ cents for each yard of sand, gravel, rock and other material removed from the land as rental thereof. The Challets borrowed $3,000 on certain property they owned, and Mrs. Challet loaned that sum to the respondents Billings to be used in the erection of the plant. This obligation was secured by a chattel

mortgage on the plant and machinery. A note and mortgage representing that indebtedness was taken in the name of Frank Conde, the father of Mrs. Challet, which was later assigned to Mrs. Challet.

At the time of the trial of the case, the respondent Paul Challet was in the employ of the Billings, supervising the construction of the plant. The respondents all claim that no interest whatever was assigned or given to Paul Challet in the business or enterprise, and that his entire remuneration was agreed to be $40 per week; that the Billings Truck Company paid the salaries and wages of the men employed and all of the expenses of construction and for the machinery. On or about May 20, 1940, the respondents mutually agreed to cancel the lease and in lieu thereof entered into an agreement whereby Mrs. Challet should sell and transfer the leased land and deliver title to the Billings. This agreement was consummated. The consideration was a down payment of $200 and a further sum of $14,800 to be paid in amounts of $200 per month. The unpaid balance was secured by a deed of trust covering the land so sold.

A. W. Billings testified that the cost of the lease was too great, and, therefore, decided to purchase the land outright. The trial court found generally that the transaction on the part of the Challets was entered into with the intent of wrongfully profiting from their violation of the provisions of the contract which they had theretofore made with the appellant; that at the time of the commencement of the action the plant was being erected by the Billings with the intention of competing with the plaintiff in the sand, rock, gravel and concrete manufacturing business in the county of San Diego; that prior to March 30, 1940, the Billings examined and had full knowledge of the agreement between appellant and the Challets and particularly paragraph VI thereof, but specifically concluded that "no conspiracy existed between the defendants." From these facts and findings above mentioned the court concluded that the agreement between the appellant and the respondents Challet, which imposed restrictions against those particular respondents engaging in the rock, sand, gravel and concrete manufacturing business, was in all respects fair, reasonable, valid and binding; and that those defendants (Challets) were not entitled, directly or indirectly, alone or with others, to engage in such business in the county of San Diego for a period of ten years, so long as plaintiff was carrying on a similar business therein; that the appellant was entitled to a decree enjoining the respondents Challet from any violation of the provisions of clause VI of the contract and from being in the employ of the respondents Billings in the erection of the rock plant and from assisting them in any way relating to such business.

As to the respondents Billings, the court found that the appellant was entitled to an injunction enjoining them from employing either of the respondents Challet in connection with either the rock plant or its business, and from aiding or abetting such respondents in any way to violate the provisions of their contract with the appellant. Judgment was entered accordingly. The court refused to enlarge the terms of the injunction as against the respondents Billings as requested and refused, particularly, to enjoin them from marketing the products of the respondents Billings in that class of competition with the appellant which was prohibited by the terms of appellant's agreement with the respondents Challet. It is in this respect that they complain of the judgment.

Appellant argues that all of the respondents acted in concert and collusion to wrongfully and unlawfully destroy appellant's contract rights, notwithstanding the fact that the trial court concluded from the evidence that no conspiracy had been proved or established. It is rather difficult for this court to reconcile the conclusion that there was no conspiracy with the findings above quoted.

From an examination of the oral opinion of the trial court, printed in the record, it appears that appellant was denied any further relief than that given, under the impression that appellant could and should "when this plant is constructed, and when it begins to operate * * * in competition with Mr. Fenton" resort to some action in damages rather than injunction, "arising from a breach of this contract."

[1-3] The authorities of the various states are not uniform on the subject but it is the general rule that injunction will ordinarily issue only against parties to the agreement or those in privity with them. One who is in no sense a party to the covenant cannot properly be restrained from carrying on such competing business although he may properly be restrained

from aiding the covenanter in violating the covenant or from employing the covenanter in such a way as would involve a breach of the covenant or from engaging in a competing business, in partnership with, or as an agent or employee of the seller. The court may, where the contract is valid, enjoin the party complained of not only from violating its terms but also from employing or combining with others to accomplish the same result. The rule that a stranger to a restrictive covenant can properly be enjoined from engaging in business with a covenanter so as to result in a breach of the covenant applies to corporations. Ordinarily, however, the corporation should not be enjoined from conducting a business independently of the covenanter, unless the circumstances are such that the corporation is to be regarded as the alter ego of the covenanter or a mere instrumentality by means of which the covenanter seeks to evade the agreement. 28 Am.Jur. 298, sec. 104.

[4, 5] It has recently been held that in California an action will lie for unjustifiably inducing a breach of contract (Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P. 2d 631), and that a contracting party may enjoin a stranger to the contract from unlawfully interfering with his business or his rights under the contract where the acts complained of would result in irreparable damage for which he has no adequate remedy at law. California Grape Control Board, Ltd., v. California Produce Corporation, Ltd., 4 Cal.App.2d 242, 40 P.2d 846.

Assuming without deciding that respondents Billings, not being parties to the contract of sale of the good will of a business, may also be enjoined against competitive operation of the business in question (Fleckenstein Bros. Co. v. Fleckenstein, 66 N.J.Eq. 252, 57 A. 1025, 1028; Thompson v. Andrus, 73 Mich. 551, 41 N. W. 683, 686), we have only the question before us to determine on this appeal whether, under the evidence, the trial court was justified in denying appellant the additional relief sought as against the respondents Billings, i. e., (1) from operating or proceeding further with the construction of the plant; (2) selling or agreeing to sell any sand, rock or gravel products therefrom.

Section 526 of the Code of Civil Procedure provides when an injunction may be granted and when an injunction cannot be granted.

[6] As a general rule, the power of a court over its orders and decrees in injunction is the same as that which it, as a court of equity, exercises over its other orders or decrees. De Godey v. Godey, 39 Cal. 157; 28 Am.Jur., page 486, sec. 315; Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co., 11 Cal.2d 634, 662, 82 P.2d 3, 118 A.L.R. 486; Vesper v. Forest Lawn Cemetery Ass'n, 20 Cal. App.2d 157, 67 P.2d 368; Willis v. Lauridson, 161 Cal. 106, 118 P. 530.

In Slade v. Sullivan, 17 Cal. 102, the trial court denied an application for injunctive relief. In upholding that order the Supreme Court said: "We do not see upon what ground we could interfere with the decision in this case. The prayer for an injunction was addressed to the sound discretion of the court, and we cannot perceive that there was any abuse of discretion in refusing to grant it. * * * It does not appear that any of the injuries, for which, if committed, he will be entitled to recover, may not be compensated in damages, and under the circumstances, we cannot undertake to say that an injunction was improperly refused."

[7] While the evidence in this case might well support an opposite conclusion, it cannot be said that the failure of the trial court to include as a part of the injunctive decree the additional relief sought was an abuse of discretion, especially as there is evidence supporting the specific determination that G. W. and A. W. Billings did not conspire with their codefendants to breach the contract.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

49 Cal.App.2d 319

FISCHER et al. v. HENDLER.

Civ. 12000.

District Court of Appeal, First District, Division 2, California.

Jan. 27, 1942.

1. Easements ⇐16

At common law where owner of two tenements sells one the purchaser takes the tenement with all of benefits that appear at time of sale to belong to it as between it and the property which vendor retains.

2. Easements ⇐16

The elements necessary to create an "easement by implied grant" are a separation of the title, before separation takes place the use which gives rise to easement must be so long continued and so obvious as to show that it was intended to be permanent, and easement must be reasonably necessary to the beneficial enjoyment of land granted. Civ.Code, § 1104.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement by Implied Grant".

3. Easements ⇐36(1)

In action by purchasers of building against vendor's grantor as owner of adjacent lot to restrain interference with easement by implied grant for passage of surface waters through opening in cement curb, purchasers were not required to show that drain was the only method possible to carry excess water from their land or that because of such absolute necessity grantor must have been deemed to have intended to include the right of way in the grant, but the showing that drain was reasonably necessary for beneficial use of the land granted was sufficient. Civ.Code, § 1104.

4. Easements ⇐36(3)

Evidence that grantor owned two adjacent lots and graded and cemented the back yard of one so that surface and rainwater would flow through the opening in curbing onto the adjacent lot, that drainage system was used continuously by the grantor for five years prior to separation of title and was used for two and a half years thereafter by grantee's transferees, and that when grantor closed the opening the water accumulated in other lot, causing the yard and its facilities to become less accessible to ordinary use, established an "easement by implied grant" in favor of transferees. Civ.Code, § 1104.

5. Easements ⇐15

The rule of easements created by implied grant applies to city lots as well as to rural property. Civ.Code, § 1104.

6. Damages ⇐62(1)

One suffering injury by carelessness of another must go to some trouble to avoid or lessen the damage if a temporary expedient or slight expense will do so, but a person who is suffering from a continuous nuisance need not take active measures involving considerable expense which may or may not be practical as a means of minimizing the damage.

7. Damages ⇐62(3)

A reasonable amount of compensation for damages resulting from obstruction of easement by implied grant for drainage of surface water onto adjacent lot was not improperly awarded on ground that plaintiffs neglected to minimize the damage by removing the standing water, where plaintiffs reopened the hole in cement curb at various times in attempt to avoid damage done by the standing water, and plaintiffs were not required to incur the considerable expense of removing the cement and changing the grade of the yard so that excess water would drain off onto street.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Samuel Fischer and others against Victoria Hendler for an injunction to restrain defendant from interfering with an easement and to recover damages. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Sidney Sampson and Sidney J. Unickel, both of Los Angeles, for appellant.

Cecil Vinnicof, of Los Angeles, for respondents.

NOURSE, Presiding Justice.

Defendant appeals from a judgment declaring plaintiffs to be the owners of an easement created by implied grant, enjoining her from interfering with the use of the easement and awarding damages in favor of plaintiffs in the sum of $165 plus costs.

The facts of the case are undisputed and appear from the stipulation to be as follows: In July, 1932, defendant owned two adjoining parcels of real property situated in the city of Los Angeles and designated as lots 18 and 19 of block "K" of the Forest Heights Tract. She constructed a four-unit dwelling on lot 18 and a four-car garage at the rear of the same lot. The remainder of the backyard was graded and cemented in such a way that it sloped down toward a small opening in a cement curb and wooden fence which had been erected on the boundary line between the two pieces of property; the yard was constructed by defendant in this manner so that rain and excess surface waters would flow from lot 18 onto lot 19. In March, 1937, defendant sold lot 18, together with the improvements thereon, to a purchaser who immediately transferred the property to plaintiffs. At all times during the aforementioned conveyances the cement surface of the backyard of lot 18 and the hole in the curb remained open and visible. For the succeeding two and one-half years defendant allowed the surface waters from lot 18 to drain through the opening onto lot 19 which she had retained, but in September, 1939, defendant closed the opening in the curb thus preventing the passage of water from plaintiffs' property onto her lot. This action caused the surface waters to flood the four-car garage and fence on lot 18. Plaintiffs thereafter opened the hole in the cement curb, and at various intervals between September, 1939, and February, 1941, the parties were engaged in reclosing and reopening the hole. Finally in the latter month plaintiffs instituted the present action for an injunction and for damages in the sum of $300. The court decreed that plaintiffs were the owners of an easement created by implied grant for the passage of all surface waters through the opening. The judgment entered in favor of plaintiffs restrained defendant from obstructing or closing the opening in the curb, ordered her to open the passageway and to permit the passage of surface waters from lot 18 onto lot 19 and awarded plaintiffs damages in the sum of $165 plus costs. Defendant appeals from the judgment.

The basis for the judgment entered by the trial court was its conclusion that respondents were the "owners of an easement created by implied grant for the passage of all surface waters through an opening approximately eight inches wide and six inches high in a cement curb and wooden fence erected on the border of Lot 18. * * *" Appellant argues that no easement was created by implied grant because it was not necessary to the reasonable enjoyment of the property, and therefore the conclusion of the lower court was erroneous.

[1] Subsequent to 1932 when appellant owned both parcels of property she allowed the surface and rain waters to drain from lot 18, the dominant estate, to lot 19, the servient estate, through the opening in the curb which she had constructed. In 1937, she sold the dominant estate and retained the servient estate. The common-law rule was to the effect that where the owner of two tenements sells one of them the purchaser takes the tenement with all of the benefits that appear at the time of the sale to belong to it as beween it and the property which the vendor retains. 9 Cal.Jur. 957, and cases cited therein. This rule is embodied in section 1104 of the Civil Code which provides:

"A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed."

[2, 3] Under the code section the courts of this state have set forth certain elements necessary to create an easement by implied grant. The following things are required: (1) A separation of the title; (2) before the separation takes place the use which gives rise to the easement shall have been so long continued and so obvious as to show that it was intended to be permanent; and (3) the easement shall be reasonably necessary to the beneficial enjoyment of the land granted. Beem v. Reichman, 36 Cal.App. 258, 263 and 264, 171 P. 972; Grimmesey v. Kirtlan, 93 Cal.App. 658, 664, 270 P. 243; 9 Cal. Jur. 958. We are referring here to an easement implied in the grant of severance of the dominant and servient estates as outlined in section 1104 of the Civil Code, as distinguished from a necessary

easement, or "way of necessity." As to the former the authorities uniformly hold to the three essentials above noted when that question has been directly presented. There is little, if any, difference between the expression "reasonably necessary to the beneficial enjoyment of the land granted" and the expression found in the code section "for the benefit thereof." In the case here the respondents successfully proved that the easement claimed was "reasonably necessary to the beneficial enjoyment of the land granted" and thus met the code requirement that it was "for the benefit thereof." They were not required to show that the drain was the only method possible to carry excess water from their land, or that, because of such absolute necessity, the grantor must have been deemed to have intended to include the right of way in the grant. Relying upon the showing of the apparent and obvious use of the drain for a long period of time preceding the severance, they met the terms of the statute by the proof that it was "reasonably" necessary (not absolutely necessary, nor merely convenient) for the beneficial use of the land granted. The distinction between an easement by implication arising out of apparent and continued use, and an easement by necessity is clearly shown in 17 Am.Jur. 948, 959; 28 C.J.S., Easements, §§ 33, 34, pp. 691, 695; 9 Cal.Jur. 957, 967–969.

[4] The undisputed facts of the instant case show that all of these required elements are present. (1) Appellant owned both lots until 1937 when she separated title by transferring lot 18 to respondents' predecessor in interest. (2) In 1932 appellant graded and cemented the backyard of lot 18 so that the surface and rain water would flow through the opening in the curbing onto lot 19. This construction was of a permanent character and the drainage system was used continuously by appellant for five years prior to the separation of title. Such long continued use plus the fact that the grading and the opening in the curb were obvious and visible at all times indicates unquestionably appellant's intention that it should be permanent. (3) The drainage system involved had been used for a period of seven and one-half years, and the evidence shows that when appellant closed the opening in the curb the water accumulated in the backyard of lot 18 thereby causing the yard and its facilities to become less accessible to ordinary use. We must conclude, therefore, that the easement was necessary for the reasonable enjoyment of the parcel sold in the form which it assumed at the time of the transfer. Grimmesey v. Kirtlan, supra.

[5] Appellant's argument that the owner of a city lot is not required to accept surface or waste waters from the adjoining property is not applicable. The rule of easements created by implied grant applies to city lots as well as to rural property. A. Hamburger & Sons, Inc., v. Lemboeck, 20 Cal.App.2d 565, 67 P.2d 380. In view of the evidence discussed above it is clear that the purchaser took the property with the benefits that appeared at the time of the sale to belong to it as between it and the lot which the vendor retained. (Jersey Farm Company v. Atlanta Realty Company, 164 Cal. 412, 129 P. 593), and that the trial court did not err in concluding that respondents were the owners of an easement created by implied grant.

[6, 7] Appellant also argues that the trial court erred in allowing respondents damages in view of the fact that they neglected to fulfill their duty to minimize the damage by removing the standing water. We cannot agree with this contention. One who suffers injury by the carelessness of another must go to some trouble to avoid or lessen the damage if a temporary expedient or slight expense will do so, but a person who is suffering from a continuous nuisance is not compelled to take active measures involving considerable expense which may or may not be practical as a means of minimizing the damage. Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 28, 276 P. 1017. In view of this rule respondents fulfilled their duty when they reopened the hole in the curb at various times in an attempt to avoid the damage done by the standing water. They could not be expected to incur the considerable expense of removing the cement and changing the grade of the yard so that the excess water would drain off onto the street. The trial court did not commit error, therefore, in awarding respondents a reasonable amount of compensation for the damages which they suffered as a result of the actions of appellant.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.

49 Cal.App.2d 293

In re SHIELDS' ESTATE.

LISERANY et al. v. OVALLE et al.

Civ. 11843.

District Court of Appeal, First District, Division 2, California.

Jan. 26, 1942.

1. Judgment ⇐199(3)

If evidence produced would reasonably support verdict of jury, it is error to grant a motion for judgment non obstante veredicto.

2. Wills ⇐55(6)

Testimony that testator was practically always drunk when observed by witnesses prior to date of execution of will, and that in witnesses' opinion testator was not of sound mind when in such condition, was not sufficient to support an inference that testator was either drunk or lacked testamentary capacity when he executed will.

3. Wills ⇐52(1)

In absence of proof that intemperate use of liquor by testator has actually destroyed testamentary capacity, no presumption will be indulged, however long continued the habit is shown to have been, that testamentary capacity has thus been destroyed.

4. Wills ⇐55(1)

In will contest, evidence that testator was sober and of sound mind when will was made could not be overcome by proof offered as to testator's condition at a previous time, and such proof, even in absence of evidence of competency, would not have been sufficient to overcome legal presumption that testator was competent when will was executed.

5. Wills ⇐52(3)

"Insanity" exists as a matter of law, with respect to mental capacity to execute a will, only from the time it is shown to exist, and proof of subsequent insanity will not create or carry a presumption of its past existence.

See Words and Phrases, Permanent Edition, for all other definitions of "Insanity".

6. Wills ⇐55(1)

In will contest, evidence did not support verdict that testator was not of sound and disposing mind when will was executed.

7. Wills ⇐166(1)

In will contest, evidence that beneficiaries under will, who were not related to testator, had become testator's tenants and had prepared meals for testator and kept testator's flat clean and that testator had taken beneficiaries for rides in his automobile would not have supported a finding of "undue influence".

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

8. Wills ⇐166(12)

To establish "undue influence" with respect to the execution of a will, evidence must be produced that pressure was brought to bear directly upon the testamentary act, but such evidence itself need not be direct.

9. Wills ⇐166(12)

"Undue influence" with respect to the execution of a will may be established by circumstantial evidence, but evidence must do more than raise a suspicion, and it must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with claim that will was spontaneous act of alleged testator.

10. Wills ⇐166(1)

In action to set aside a will on ground of undue influence, it is necessary to show that the influence was such as, in effect, to destroy testator's free agency and substitute for his own another person's will.

11. Wills ⇐155(1)

Mere general influence, however strong and controlling, not bearing upon the testamentary act, is not sufficient to establish "undue influence", which must be influence used directly to procure will and must amount to coercion destroying free agency of testator.

12. Wills ⇐155(1)

A mere opportunity to influence testator's mind, even coupled with an interest or a motive to do so, is not sufficient to establish "undue influence".

13. Wills ⇐163(2)

Even if evidence in a will contest had shown the existence of a confidential relationship between testator and beneficiaries under will, such fact would not, standing alone, have shifted the burden to proponents to show a lack of undue influence.

14. Wills ⇐163(2)

A presumption of undue influence arises from proof of the exercise of a confidential relation between testator and a beneficiary, coupled with activity on beneficiary's part in preparation of will, but the confidential relation alone is not sufficient to show "undue influence".

15. Wills ⇐82

A will giving testator's entire estate to beneficiaries who were not related to testator could not be attacked by testator's collateral relatives on ground that will was unnatural in omitting to provide for them, especially where relatives had not seen testator for many years.

16. Wills ⇐166(1)

That a will was prepared from directions given by testator to his attorney when no one else was present was strong evidence that will was testator's voluntary act.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge pro tem.

Will contest proceedings in the matter of the estate of Alvin W. Shields, deceased, between Eleanor Liserany and others, contestants, and Adeline Ovalle and others, proponents. From a judgment of nonsuit on the issue of undue influence and a judgment for proponents notwithstanding the verdict on the issue of unsoundness of testator's mind at the time of execution of the will, contestants appeal.

Judgments affirmed.

Gus L. Baraty, Charles V. Barfield, and Robert M. Davis, all of San Francisco, for appellants.

Alfred J. Hennessy and Alfred Voyce, both of San Francisco, for respondents.

DOOLING, Justice pro tem.

This is an appeal by the contestants of the decedent's will from a judgment of nonsuit granted by the trial court on the issue of undue influence and a judgment notwithstanding the verdict on the issue of the unsoundness of mind of the testator at the time of the execution of the will.

The contestants are first cousins of the testator and his nearest living relatives. No provision was made for any of them in the will, the testator leaving his entire estate to the respondents Ovalle who are husband and wife and not related to the testator.

The will was executed on February 28, 1936. It was prepared by Alfred Voyce, an attorney at law, from directions given to Voyce a few days before by the testator when Voyce called upon the testator at his home where the testator was recovering from a serious attack of chronic bronchitis. Voyce was at that time the attorney for the testator in the administration of the estate of his deceased wife, and no one else was present at the time that the instructions were given for the preparation of his will. It may be remarked in this connection that while Voyce subsequently became one of the attorneys for the Ovalles as proponents of the will, there is not a scintilla of evidence that he was attorney for the Ovalles in any matter at the time of the execution of the will. He had at that time only met them casually, having been introduced to them by the testator a short time before. This is mentioned because of the claim advanced by appellants in their brief that the will was prepared by the Ovalles' attorney. The claim finds no support in the evidence and need not be further mentioned.

Appellants on the issue of the lack of testamentary capacity rely upon the evidence of Catherine Spencer and John Alvin Spencer her son as to the mental condition of the testator at a time prior to the execution of the will and upon the admitted insanity of the testator commencing about the month of August, 1936, as a result of which the testator was first confined in the Park Sanitarium, a private hospital for the treatment of nervous and mental cases, and later adjudged insane and committed to a state hospital where he remained until the time of his death, and upon the evidence of Dr. Gobar, a witness called by the proponents, as to the condition of the testator commencing in June, 1936, when Dr. Gobar was first called to attend him.

The evidence of the witnesses Spencer is to the effect that for a number of years prior to 1936 the testator had been a habitual drunkard, that at the time of his wife's death on August 25, 1935, he had been drunk and his house was filthy and full of fleas, that he remained so drunk that he could not attend his wife's funeral; that thereafter for a period of a week John Alvin Spencer took the testator for rides in his automobile, that the testator was always drunk on these occasions and had hallucina-

tions that cars were coming up behind them when no cars were there, that Spencer was driving too close to the curb when such was not the fact and that he was endangering the safety of pedestrians when no pedestrians were present; that one night during this period the testator came to the Spencers' home, he was drunk and said he was afraid of the dark and they allowed him to spend the night with them; that during this period he was dishevelled, dirty, didn't shave and didn't take care of himself; he was a changed man. John Alvin Spencer did not see the testator after August or September, 1935. During the period when John Alvin Spencer saw the testator after his wife's death he was always drunk or partially drunk, and during that period it was his opinion that he was not of sound mind.

Catherine Spencer's observation of the testator extended over a longer period of time. In 1933 when her husband died the testator was too drunk to go to his funeral, and for many months before he had been under the influence of liquor; about that time a change came over him and he attended to very little business; since 1933 the use of intoxicating liquors affected Mr. Shields mentally; he wandered around the streets much dishevelled, asking people for money. After his wife's death this witness saw the testator every other day or so for two months; his house was in a terrible condition; most of the time he was under the influence of liquor; when she spoke to him everything was so confused by him that she was hardly able to know what he was talking about; one day he was telling her about people coming in the back way, how cats had been bothering him getting in the window. Her visits continued until about December, 1935, and once in January, 1936, she saw the testator walking along the street toward a place where he used to buy liquor. He had pajamas on, one leg rolled up, bedroom slippers and an overcoat. It was her opinion that he was insane "because he was continuously under the influence of liquor" and of the other facts to which she had testified.

Dr. Gobar's testimony is here referred to because, while he was called as a witness for proponents, appellants rely on his testimony on this appeal to argue that it supports an inference that the testator was suffering from senile dementia at and prior to the date of the execution of his will. Dr. Gobar was called to treat the testator in June of 1936. He was suffering from sclerosis of the liver and had fluid in the abdominal cavity or dropsy. He was very weak and not competent to transact any business when the doctor first saw him because of his extreme illness. He made a good recovery and was sitting up part time in two or three weeks. He told the doctor that he had been drinking wine considerably before his sickness began. From the doctor's observation he testified that after the first stage of the testator's illness had passed he was of sound mind until about the middle of August, at which time he began seeing things, talked to his father, mother, brother and aunt, all long dead, as if they were present. At that time he was suffering from senile dementia which is a depreciation of the brain tissue brought on in his case by sclerosis of the liver and arteriosclerosis. These are all progressive diseases which develop over a considerable period of time. The depreciation of the brain tissue may, however, in a terminal case develop very rapidly; "the brain holds up to a certain point and then through lack of nutrition it suddenly gives way * * * a case of this character goes a certain period, and then there is a sudden breakdown as a result of the groundwork having been laid before * * * and sooner or later some organ has to give. * * * In this case it happened to be the brain."

[1] We approach the consideration of the effect of this evidence in view of the established rule that if the evidence produced would reasonably support the verdict of the jury it is error to grant a motion for a judgment non obstante. In re Estate of Nelson, 134 Cal.App. 561, 25 P.2d 871; In re Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25.

[2] Taking the evidence of the witnesses Spencer as to the condition of the testator prior to the date of the execution of the will, it is to be observed that its effect was that the testator during the periods covered by their testimony was practically always drunk when they had seen him and when in that condition he was in their opinion not of sound mind. This was not enough to support an inference that at the later time when he executed his will he was either drunk or lacked testamentary capacity. In re Estate of Fisher, 202 Cal. 205, 259 P. 755; In re Estate of Putnam, 1 Cal.2d 162, 34 P.2d 148; In re Estate of Arnold, supra; In re Estate of Garvey, 38 Cal.App.2d 449, 101 P.2d 551.

It was said in Re Estate of Fisher, supra, 202 Cal. at page 212, 259 P. at page 758: "Proof that decedent was 'incompetent' or 'insane' when so intoxicated that it was necessary to arrest him or upon occasions when, in the words of the witness, he 'only needed another drink to put him down and out,' is entirely insufficient to show that decedent never enjoyed lucid intervals during which he was competent to execute a will. The witness himself testified that the decedent was not released from jail until sober and that he was not insane when sober."

In connection with the sentence last quoted, it is to be remarked that on cross-examination the witness Catherine Spencer testified that she was in court on the day that the testator was appointed administrator of his wife's estate, she saw him sworn and examined, and he was not intoxicated that day, he was sober.

[3] It is likewise said in Re Estate of Fisher, supra, 202 Cal. at page 209, 259 P. at page 757: "In the absence of proof that the intemperate use has actually destroyed testamentary capacity, no presumption will be indulged, however long continued the habit is shown to have been, that it has thus been destroyed." And again on page 210 of 202 Cal., on page 757 of 259 P.: "It [proof of a commitment for inebriacy] is not, however, even prima facie evidence that the use of alcoholic liquors has caused a permanent impairment of the mental faculties and a loss of self-control which persists after the temporary effects of the liquor have passed away, nor will it be presumed from the fact that the subject of the commitment was a victim of the liquor habit at the time of the commitment that such habit persisted thereafter. It is only in those cases where the mental disease has become settled that the mental disorder is presumed to continue."

In Re Estate of Arnold, supra, a much stronger case was presented for the contestant. There a physician who had treated the testator for a period of six years for being drunk over 200 times testified that when he saw him during that period he was always drunk, that he was suffering from chronic alcholism and that he was of unsound mind. The court said of this testimony at page 585 of 16 Cal.2d, at page 31 of 107 P.2d: "He referred to Arnold drunk and not Arnold sober. This evidence falls far short of that required to prove that Arnold was mentally incompetent to make a valid will. In fact it is no evidence of the unsoundness of mind of a sober individual."

[4] The evidence was that when the testator made this will he had not had a drink for several weeks, that he was sober and of sound mind. In view of the rules laid down by the cases cited, including those quoted from supra, this evidence of the testator's competency not only could not be overcome by the proof offered as to the testator's condition at a previous period, but even in the absence of such evidence of competency it would not have been sufficient to overcome the legal presumption that he was competent at the time that he executed his will.

[5] Of the testimony of testator's condition after he executed his will appellants attempt to seize upon an isolated portion of Dr. Gobar's testimony, that senile dementia and the other inducing ailments from which the testator suffered are progressive and the result of physical changes that take place over a considerable period of time, to argue that the testator must have been incompetent on February 28, 1936, at the time when his will was executed. This ignores the rest of Dr. Gobar's testimony completely. It will not do to wrench a fragment of the testimony from its context. Dr. Gobar's testimony above recited was that the testator was competent from a week or ten days after he first saw him to some time in August when the cumulative effects of his condition suddenly culminated in his becoming insane. "Insanity exists as a matter of law only from the time it is shown to exist and proof of subsequent insanity will not create nor carry a presumption of its past existence." In re Estate of Perkins, 195 Cal. 699, 235 P. 45, 46; In re Estate of Dolbeer, 149 Cal. 227, 235, 86 P. 695, 9 Ann.Cas. 795; In re Estate of Finkler, 3 Cal.2d 584, 595, 596, 46 P.2d 149.

[6] It was not proved by any evidence that the testator when sober lacked testamentary capacity at any time prior to the date of the execution of his will, the only evidence on the subject was that at the time of its execution he possessed testamentary capacity and continued to possess it, except for a brief temporary incapacity caused by the extreme weakness brought on by a severe illness in June, 1936, until at least some time in August of that year.

There being no evidence to support the jury's verdict that the testator was not of sound and disposing mind at the time the will was executed, the judgment notwithstanding, the verdict must be affirmed.

[7-12] On the issue of undue influence it was shown that the Ovalles became tenants of the testator in September, 1935. They occupied the upper flat and the testator occupied the lower one in a building owned by the testator. They felt sorry for the testator and cleaned up his flat which was very dirty, kept it clean thereafter and used to prepare some of his meals. The testator took them for rides in his automobile. The Ovalles were not related to the testator and he had never known them before they rented his flat. Neither of the Ovalles was present when the testator directed Voyce to prepare the will nor when it was executed. Shields did not tell them that the will had been executed in their favor until the May following its execution. A cousin of Mrs. Ovalle was a witness to the will. Her testimony was that she was paying a friendly visit to the testator because he had been ill and he asked her to act as a witness to the will. There is nothing in this evidence to support a finding of undue influence.

"Evidence must be produced that pressure was brought to bear directly upon the testamentary act, but this evidence itself need not be direct. Circumstantial evidence is sufficient. It must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator." In re McDevitt's Estate, 95 Cal. 17, 33, 30 P. 101, 106; In re Estate of Leahy, 5 Cal.2d 301, 304, 54 P.2d 704.

"In an action to set aside a will of a deceased person on the ground of undue influence, it is necessary to show that the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will. [In re] Estate of Motz, 136 Cal. 558, 563, 69 P. 294. Evidence must be produced that pressure was brought to bear directly upon the testamentary act. In re McDevitt's Estate, 95 Cal. 17, 33, 30 P. 101. Mere general influence, however strong and controlling, not to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount to coercion destroying free agency on the part of the testator. [In re] Estate of Keegan, 139 Cal. 123, 127, 72 P. 828. It is further held that mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient. [In re] Estate of Easton, 140 Cal.App. 367, 371, 35 P.2d 614." In re Estate of Arnold, supra, 16 Cal.2d page 577, 107 P.2d page 27.

[13, 14] It is claimed, however, that the evidence showed that the Ovalles stood in a confidential relationship to the testator and this shifted the burden to them to show a lack of undue influence. We do not agree that such a confidential relationship was shown but conceding that it was this did not, standing alone, shift the burden to the proponents.

"In the Estate of Baird, 176 Cal. 381, 384, 168 P. 561, 563, we find the applicable rule stated in the following concise language: 'As suggested in [Matter of] Estate of Higgins, 156 Cal. 257, 261, 104 P. (6), 8, a "presumption of undue influence" arises from proof of the exercise of a confidential relation between the testator and such a beneficiary, "coupled with activity on the part of the latter in the preparation of the will." The confidential relation alone is not sufficient. There must be activity on the part of the beneficiary in the matter of the preparation of the will'." In re Estate of Arnold, supra, 16 Cal.2d page 581, 107 P.2d page 29.

[15] The claim that the will was unnatural in omitting to provide for contestants is equally unfounded. None of them had seen the testator since 1920 when they met at the funeral of a relative except for two or three chance meetings on the streets of San Francisco. They practically had lost all contact with one another for a great many years. They were all collateral relatives and not in any legal sense the natural recipients of the testator's bounty. In re Estate of McDonnell, 109 Cal.App. 577, 293 P. 651; In re Estate of Nolan, 25 Cal.App.2d 738, 742, 78 P.2d 456; In re Estate of Finkler, supra, 3 Cal.2d pages 597, 598, 46 P.2d 149; In re Estate of Leahy, supra, 5 Cal.2d page 303, 54 P.2d 704.

[16] The fact that the will was prepared from directions given by the testator to his attorney when no one else was present is very strong evidence that it was

the testator's voluntary act. In re Estate of Unger, 188 Cal. 714, 206 P. 1003; 26 Cal.Jur. 728.

The judgments appealed from are affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.



BUTCHER v. BROUWER.

Civ. 13238.

District Court of Appeal, Second District, Division 2, California.

Jan. 27, 1942.

Hearing Granted March 27, 1942.

1. Execution ⇐73

For issuance of a writ of execution on a judgment more than five years after it was entered, judgment creditor need not file an affidavit showing reasons for his failure to have caused to be issued an execution within five years after entry of the judgment before it became outlawed by limitation. Code Civ.Proc. § 336, subd. 1; §§ 681, 685.

2. Execution ⇐73

Under statute relating to enforcement of judgment after lapse of five years from date of its entry by leave of court upon motion, the failure of judgment creditor to file an affidavit stating reasons for his not having caused to be issued an execution within the period of five years after entry of judgment does not deprive trial court of power to order the issuance of a writ of execution after five years have elapsed from date of entry of judgment, but the failure to file such an affidavit will justify denying the application for a writ of execution. Code Civ.Proc. §§ 681, 685.

3. Execution ⇐73

That judgment debtor has had property subject to execution during five years following entry of judgment is not a ground for refusal of order for issuance of a writ of execution pursuant to statute relating to enforcement of judgment after lapse of five years from date of its entry by leave of court upon motion. Code Civ.Proc. § 685.

4. Execution ⇐73

The mere lapse of time is not a sufficient reason for denying an order for issuance of a writ of execution pursuant to statute relating to enforcement of judgment after lapse of five years from date of its entry by leave of court upon motion. Code Civ.Proc. § 685.

5. Execution ⇐75

Where judgment creditor for 7½ years, during portion of which time judgment debtor possessed property upon which execution might have been levied, failed to take any steps to collect the judgment and during such intervening period, judgment debtor and his wife commingled their community property with wife's separate property and incurred personal indebtedness in connection with such property, but delay of judgment creditor operated in favor of judgment debtor rather than to his detriment, the issuance of a writ of execution on such judgment was not an abuse of discretion. Code Civ.Proc. § 685.

6. Appeal and error ⇐843(1)

Where appellant presented a stipulation to the appellate court waiving a question presented in prior appeal wherein a rehearing was granted, the appellate court would not discuss such question.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge. Affirmed.

Suit by R. L. Butcher against John C. Brouwer wherein a money judgment was entered in favor of plaintiff. The plaintiff thereafter assigned money judgment to Sally Williams. From an order for issuance of an execution more than five years after entry of the judgment, which order was granted upon motion of assignee of the money judgment, the defendant appeals.

Affirmed.

For prior opinion see 120 P.2d 506.

George Acret, of Los Angeles, for appellant.

Emmett A. Tompkins, of Los Angeles, for respondent.

McCOMB, Justice.

From an order directing that an execution issue pursuant to section 685 of the Code of Civil Procedure, more than five years after the entry of judgment,

defendant John C. Brouwer appeals. The order was granted upon the motion of Sally Williams, the assignee of a money judgment in favor of plaintiff.

So far as material here these are the essential facts:

January 10, 1929, the appealing defendant was adjudicated a bankrupt. June 27, 1929, plaintiff obtained a default judgment against appealing defendant in the sum of $2,082.22, together with costs amounting to the sum of $22. Thereafter partial payments in the sums of $485.21 and $165.18 were made upon the judgment. December 16, 1932, the judgment was assigned to Sally Williams. On the same day a writ of execution was issued and caused to be levied upon the property of John C. Brouwer, the appealing defendant. Thereafter Mr. Brouwer applied to this court for a writ of mandate requiring the superior court to quash the writ of execution which had been issued. This court issued such an order and also ordered the superior court "to desist from all attempt to enforce" the judgment "against petitioner John C. Brouwer until he is finally either granted or denied a discharge as a bankrupt in the bankruptcy proceeding now pending, and until the proper presentation of proof of such final grant or denial to" the superior court. (Brouwer v. Superior Court, 130 Cal.App. 163, 168, 19 P.2d 834.)

February 6, 1933, a special master heard the application of appealing defendant for his discharge in bankruptcy and made and filed a report recommending that such application be denied. His report contained the following findings:

"(1) That said bankrupt committed an offense punishable by imprisonment, as provided by said Bankruptcy Act, in that said bankrupt made a false oath and rendered a false account in and in relation to this proceeding in bankruptcy, in that he knowingly and fraudulently omitted from schedule B and from his schedules in bankruptcy, a statement of his ownership of an equitable interest owned by him in said Chrysler automobile.

"(2) That said bankrupt committed an offense punishable by imprisonment, as provided by said Bankruptcy Act, in that the bankrupt knowingly and fraudulently concealed from M. L. Rabbitt, his trustee in bankruptcy, duly appointed on the 31st day of January, 1929, and duly qualified on the 4th day of February, 1929, his said equitable interest in said Chrysler automobile, and further find that on examination of said bankrupt, he stated that he did not own any interest in said automobile and continued to so make said claim for some considerable time after the qualification of said trustee herein.

"(3) That said bankrupt committed an offense punishable by imprisonment, as provided in said Bankruptcy Act, in that said bankrupt knowingly and fraudulently concealed from his trustee in bankruptcy, duly appointed on the 31st day of January, 1929, and duly qualified on the 4th day of February, 1929, the sum of $600.00, and in this respect, that at the time of the filing of the petition in bankruptcy herein, and at the time of the adjudication herein, said bankrupt was the owner of the sum of $600.00, and that he knowingly and fraudulently failed to list same in the schedule of his assets and failed to turn the same over to his said trustee in bankruptcy for some considerable time after the qualification of said trustee, and further find that in an examination in open court he stated that he did not have any money or property other than listed in his schedules."

This report was confirmed on February 27, 1933, by the United States District Court, and, no appeal having been taken therefrom, the order became final and a copy of the order was filed in the Superior Court of Los Angeles County May 19, 1933.

September 30, 1940, plaintiff's assignee instituted the present proceeding, which resulted in the trial court's making an order on March 5, 1941, directing the issuance of a writ of execution against the property of the appealing defendant.

It is necessary for us to determine two questions, which will be stated and answer hereunder *seriatim*.

[1] *First: Is it a prerequisite for an order for the issuance of a writ of execution pursuant to the provisions of section 685 of the Code of Civil Procedure that the judgment creditor file an affidavit showing reasons for his failure to proceed under section 681 of the Code of Civil Procedure before the judgment became outlawed by the limitation in subdivision*

1, section 336 of the Code of Civil Procedure?

This question must be answered in the negative. Section 685 of the Code of Civil Procedure as amended in 1933 reads as follows:

"In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor *accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion.*" (Italics added.)

[2] It is the law in California that the italicized portion of the foregoing provision of the Code of Civil Procedure means that the failure of the judgment creditor to file an affidavit setting forth the reasons why he has not proceeded in compliance with the provisions of section 681 of the Code of Civil Procedure, that is, his not having caused to be issued an execution within the period of five years after the entry of judgment, does not deprive the trial court of power to order the issuance of a writ of execution after five years has elapsed from the date of the entry of judgment, but that the failure to file such an affidavit will constitute a valid reason for denying the application for a writ of execution. (Peers v. Stoll, 32 Cal.App. 2d 511, 513, 90 P.2d 119 (a hearing was denied by the Supreme Court in this case); McClelland v. Shaw, 23 Cal.App.2d 107, 110, 72 P.2d 225, et seq.; see, also, Passow v. Bell, 27 Cal.App.2d 360, 361, 81 P.2d 224.)

The majority opinion in Williams v. Goodin, 17 Cal.App.2d 62, 61 P.2d 507, does not state a contrary rule. In Williams v. Goodin the trial court had denied a motion for the issuance of a writ of execution after more than five years had elapsed from the date of the entry of the judgment. Therefore, if we assume that in such case there was no showing by the judgment creditor of the reason for his failure to have a writ of execution sooner issued, the trial court's action was merely in accordance with the provisions of section 685, supra, to the effect that the failure to file a proper affidavit "setting forth the reasons for failure to proceed in compliance with the provisions of section 681" of the Code of Civil Procedure, shall constitute sufficient reason for the denial of the application for a writ of execution.

Second: Did the trial court abuse its discretion in ordering the issuance of a writ of execution, where the evidence disclosed that the judgment creditor for seven and one-half years failed to take any steps to collect the judgment, during which time the appealing defendant and his wife co-mingled their community property with the wife's separate property and incurred a personal indebtedness amounting to $17,000 in connection with such property?

[3, 4] This question must also be answered in the negative and is governed by the following pertinent rules of law:

(1) That the judgment debtor has had property subject to execution during the five-year period following the entry of judgment is not a ground for refusal of an order for the issuance of a writ of execution pursuant to the provisions of section 685 of the Code of Civil Procedure. (McClelland v. Shaw, 23 Cal.App.2d 107, 113, 72 P.2d 225.)

(2) The mere lapse of time is not a sufficient reason for denying an order for the issuance of a writ of execution pursuant to section 685, supra (McClelland v. Shaw, supra, 23 Cal.App.2d page 111, 72 P.2d 225).

[5] The facts in the instant case disclose that the judgment creditor allowed seven and one-half years to pass, during a portion of which time the judgment debtor possessed property upon which an execution might have been levied. Under the rules above stated it is clear that these facts alone would not have justified the trial court in denying plaintiff's assignee an order under the provisions of section 685, supra. So far as appears from the record, the delay upon the judgment creditor's part operated in favor of appealing defendant rather than to his detriment.

[6] Since the appealing defendant has presented a stipulation in this court waiving the question presented in Butcher v. Brouwer, 48 Cal.App.2d 650, 120 P.2d

506, 510, in which case we granted a rehearing, the matter there considered is not discussed in this opinion.

For the foregoing reasons the order is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurrred.



49 Cal.App.2d 268

VOJKOVICH v. URSICH et al.

Civ. 13225.

District Court of Appeal, Second District, Division 2, California.

Jan. 22, 1942.

Rehearing Denied Feb. 16, 1942.

Hearing Denied March 19, 1942.

1. Seamen ⇐29(5)

Plaintiff having elected to proceed under the Jones Act to recover for injuries resulting from defendants' alleged negligence in failing to furnish him a safe place to work on their fishing vessel, it was immaterial, on the question of jurisdiction, that he might have proceeded under the general maritime law in a federal court, since in an action under the Jones Act the injured seaman may recover not only for injuries due to negligence but also for injuries caused by defective condition of vessel or appliances, where defect is due to negligence. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51; Jones Act, 46 U.S.C.A. § 688.

2. Seamen ⇐29(5)

Injured seaman's allegation, in complaint in action under the Jones Act, that defendants negligently kept, maintained, and operated an ice blower in hold of fishing vessel without any protecting guard to prevent employees on vessel from coming in contact with revolving fan and other moving parts of blower while working, was sufficient to charge defendants with negligence in maintaining defective equipment or appliances, and it was not necessary to allege that injury was occasioned by the negligence of an officer, agent, or employee of defendants. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51; Jones Act, 46 U.S.C.A. § 688.

3. Admiralty ⇐20

Where an injury occurs on land, state workmen's compensation laws apply, and the maritime law does not operate, but, where it occurs on navigable waters, the jurisdiction of admiralty is prima facie exclusive.

4. Admiralty ⇐20

Where an injury occurs on navigable waters and in the performance of a maritime contract, it is within the exclusive jurisdiction of admiralty unless the contract is of merely local concern, its performance has no direct effect on navigation or commerce, and application of state law would not necessarily work material prejudice to any characteristic feature of the general maritime law or interfere with the proper uniformity of that law, and state workmen's compensation laws are applicable to maritime service on navigable waters only when the service is within those three exceptions.

5. Admiralty ⇐20

Where an injury occurs on navigable waters but in the performance of a nonmaritime contract, it is, at least prima facie, local and within the operation of state workmen's compensation laws.

6. Seamen ⇐2

Plaintiff, who was employed as a tuna fisherman to go on the high seas and was actually aiding in preparation for voyage to Mexico at time of injury which occurred on navigable waters, was a "seaman" entitled to all of the benefits of the Jones Act, and hence the Superior Court had jurisdiction of his action for damages under that act, and his exclusive remedy was not with the Industrial Accident Commission. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51; Jones Act, 46 U.S.C.A. § 688.

See Words and Phrases, Permanent Edition, for all other definitions of "Seaman".

7. Seamen ⇐2

The term "seaman" within the Jones Act includes all those on board a vessel whose labor contributes to the accomplishment of the main objective of the voyage. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51; Jones Act, 46 U.S.C.A. § 688.

8. Seamen ⇐29(2)

Under the Jones Act, an employer is not held absolutely responsible to furnish employees with a safe place in which to work, but is only bound to exercise reasonable care to see that the place is reasonably safe. Fed-

eral Employers' Liability Act § 1, 45 U.S.C.A. § 51; Jones Act, 46 U.S.C.A. § 688.

9. Seamen ⊂=29(5)

In seaman's action under the Jones Act to recover for injuries allegedly resulting from defendants' negligence in failing to furnish a safe place to work on their fishing vessel, instructions that a vessel owner must supply a safe place to work and must furnish and maintain equipment and appliances reasonably free from defects were erroneous as placing on defendants a heavier duty than is imposed by the applicable law. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51; Jones Act, 46 U.S.C.A. § 688.

10. Appeal and error ⊂=1172(1)

Where record disclosed substantial evidence which, had the jury been properly instructed, would have been sufficient to sustain a verdict in plaintiff's favor, an order denying defendants' motion for judgment notwithstanding the verdict was affirmed though judgment was reversed.

Apeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Mike Vojkovich against Louis Ursich and others under the Jones Act, 46 U.S.C.A. § 688, to recover damages for injuries. From a judgment for plaintiff and from an order denying their motion for judgment notwithstanding the verdict, defendants appeal.

Judgment reversed and order affirmed.

Lasher B. Gallagher, of Los Angeles, for appellants.

Ames Peterson and Hugh Kelley, both of Los Angeles, for respondent.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover damages for injuries resulting from the negligence of defendants in failing to furnish plaintiff a safe place in which to work on their fishing vessel, "Dauntless." Defendants have appealed from a judgment in favor of plaintiff and from an order denying their motion for judgment notwithstanding the verdict.

At the time of his injury plaintiff, who was employed by defendants as a fisherman, was engaged in distributing ice in the hold of the "Dauntless," which was moored to a dock in San Pedro harbor. Crushed ice from a crusher located on the dock was conveyed through a gravity pipe to a device known as an ice blower which was suspended in the hold of the vessel. By means of a revolving fan in the ice blower ice was discharged from an aperture in the front of the blower to various parts of the hold. It was the duty of plaintiff and another fisherman to turn the blower in order to direct the flow of crushed ice so that it would be evenly distributed throughout the hold. Having completely filled the hold with ice, plaintiff shouted to an employee on the ice crushing machine to shut off the electric current which actuated the fan in the ice blower. Although the current was shut off at that time, the fan of the blower continued for some time to revolve of its own motion. Plaintiff, who was seated on the hatch coaming, with his feet encased in rubber boots about a foot above the surface of the ice in the hold, started to cross the ice to the opposite side of the hatch where the ice blower was located for the purpose of disconnecting the switch plug. He slipped on the ice and fell forward, involuntarily extending both hands to help break his fall. One of his hands went into the aperture of the blower and came in contact with the revolving fan and was injured.

The action was brought under the provisions of the Jones Act (46 U.S.C.A. § 688; sec. 33 of the Merchant Marine Act), which provides that any seaman who is injured in the course of his employment may, at his election, maintain an action for damages at law, and that in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. The alleged negligence of defendants consisted in the furnishing of an ice blower to be used by plaintiff with an unguarded aperture. Defendants contend that plaintiff was guilty of contributory negligence in crossing the ice in the hold when he could have walked around the hatch on the deck of the vessel.

Prior to the enactment of the Jones Act a vessel and her owner were liable under the general maritime law in the event a seaman became sick or was wounded in the service of the ship, whether through negligence or accidentally, to the extent of the seaman's maintenance and cure, and were liable for injuries received by a seaman because of the unseaworthiness of the ship and her appliances. But a seaman could

not recover for injuries sustained by the negligence of the master or any member of the crew. Pacific Steamship Co. v. Peterson, 278 U.S. 130, 49 S.Ct. 75, 73 L.Ed. 220. The Jones Act was enacted to permit a seaman to maintain an ordinary common law action for damages based on negligence, by reference, however, making such action subject to the provisions of section 1 of the Federal Employers' Liability Act, 45 U.S.C.A. § 51, relating to actions by railroad employees for personal injuries. That section provides: "Every common carrier by railroad while engaging in commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

[1, 2] It is contended by defendants that the federal courts have exclusive jurisdiction of the matter which is the subject of the present litigation, since, it is argued, the injury was occasioned by an alleged defective appliance appurtenant to the ship (i. e., because of the unseaworthiness of the vessel). Although plaintiff had the right to file an action in the federal courts, he was given the option in the Jones Act of pursuing in the state courts a common law remedy based on negligence. Since plaintiff elected to proceed under the alternative afforded by the Jones Act, it is immaterial that he might have availed himself of the existing remedy by proceeding under the general maritime law. It has been held that in an action under the Jones Act the injured seaman may recover not only for injuries due to negligence but also for injuries caused by the defective condition of the vessel or appliances appurtenant thereto where such defect is due to negligence. Stevens v. R. O'Brien & Co., 1 Cir., 62 F.2d 632. Defendants further contend that even if the action is properly based on the Jones Act the complaint fails to state a cause of action because it is not alleged that the injury was occasioned by the negligence of any officer, agent or employee of defendants. Such an allegation was unnecessary, for it is provided by section 1 of the Federal Employers' Liability Act, which by reference is made applicable to actions under the Jones Act, that recovery may be had for injuries caused by any "defect or insufficiency, due to its [the carrier's or employer's] negligence, in its * * * appliances, machinery * * * boats, wharves, or other equipment." It is alleged in the complaint that "defendants negligently kept, maintained and operated an ice blower in the hold of said vessel without any guard or any contrivance to protect and prevent persons on said vessel and employed by defendants and while working in the course of their employment from coming in contact with the revolving fan and other moving parts of said blower." This allegation is sufficient to charge negligence on the part of defendants in maintaining defective equipment or appliances.

[3-7] It is argued by defendants that if the state tribunals can exercise jurisdiction of the subject matter of the litigation the exclusive remedy is with the Industrial Accident Commission and not in the superior court. The rules for determining whether a particular case falls within the jurisdiction of the Industrial Accident Commission or a court administering the maritime law are set forth in Teahan v. Industrial Acc. Comm., 210 Cal. 342, 346, 292 P. 120, 122, as follows: "1. If an injury occurs on land, the maritime law does not operate. 2. If it occurs on navigable waters, the jurisdiction of admiralty is prima facie exclusive. 3. If an injury occurs on navigable waters and in the performance of a maritime contract, it is certainly within the exclusive jurisdiction of admiralty unless (a) the contract is of merely local concern; and (b) its performance has no direct effect upon navigation or commerce; and (c) the application of the state law 'would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.' 4. State Workmen's Compensation Laws, contractual in character, are applicable to maritime service on navigable waters, when, and only when, the service is within exceptions (a), (b), and (c) above. 5. If, however, the injury occurs on navigable waters, but in the performance of a nonmaritime contract, it is, at least prima facie, local and within the operation of state laws. If there are any exceptions to this rule, they are yet to be developed." Plaintiff's employment with

defendants was not local but was such as to characterize him as a "seaman" within the meaning of the Jones Act. The accident occurred on navigable waters. Plaintiff was employed as a tuna fisherman to go upon the high seas and was actually aiding in the preparation for the voyage. When the ship's articles were signed the vessel was preparing to depart for Mexico. The term "seaman" includes all those on board a vessel whose labor contributes to the accomplishment of the main objective of the voyage. Osland v. Star Fish & Oyster Co., 5 Cir., 107 F.2d 113; Domandich v. Doratich, 165 Wash. 315, 5 P.2d 310. In both of the cited cases a fisherman was held to be a seaman entitled to all the benefits of the Jones Act. We are satisfied that the superior court has jurisdiction of the action.

The judgment must be reversed because of the errors of the trial court in giving the following instructions to the jury:

"Owner of vessel must supply safe place to work.

"A seaman injured at sea may recover indemnity, not only for injuries due to an unseaworthy vessel or defective equipment, but for injuries due to the negligence of one in authority over him, or to any defective condition of the vessel.

"The owners of a vessel are bound to furnish and maintain equipment and appliances reasonably free from defects, as well as reasonably proper and suitable for the special kind of work being done.

"A shipowner which equips its vessel with improper and dangerous appliances, even when proper ones cannot be obtained, does so at its own risk, and not at the risk of the seaman."

[8, 9] Under the Jones Act an employer is not held absolutely responsible to furnish employees with a safe place in which to work but is only bound to exercise reasonable care to see that the place is reasonably safe. Baltimore & Ohio S. W. R. Co. v. Carroll, 280 U.S. 491, 50 S.Ct. 182, 74 L.Ed. 566. It has been held that there is no absolute responsibility on the part of an employer to furnish reasonably safe equipment, his duty being merely to exercise reasonable care to that end. Seaboard A. L. R. Co. v. Horton, 233 U.S. 492, 34 S.Ct. 635, 58 L.Ed. 1062, L.R.A.1915C, 1. Upon receiving the instructions above set forth the jury might well have concluded that the employers were insurers of plaintiff's safety. The jury was not informed that defendants could be freed from responsibility upon proof that they had exercised reasonable care in providing proper equipment on their vessel for the use of their employees. Clearly the instructions placed upon defendants a heavier duty than the law applicable to the situation justifies.

[10] With respect to the appeal from the order denying defendants' motion for judgment notwithstanding the verdict, the record discloses substantial evidence which, had the jury been properly instructed, would have been sufficient to sustain a verdict in plaintiff's favor.

The judgment is reversed. The order denying the motion for judgment notwithstanding the verdict is affirmed.

MOORE, P. J., and McCOMB, J., concurred.



BAINE v. CONTINENTAL ASSUR. CO.

Civ. 12735.

District Court of Appeal, Second District, Division 1, California.

Jan. 26, 1942.

Hearing Granted March 23, 1942.

1. Specific performance ⇐121(3)

In suit for specific performance of an exchange of policy clause in a life insurance policy, a stipulation that insured received a refund of a portion of the premium paid with his application because of a reduction in the premium on account of a denial of disability insurance, evidence that insurance company struck out portion of insured's application requesting disability insurance, wrote the insured that it refused to issue him accidental death coverage and disability benefits, and therefore reduced premium, and testimony that insurance company only issued disability insurance in the form of a separate rider and required a more rigid medical examination for disability than for ordinary life insurance, supported a finding that the insurance company denied disability insurance to the insured at the time of the issue of the original ordinary life policy.

2. Insurance ⇐144(1)

"Exchange of policy" provision of life insurance policy providing for change without medical examination for another policy of the same amount, but providing for a higher premium upon any form issued by the company at the time policy containing provision took effect, did not permit policy holder to ask for same policy with same premium unchanged except for the supplementary addition of a contract providing for additional insurance for disability.

See Words and Phrases, Permanent Edition, for all other definitions of "Exchange of Policy".

3. Insurance ⇐144(1)

Where life insurance company declined to issue disability benefits with an ordinary life insurance policy and refunded premium difference, acceptance by insured of premium refund without protest, precluded a later demand for issuance of disability benefits based upon an exchange of policy clause in the original life policy.

4. Insurance ⇐400

In suit for specific performance of exchange of policy clause in life insurance policy wherein insured sought to have new policy issued containing disability benefits, the incontestability clause appearing in insured's policy did not preclude the affirmative defense by the insurance company that it had denied insured disability benefits at the time of issuance of the original policy because of an unfavorable family history as disclosed by the medical certificate.

5. Insurance ⇐400

A provision in a life policy to the effect that after being in force for a specified time it shall be incontestable precludes any defense after the stipulated period on account of false statements warranted to be true, even though such statements were fraudulently made, unless fraud is expressly or impliedly excepted from the effect of such provision.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Harry M. Baine against the Continental Assurance Company for specific performance of an exchange of policy clause in a life insurance policy. From a judgment for the defendant, plaintiff appeals.

Affirmed.

Isaac Martin Sackin, of Hollywood, for appellant.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal from a judgment in favor of respondent insurance company in an action for specific performance of an "Exchange of Policy" clause contained in a life insurance policy, made and delivered to appellant by respondent on June 18, 1927 at Los Angeles, said clause reading as follows:

"Exchange of Policy—At any time while in full force, provided the Insured is then less than sixty years of age, this policy may be changed without medical examination for a policy of the same amount upon any form issued by the Company at the time this policy takes effect and which provides for a higher rate of premium. Such change will be made upon written application therefor on the forms required by the Company and upon payment of a sum equal to the difference between the premium on the new policy and the premium paid on this policy, with interest at the rate of five and one-half per cent per annum from the due date of each payment to the date when the change is made. The new policy shall take effect as of the date of this policy and shall be based upon the same age of the Insured as this policy."

Pursuant to said recital, appellant on October 16, 1938, and again on January 11, 1939, requested respondent insurance company to exchange the ordinary life policy dated June 18, 1927, "for a new life policy with disability benefits" providing for a life income of $10 each month for each $1,000 of insurance. Respondent refused to make the requested exchange and on April 24, 1939, appellant instituted the instant action. It was stipulated at the trial that on the dates when such requests for exchange were made, appellant was less than sixty years of age; that a proper offer of payment was made by him and that his insurance policy was in full force and effect.

Respondent in its answer to the complaint herein alleged as an affirmative defense the fact that disability insurance was denied appellant at the time the original policy was issued because of unfavorable family history disclosed by the medical certificate attached to appellant's application for such policy.

With respect to this defense, it was found by the court that appellant's application for the policy, which was issued, "in addition to said life insurance policy also requested the issuance by defendant to plaintiff of certain disability and double indemnity benefits upon defendant's Disability Form L-398, which was a supplemental contract form to be added to the life insurance policy; that defendant refused to issue said supplemental form providing for disability and double indemnity benefits and did execute and deliver said life insurance policy without said additional benefits and the policy thus executed and delivered by defendant was received and accepted by plaintiff and at about the same time plaintiff received from defendant, as a refund, the difference between the premium originally tendered to cover both the life insurance and the supplemental contract for disability and double indemnity benefits and the premium on the life insurance policy only as such policy was actually executed and delivered."

It was found by the court also that at the time when said life policy was executed and delivered to appellant, respondent "had available for issuance at least twelve other forms of life insurance policies, each providing for a higher rate of premium than said policy, executed and delivered to plaintiff, and that at the same time defendant also had available for issuance seven different forms of riders or supplemental contracts which did not constitute separate policies themselves but which could be attached to life insurance policies to provide for additional insurance, to-wit: double indemnity for accidental death and various forms of disability benefits; that each of said supplemental contracts, or riders, provided for a premium for the benefits therein specified which was separate from and in addition to the premium charged by defendant for the life insurance provided in the several forms of policies to which such supplemental contracts or riders might be attached."

As a conclusion of law from the various facts found, the court concluded: "Plaintiff is entitled to exchange said policy for another policy executed on one of the other forms of life insurance policy available for issue by defendant in 1927 providing for Ten Thousand and No/100 ($10,000.00) Dollars of life insurance at a higher rate of premium, but he is not entitled to change said policy for another life insurance policy identical in terms and amount and premium but including as a supplemental contract a rider providing for additional insurance of a different kind, to-wit: disability benefits at an additional premium."

It is urged by appellant (1) that the finding of the trial court in accordance with said affirmative defense is not sustained by the evidence; (2) that said affirmative defense is barred by the incontestability clause of the policy; (3) that the court erred in creating a new contract for the parties by a forced construction of the explicit terms of the policy; and (4) that the insurance contract should be construed most strongly against the insurer, the author thereof.

[1] An examination of the record herein reveals evidence supporting the court's finding that disability insurance was denied appellant at the time the original ordinary life policy was issued. In the first place, it was stipulated at the trial that appellant received a refund from the respondent insurer, either at the time the original policy was delivered to him or thereafter, of the difference between $333.20 and $252.60 because of reduction in amount of premium on account of denial of disability insurance. In the second place, appellant's application for such original policy of insurance, a photostatic copy of which was introduced in evidence, reads in part as follows:

"I hereby apply * * * for a policy of insurance upon the Com'l Ordinary Life —N.P. Disability L-398 plan, with" (here follow three tables of disability benefits printed on the face of the application, to-wit:)

"1.	Double Indemnity for Accidental Death; and Disability benefits	(1% of face amount of policy monthly)
	Life Income of	(2% of face amount of policy monthly) or
	Disability Benefits	($10 per month for each $1,000 of Insurance
	Life Income of	($20 per month for each $1,000 of Insurance
"2.	Double Indemnity for loss of life by travel accident, and Disability Benefits	($10 per month for each $1,000 of Insurance
	Life Income of	($20 per month for each $1,000 of Insurance
"3.	Disability Benefits—Life Income of $10 per month for each $1,000 of Insurance	

for $10,000.00 with Premium of $333.20 payable annually."

Appellant placed a check mark before Table 1 in said application.

Both the agent, Lewis, and Miss Bender, as underwriter for the life department of the General Agent at Los Angeles for the respondent Insurer, testified that after the application left their hands, i.e., between the time it was mailed to the home office at Chicago and the time when the issued policy (to which was attached a photostatic copy of appellant's application) was returned to Miss Bender for delivery to appellant at Los Angeles, certain deletions were made in the application: horizontal pen and ink lines had been drawn through the words "N.P. Disability L398"; oblique lines had been drawn through the three indemnity and disability tables, and the figures $252.60 had been substituted therein for $333.20, the amount of the original premium. All of these deletions are plainly visible in the photostatic copy of the application attached to the original policy which was introduced in evidence at the trial herein.

In addition to this, there was introduced in evidence a letter dated October 28, 1938, from an associate actuary of insurer written in answer to an inquiry of appellant, reading in part as follows: "Our records indicate that on June 9, 1927 you made written application for an Ordinary Life policy in the amount of $10,000 and that in said application you applied for supplemental contract providing for accidental death coverage and disability Form L398. The total premium for such policy with such additional benefits was indicated in the application as $333.20. The Company declined to issue such rider providing accidental death coverage and disability benefits and policy was issued without the supplemental contract. The premium was thus reduced to $252.60 and the request for the rider was crossed out in the application. We suggest you refer to photo of application attached to policy #96633. This refusal of the Company to issue such rider is set forth in the application subsequently made by you for other policies.

"We are unable to agree with your interpretation of the policy contract. The Company's viewpoint remains the same as set out in our letter of last year."

Evidence was introduced by respondent to the effect that disability insurance is issued only in the form of a separate rider, and that a more rigid medical examination is required by the insurer for the issuance of disability insurance than for ordinary life insurance.

[2] The "Exchange of Policy" clause provides that "this *policy may be changed* without medical examination *for a policy of the same amount* upon any form issued by the Company at the time this policy takes effect and *which provides for a higher rate of premium.*" (Emphasis added.) Obviously, it is not a reasonable construction of said clause to say that it entitled appellant to ask for the same form of policy, unchanged in any respect, bearing exactly the same rate of premium, but supplemented by the addition of a new and different contract providing for additional insurance of an entirely different type. Therefore, appellant's requests that respondent issue "a new life policy with disability benefits" did not meet the requirements of the "Exchange of Policy" clause.

[3] Moreover, having accepted without protest the refund of premium and the denial of respondent to issue disability benefits, appellant cannot make a demand ten or twelve years later for the issuance of disability benefits based upon the "Exchange of Policy" clause.

[4, 5] With respect to appellant's second point, it is the general rule that a provision in a life policy to the effect that after being in force for a specified time it shall be incontestable, precludes any defense after the stipulated period on account of false statements warranted to be true, even though such statements were fraudulently made, unless fraud is expressedly or impliedly excepted from the effect of such provision. 14 Cal.Jur. 531. This was the holding in Coodley v. New York Life Ins. Co., 9 Cal. 2d 269, 70 P.2d 602, cited by appellant, and this rule was followed in Mutual Life Ins. Co. v. Margolis, 11 Cal.App.2d 382, 53 P.2d 1017, also cited by appellant.

Since there was sufficient evidence to support the findings and judgment and no errors appear in the record, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concurred.

WHITLOW v. DURST.

CENTRAL & SOUTHERN PAC. R. EMPLOYES' MUT. BEN ASS'N v. DURST et al.

Civ. No. 6713.

District Court of Appeal, Third District, California.

Jan. 22, 1942.

Hearing Granted March 19, 1942.

1. Husband and wife ⇐279(3)

A subsequent reconciliation, coupled with cohabitation in pursuance thereof, operates to avoid a separation agreement as to all features remaining executory, but the reconciliation must be permanent and must restore the former relations of the parties.

2. Interpleader ⇐29

In consolidated actions involving right to proceeds of insurance, wherein insured's executrix relied upon property settlement agreement under which beneficiary assigned insurance policies to insured, beneficiary had burden of proving her contention that there had been a reconciliation of the parties subsequent to execution of the property settlement agreement.

3. Husband and wife ⇐279(3)

A court may not indulge in a presumption of revocation of separation agreement by a reconciliation of the parties unless evidence offered to establish full resumption of marital relations is sufficient to satisfy mind of court that such was the parties' intent.

4. Appeal and error ⇐1008(1)

In consolidated actions involving question of whether beneficiary or insured's executrix was entitled to insurance proceeds, whether insured and beneficiary, who was his wife, were reconciled subsequent to separation and execution of property settlement agreement under which beneficiary assigned the insurance policies to insured was a question of fact for the trial judge.

5. Evidence ⇐271(16)

In consolidated actions involving question of whether insured's executrix or the beneficiary, who was insured's wife, was entitled to proceeds of life insurance, where wife claimed that, subsequent to separation of parties and execution of property settlement agreement under which she assigned insurance policies to insured, there had been a reconciliation, insured's declarations made subsequent to the separation to the effect that there would never be a reconciliation were improperly admitted, since they were self-serving in their nature.

6. Evidence ⇐271(1)

Generally, declarations of a party made out of court and in his own favor are not admissible in his behalf.

7. Evidence ⇐271(16)

The declarations of a person, since deceased, not against but in support of his own interests, are inadmissible in favor of those who claim rights which such declarations would uphold and sustain, and proof of intent comes within that rule.

8. Appeal and error ⇐1170(7)

In consolidated actions involving question of whether insured's executrix or the beneficiary, who was insured's wife, was entitled to proceeds of insurance, where wife claimed that there had been a reconciliation of parties subsequent to their separation and execution of property settlement agreement under which she assigned insurance policies to insured, error in admission of declarations made by insured subsequent to the separation, to effect that there would never be a reconciliation, resulted in a "miscarriage of justice" requiring reversal, notwithstanding trial court's statement that the executrix should prevail even though the evidence were excluded. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

9. Evidence ⇐276
Trial ⇐75

In consolidated actions involving question of whether insured's executrix or the beneficiary, who was insured's wife, was entitled to proceeds of insurance, where wife claimed that there had been a reconciliation of the parties subsequent to their separation and execution of property settlement agreement under which she assigned the insurance policies to insured, declarations against interest made by insured after alleged reconciliation were admissible, and fact that wife introduced evidence thereof did not preclude her from objecting to evidence of other declarations by insured to effect that there would never be any reconciliation. Code Civ.Proc. § 1853; 1870, subd. 2.

10. Evidence ⇐271(16), 276

In consolidated actions involving question of whether insured's executrix or the beneficiary, who was insured's wife, was entitled to proceeds of insurance, where evidence was introduced of declarations made by insured subsequent to separation of insured from wife and execution of property settlement agreement under which wife assigned insurance policies to insured, codal provision relating to admissibility of acts or declarations of a deceased person was inapplicable. Code Civ.Proc. § 1870, subd. 4.

11. Husband and wife ⇐49½(8)

Evidence sustained finding that deceased husband prior to his death did not make gift of insurance policies to his wife.

Appeal from Superior Court, Siskiyou County; Herbert S. Gans, Judge Assigned.

Action to recover the proceeds of a policy of life insurance by Mrs. Ben Whitlow, as executrix of the estate of Charles W. Durst, deceased, against Carrie E. Durst, and an action in interpleader by the Central & Southern Pacific Railroad Employes' Mutual Benefit Association against Carrie E. Durst and Mrs. Ben Whitlow, as executrix of the estate of Charles W. Durst, deceased, to determine which of the defendants was entitled to the proceeds of a policy of insurance, wherein the defendants in the interpleader action filed cross-complaints, and wherein the two actions were consolidated for trial. From a judgment in favor of the executrix, the defendant Carrie E. Durst appeals.

Judgment reversed.

Hearing granted; CARTER, J., not participating.

J. Everett Barr, Tebbe & Correia, and Samuel Friedman, all of Yreka, for appellant.

Daniel S. Carlton, of Redding, for respondent.

TUTTLE, Justice.

These actions were brought to recover the proceeds from two policies of life insurance. In the first, the insurance carrier paid the amount of the policy, $4,000, to defendant, who was named beneficiary therein. In the second, the amount of the policy, $1,000, was paid into court by plaintiff insurer, who disclaimed any interest therein. The actions were consolidated for trial. Findings were made in favor of Mrs. Ben Whitlow, and judgment entered accordingly. The appeal is from the judgment.

The complaint in the first action was filed by Mrs. Ben Whitlow, executrix of the estate of Charles W. Durst, deceased. It alleges that Charles W. Durst and defendant were at all times husband and wife. It further alleges that said decedent took out a policy of life insurance for $4,000, naming Carrie E. Durst, defendant, as beneficiary therein. It is further alleged that on July 6, 1938, the parties to the action executed a property settlement agreement, in view of immediate separation, and that, under said agreement, Carrie E. Durst transferred to her husband all her right, title and interest in and to said insurance policy, and the amount payable thereunder. It is further alleged that upon the death of the husband, which occurred on August 11, 1938, the insurer paid the amount of the policy to defendant, and that the latter has no right or interest in the same.

The second action is in interpleader. The complaint alleges the issuance of a policy of insurance by plaintiff, Central and Southern Pacific Railroad Employes' Mutual Benefit Association, upon the life of Charles W. Durst, and in the sum of $1,000; that the beneficiary designated therein was the wife of the insured, Carrie E. Durst; that due proof of the death of the insured had been made; that the will of the insured was filed for probate, in which the proceeds from said policy, and a policy issued by Central and Southern Pacific Railroad Employes' Mutual Benefit Association were bequeathed and devised to the sister of the testator Mrs. Ben Whitlow, and that demand for the payment of said policy had been made by the beneficiary named therein. Pursuant to an interlocutory decree, the amount of said $1,000 policy was paid into court. Thereafter, in said action, Carrie E. Durst filed an answer and cross-complaint. By the latter pleading she seeks to have her title to said money quieted. Mrs. Whitlow also filed an answer and cross-complaint, setting up as a defense the property settlement agreement mentioned above, wherein the wife assigned both of said policies to her husband. Mrs. Durst filed an answer to the said cross-complaint, alleging that after the execution of said agreement, the parties thereto became reconciled.

The court found that the parties to said agreement were never reconciled. It also

found that the husband did not make a gift of said policies to his wife.

It is the contention of the wife, appellant herein, that the evidence is insufficient to support either of said findings. She also claims reversible error in the admission of certain declarations made by the husband just prior to his death.

[1] The general rule governing the situation is thus stated in 9 Cal.Jur., section 165, pages 827 and 828: "Subsequent reconciliation coupled with cohabitation in pursuance thereof operates to avoid an agreement for separation, at least, as to all features remaining executory. The law attaches such consequence upon the theory that the consideration for the deed has failed, inasmuch as the maintenance of the wife thereupon becomes obligatory upon the husband. But to avoid a contract of separation, the reconciliation must be permanent and be followed by cohabitation. It must be a reconciliation that restores the former relations of the parties. Mere copulation without occupying the same habitation and dwelling there as husband and wife is by no means sufficient to sustain such a conclusion."

Another statement of the rule is found in 30 C.J., section 847, page 1066: "Strictly speaking, a contract of separation is annulled and avoided, not solely, or necessarily as a matter of law, by a subsequent reconciliation, cohabitation, or resumption of the marital relation, but rather by the intentional renunciation of the agreement which the reconciliation and resumption of the marital relation sometimes evidences. Subsequent cohabitation has the effect of avoiding the contract so far, and only so far, as it establishes an intention to renounce the agreement."

[2, 3] Also, the burden of proving that there was a reconciliation was upon appellant, and "Before a court may indulge in a presumption of revocation, however, *the evidence offered to establish full resumption of marital relations must be sufficient to satisfy the mind of the court that such was the intent of the parties.* (Emphasis added.)" Estate of Boeson, 201 Cal. 36, 42, 43, 255 P. 800, 802.

[4] Appellant and her husband had lived a tempestuous married life. He evidently had used intoxicating liquor to an excessive degree and his relations with other women had been anything but platonic. With this background, they decided to separate, and on July 5th the wife filed suit for divorce. The following day they executed a property settlement, to which we have referred. On August 11th following, Durst took his own life. The question is: What took place in respect to the marriage relations between them from the date of the agreement to the time of his death? Was there a resumption of such relations, with intent to live again as husband and wife? These are questions of fact for the sole determination of the trial judge. In support of her contention, appellant testified that on the evening of July 16th, her husband came to their home and promised to mend his ways. Appellant said that she would give him another chance, and she further testified that between that date and July 25th, they lived together as man and wife, occupying the same bed and having sexual intercourse. On the latter date appellant was called away from her home by his duties in connection with the Forest Service. She next saw her husband August 2nd, and he slept with her that night, and the nights of the 3rd and the 4th. He left the home on August 5th for Fort Bragg. She never saw him alive again. She discussed property matters with her husband on August 3rd, and her testimony in respect to what took place on that occasion is as follows: "The evening of the 5th of August before he left for a trip to the Coast, he discussed his insurance policies, and he asked me if I had made any change in mine, and I told him no, that they remained as they were made out to him as beneficiary. And he said that he wanted no change made in his; that he wanted them to remain as they were; that before he left that evening he would give me his policies. They were in his possession. He said that he would get his policies out of the car and give them to me; that he wanted me to have them. * * * He gave me an envelope, a large, manila envelope, and in it was an insurance policy from the New York Life Insurance Company and the other from the Employees' Mutual Benefit Association."

Another witness testified that the husband told him he was living at home after July 16th. Another testified that the parties seemed to be normal in their relations when she saw them subsequent to July 17th.

As opposed to the foregoing, there is the impeaching evidence of witness Korst, clerk in the Clarendon Hotel at Yreka.

That witness testified that the husband registered at the hotel on August 2nd, and stayed at the hotel for the period of August 2nd, 3rd, and 4th; that he saw the husband go to his room on each of these nights, and that he knew that he slept in said room. He produced a registration card with Durst's signature thereon. He also testified that the husband registered at the hotel and stayed there on the night of August 10th. There was also introduced in evidence the official fire-log of the Forest Service, showing that Durst was fifty-miles from Yreka on July 18th, having left that city at 5:15 p.m., and that he did not return until 2:00 p.m. on July 19th; that he was twenty miles away from Yreka on the night of July 19th, returning at 5:30 a.m., and that he rested at the barracks until 9:00 a.m. The record also shows that Durst moved to the Forest Service Barracks at the time of his separation from his wife, taking his bed with him, and that this bed remained there until he left on his vacation on July 27th.

Over the objection of appellant, a number of statements and declarations made by Durst after July 16th, were admitted in evidence. These declarations were to the effect that he and his wife were separated, and that there would never be a reconciliation. Seven witnesses testified to such statements, four of them being members of the husband's family, and three of them intimate acquaintances. Between August 5th and August 10th, witness Nixon testified Durst told him that Mrs. Durst was keeping company with another man. Witness Owens testified that Durst repeatedly told him, during July and August, that he and his wife were separated. He also complained to Owens that his wife was having an affair with another man. Witness Dunphy testified that Durst had asked him if he could share Dunphy's hotel room as a permanent residence. This was approximately one week before his death. On July 25th, ten days after the alleged reconciliation, Durst, according to the testimony of his sister, Mrs. Whitlow, declared that he and his wife were separated, and that there was no possibility of a reconciliation.

[5, 6] We are of the opinion that the court erred in admitting in evidence the declarations of the husband as outlined in the preceding paragraph. We might here take occasion to observe that the case of appellant is not a "weak" one. There is abundant evidence in the record which would support a finding in her favor, provided that a trial court was satisfied with the credibility of her witnesses. On the other hand, and exclusive of the questioned evidence, the court might properly have found that there was no reconciliation. The declarations were manifestly self-serving in their nature. Of such testimony, it is said in Jones' Commentaries on Evidence, vol. 2, pages 1636, 1637, 1638 and 1639, par. 895: "It is repeatedly said that 'the declarations of a party in his own favor can never be received in evidence.' The danger of such expressions lies in their partial truth. Ordinarily, it is true, such statements are not admissible. It would obviously be unsafe if parties to litigation, without restriction, were allowed to support their claims by proving their own statements made out of court. Such a practice would be open to all the objections which exist against the admission of hearsay in general, and would also open the door to fraud and to the fabrication of testimony. It is accordingly a general rule of broad application that the declarations of a party, made out of court and in his own favor, are not admissible in his behalf. Almost endless illustrations of the rule might be given, for it is one of constant application. It serves not only as a preventative of fraud and of the fabrication of evidence for the purposes of a particular controversy, but also as the nominal reason for the exclusion of much other matter, some of which, to the lay mind, might be considered of logical probative value and weight."

A case directly in point is Carter v. Younger, 123 Ark. 266, 185 S.W. 435, 437. There, in passing upon the identical question, the court said: "Appellants offered to prove by several witnesses certain declarations of Younger made during and a short time subsequent to the time when it was claimed by appellee that the separation agreement had been abrogated, tending to show that there had been no abrogation of such agreement. *These were in the nature of self-serving declarations, and the ruling of the court in excluding them was correct.* The appellants' heirs are privies in blood and estate with Samuel Younger, deceased." (Emphasis ours.)

In 9 Cal.Jur. pages 828 and 829, section 165, the rule is thus stated: *"Declarations of party refusing reconciliation.*—It has been held that a declaration made by a

deceased husband, a short time prior to an alleged reconciliation, to the effect that he did not want to have anything more to do with his wife is admissible in evidence for the purpose of showing the attitude of the decedent and as going to the probability of such reconciliation and was not self-serving. *A different rule, however, is applicable where the declarations of the decedent are made after the alleged agreement of reconciliation and are offered in evidence as proof that no such reconciliation had occurred.*" (Italics ours.)

The Supreme Court of this state has approved the holding in the Carter case, (In re Clover's Estate, 179 Cal. 313, 176 P. 452.) The case of Steinberger v. Young, 175 Cal. 81, 83, 165 P. 432, while it did not involve a property settlement, follows the same rule. The court stated at page 90 of 175 Cal., at page 436 of 165 P.: "The appellant assigns as error certain rulings on the admission and rejection of evidence. The only ones which call for particular notice are those relating to the declarations of Mrs. Ross. The declarations offered by the plaintiff, as a part of her case, were properly admitted as the declarations of a decedent against her pecuniary interest. Code Civ. Proc. § 1853. On the other hand, the court was right in rejecting evidence offered by the appellants to show declarations of Mrs. Ross in favor of the position assumed by the appellants, who claim under her in this litigation."

In Hausman v. Hausling, 78 Cal. 283, at page 286, 20 P. 570 at page 571, it is said: "A litigant is not permitted to strengthen his case by his own declarations, whether written or verbal. They may be used against him, but not for him. Code Civ. Proc. § 1870, subd. 2."

It is contended by respondent that the question here is primarily one of intent, (Gump v. Gump, 42 Cal.App.2d 64, 108 P. 2d 21), and the rule in the foregoing authorities is therefore not applicable. She states that: "Since reconciliation involves a state of mind, evidence of the declaration of the parties, either before or after the act in issue, are admissible in California as long as they are not too remote."

She relies upon the case of Piercy v. Piercy, 18 Cal.App. 751, 124 P. 561. There, however, in an action to set aside a deed, the inquiry was not directed to the intent of the grantor, but rather to her mental capacity and competency—matters which are not here in question. This is clearly pointed out by the following language, at page 764 of 18 Cal.App., at page 566 of 124 P.: "The principle is not that involved in the case of Bury v. Young, 98 Cal. 446, 33 P. 338, 35 Am.St.Rep. 186, and Ord v. Ord, 99 Cal. 523, 34 P. 83. In the former it was said that the declarations and acts of the grantor 'made and done in his own interest months after the deed was delivered are not admissible as indicating his intentions in delivering the deed,' and, in the latter, that a 'grantor will not be permitted to disparage his deed by declarations made or acts done by him in his own interest subsequent to its execution.' But in those and other similar cases there was no issue as to fraud or the mental condition of the grantor, and the testimony was offered as evidence of the truth of the facts asserted in it and was clearly self-serving and hearsay. In a case like this it is plain the witness is permitted to detail declarations which he has heard, not as evidence of the truth of the fact asserted, but of a spontaneous and unreflecting expression of the mental and emotional condition of the declarant. The distinction is marked and vital and recognized by the authorities."

[7] Our conclusion is that this case comes under the general rule that the declarations of a person, since deceased, not *against*, but in *support* of his own interest, are inadmissible in favor of those who claim rights which such declarations would uphold and sustain, and that proof of intent comes within that rule.

[8] It is urged that the evidence erroneously admitted was not prejudicial, and that article VI, section 4½ of the Constitution is applicable. Respondent points to a statement of the trial court to the effect that even though the evidence were excluded, plaintiff should prevail. It is our opinion that where prejudicial evidence is admitted, the effect thereof cannot be removed or obliterated by such a statement. Even though the court might have found for plaintiff, if such evidence were omitted, no one can say whether, consciously or unconsciously, the court may have been influenced by it in the final determination of the issues. The effect of the testimony of seven witnesses all in accord upon one point, would ordinarily be of considerable weight. We believe that, under the circumstances, it would result in a miscarriage of justice, if the

judgment were allowed to stand. This is particularly true here, where the evidence of appellant might be justly characterized as "strong" in its probative effect.

[9,10] Appellant seeks to invoke the rule stated in 2 Cal.Jur. page 848, par. 497, which provides that if a party introduces or calls out improper evidence, he is precluded from objecting to evidence of like character introduced by his adversary. Appellant introduced evidence of statements made by deceased after the alleged reconciliation. Such evidence was proper, the declarations being made *against* the interest of the declarant. Code of Civil Procedure, section 1870 subd. 2; sec. 1853. We do not believe that section 1870, subd. 4 of the Code of Civil Procedure, has any application to the case.

[11] It is finally contended by appellant that the evidence is insufficient to sustain the finding that the husband did not make a gift of the said policies of insurance to appellant. We think that there is sufficient evidence in the record to uphold the finding, particularly in view of the rule relating to the proof of such an issue, which is found in 13 Cal.Jur. pages 46 and 47, section 12:

"When the claim of a gift is not asserted until after the death of the alleged donor, it should be sustained by clear and satisfactory evidence of every element requisite to constitute a gift. Gifts first asserted after the death of the alleged donor are always regarded with suspicion by the courts. The reason for the rule expressed in the language of the district court of appeals is:

" 'Mindful of the facility with which, after the alleged donor is dead, fraudulent claims of ownership may be founded on pretended gifts of his property asserted to have been made whilst he was living, it is but a salutary precaution which demands explicit and convincing evidence of every element needed to constitute a valid donation, whether it be a donation *inter vivos* or *mortis causa*. Even then fraudulent claims may prevail, but the rigid requirement of the clearest proof will at least diminish the number.' (Italics added.)

"Whether a gift is clearly supported by the evidence is a question for the trial court, and its conclusion will not be disturbed unless the reviewing court can say that such conclusion is clearly unwarranted. The administrator of a deceased donor is in no better position to question a gift than the donor would be if alive."

This finding would not establish title in the policies in the decedent, and hence would not entitle respondent to judgment. The other issues must still be determined to settle the rights of the parties.

The judgment is reversed.

THOMPSON, Acting P. J., and STEEL, Justice pro tem., concurred.



49 Cal.App.2d 287

BEWICK et al. v. MECHAM.

Civ. 2686.

District Court of Appeal, Fourth District, California.

Jan. 22, 1942.

1. Arbitration and award ⇐78

Evidence afforded by affidavit of one of arbitrators, supposed to be appointed by one of the parties to arbitration, that he had not been so appointed, was sufficient evidence of such nonappointment to warrant vacation of award purporting to be signed by three arbitrators, since such nonappointment invalidated the purported selection by two arbitrators of third arbitrator so that there was in fact but one arbitrator.

2. Arbitration and award ⇐72

In proceeding for confirmation of an award, implied finding, based upon conflicting evidence, that individual purporting to act as an arbitrator had never been appointed arbitrator was conclusive.

3. Appeal and error ⇐205

Where question itself does not indicate whether answer to it will be material evidence, the party seeking to introduce the evidence must, in order to present the question to an appellate court, make an offer of what he proposes to prove so that the trial court and the appellate court can determine whether the proposed proof is material.

4. Appeal and error ⇐205

Where affiant was called for purpose of cross-examination, error in sustaining objection to cross-examination could not furnish ground for reversal of judgment, where counsel made no offer of what he expected to prove, since prejudice was not shown and could not be assumed.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Proceedings in the matter of the arbitration between Richard H. Bewick and another and J. J. Lopez, wherein Richard H. Bewick and another filed a petition for an order confirming the award of arbitrators and Pearl Margaret Mecham, as executrix of the estate of J. J. Lopez, deceased, filed a motion to vacate the award. From a judgment vacating the award and denying the petition to confirm the award, Richard H. Bewick and another appeal.

Affirmed.

Harvey, Johnston & Baker, of Bakersfield, for appellants.

Claflin, Dorsey & Campbell, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment setting aside and vacating an award of arbitrators.

J. J. Lopez and Mary W. Lopez owned property in the city of Bakersfield. By an instrument in writing, dated May 22, 1929, they leased this property to S. S. Lombard for a period of ten years commencing on July 1, 1929, and ending June 30, 1939.

Mrs. Lopez died and her interest in the leased property passed to her husband. J. J. Lopez died on July 21, 1939, and Pearl Margaret Mecham was appointed executrix of his estate.

With the written consent of the lessors the interest of Lombard passed to Richard H. Bewick who assumed and agreed to perform the obligations of the lease. Tricy Bewick is the wife of Richard H. Bewick.

The lease contained the following provisions:

"And the lessee is granted the further option to purchase as follows:

"(a) Upon the expiration of the ten year term hereof at a price and terms then to be agreed on between the parties hereto, and if not agreed on then to be fixed by arbitration, each of the parties hereto selecting one arbitrator, and the two selected a third, which said arbitrators shall fix such purchase price and the terms under which the purchase may be made, but with the proviso that on the matter of terms at lease one-half of such purchase price shall be payable in cash, and the remaining half to be evidenced by promissory note secured by deed of trust, and to draw not less than the legal rate of interest.

"To exercise this option the lessee must, not later than thirty days prior to the expiration of the term of the lease, give written notice to the lessors of his desire to exercise same, and accompany such notice with a deposit of not less than One Thousand Dollars ($1,000.00) to be applied upon account of such purchase, and to be forfeited to the lessors in event the lessee fails to complete his purchase."

Under date of May 12, 1939, Mr. and Mrs. Bewick attempted to exercise the option of purchase. They mailed their check for $1,000 to Lopez with a letter informing him that they desired to purchase the property, which letter concluded as follows:

"Will you please, according to the terms of said lease, meet with the undersigned at your earliest convenience for the purpose of determining the price so that if and in the event a price cannot be determined the same may be fixed by arbitration as provided in said lease."

By a letter dated May 23, 1939, informing Mr. and Mrs. Bewick that he was not in a position to comply with their letter of May 12th, Lopez returned the money to them. They refused to accept the return of the money and about May 24, 1939, Lopez deposited it to their credit in the Anglo-California National Bank, Bakersfield Branch, and enclosed a duplicate deposit slip in a letter informing them of that fact. On May 26, 1939, the deposit was changed to a savings account.

As Lopez was dead at the time of the hearing in the court below the story of what transpired between the parties is confined to the testimony of Mr. Bewick and other witnesses and certain documentary evidence.

Bewick testified that Lopez saw him and told him he wanted $10,000 for the property; that he (Bewick) had it appraised and wanted it for $6,000; that the two talked of the arbitration; that Lopez said he

would appoint Alphonse Weill as his arbitrator; that Bewick appointed E. H. Clare as his arbitrator; that these two finally selected Howard J. Nichols as the third arbitrator; that Lopez thought when Nichols was mentioned as the third arbitrator he would be a good man. There is some evidence corroborating this testimony and also showing that Weill and Clare viewed the property, probably in June, 1939.

On December 20, 1939, Mr. and Mrs. Bewick filed their petition for an order confirming the award of the arbitrators. The arbitrators' decision and award is attached to this petition. From this document and the exhibits attached to it we gather the following:

That under date of September 28, 1939, Alphonse Weill and E. H. Clare in writing selected Howard J. Nichols as the third arbitrator and that Nichols accepted the appointment in writing on October 4, 1939; that each of the three took an oath on November 2, 1939, that he would "faithfully and fairly hear any and all evidence presented * * * and examine the matter in controversy upon the questions to be arbitrated and make a just award according to the best of his understanding." On the same day Geraldine Hall took an oath of office as reporter of the hearing to be held.

Under date of October 21, 1939, the three arbitrators signed a notice directed to Pearl Margaret Mecham as executrix, to her attorneys, and to Richard H. and Tricy Bewick and their attorneys informing them that at ten o'clock a. m. on November 2, 1939, in the office of the attorneys for Mr. and Mrs. Bewick they would hold a hearing and take evidence on the question to be arbitrated. The attorneys for Mr. and Mrs. Bewick admitted service on October 25, 1939. There are affidavits showing service on the executrix on October 26, 1939, and on her attorneys on the previous day.

The decision and award of the arbitrators was signed by the three of them on November 3, 1939. It recites the facts already outlined; that the hearing was held at the time and place noticed; that Mr. and Mrs. Bewick appeared by their attorneys; that no one appeared on behalf of the executrix; that evidence was taken and an award made; that the price to be paid for the property was fixed at $7,800, one-half to be paid in cash and the balance in three years in instalments of $100 per month plus interest at seven per cent per annum, the last instalment to include the balance due. Deferred payments were to be secured by a deed of trust on the property.

There was no written appointment of Weill by Lopez or any other person.

The executrix filed a written answer and objections to confirmation of the award and a motion to vacate the award. Among the many grounds stated there is only one we need notice, which is this: That Weill was never appointed arbitrator by Lopez or the executrix so that consequently no arbitration was had and no award made. The trial judge granted the motion on this and all other grounds and entered a judgment vacating and setting aside the award and denying the petition to confirm it.

The important question for consideration is whether the implied finding that Weill was not appointed arbitrator is sustained by the evidence. It is clear that if he was not so appointed there was only one arbitrator. Consequently there could be no arbitration and no award made that could be confirmed. The attempted selection of Nichols as the third arbitrator depended on Weill's authority, for certainly Clare could not act alone in that matter.

The executrix produced and relied upon the affidavit of Weill, which is as follows:

"Alphonse Weill, being first duly sworn, deposes and says: I knew J. J. Lopez in his lifetime. Said J. J. Lopez did not appoint me as an arbitrator, so-called, or as his agent or representative concerning any matter involving the property at the Northwest corner of Chester and California Avenues, Bakersfield, as between him and any other person whomsoever, nor any other property or matter whatsoever, nor did I ever have any conversation with said J. J. Lopez in which the matter of my acting as arbitrator as between him and any other person, or his agent or representative, or that I would perform any act whatever concerning said matter or in any matter, was ever mentioned, nor did I in any conversation with said J. J. Lopez state in substance or otherwise that I would act as arbitrator or agent or representative, or perform any act whatever in the matter hereinbefore mentioned, or any matter whatever.

"That I met E. H. Clare and Howard Nichols at a so-called arbitration meeting

on November 2nd, 1939, solely upon the statement of others, but not of J. J. Lopez, that I had been so appointed.

"That I make this statement to the Court that the Court may fully understand my position in the matter, and that my purporting to act as arbitrator was solely upon the statement of others, but not J. J. Lopez, that I was appointed and that my appointment was legal."

[1, 2] This affidavit in itself is sufficient to sustain the implied finding of the trial court that Weill was never appointed arbitrator. Of course there are rather strong inferences to the contrary that might be drawn from other evidence and from the fact that Weill actually attempted to act as arbitrator in the matter. These inferences merely created a conflict in the evidence which the trial court resolved against Mr. and Mrs. Bewick. That ruling is conclusive here.

Mr. Weill was in court and was called to the stand for the purpose of cross-examination on the matters set forth in his affidavit. Counsel for the executrix objected to this cross-examination. This objection was sustained, the trial court holding that if Mr. and Mrs. Bewick wished to interrogate Weill, they must call him as their witness. This ruling is assigned as error.

Weill was called as a witness for Mr. and Mrs. Bewick, but their counsel discontinued his examination before anything material to the question of his appointment as arbitrator had been developed. Further, counsel made no offer of what he expected to prove by this witness either by cross or direct examination.

In Murnane v. Le Mesnager, 207 Cal. 485, 279 P. 800, 805, the Supreme Court said: "We find no prejudicial error in the refusal of the trial court to permit the cross-examination in court by appellants of the witness Haas, who had previously testified by deposition. The court permitted the appellants to call Haas as their own witness, and that was done."

[3] In Marshall v. Hancock, 80 Cal. 82, 22 P. 61, this rule is announced: "Where the question itself does not indicate whether the answer to it will be material evidence or not, the party seeking to introduce the evidence must, in order to present the question to this court, make an offer of what he proposes to prove, so that the court below and this court can determine whether the proposed proof is material or not. There is nothing in the record to show what the proposed testimony was. The question indicated nothing of the kind. The witness is asked for a conversation between White and himself. The conversation, if there was one, may have been about a matter entirely aside from the matter under investigation. Therefore the record fails to show any error in this ruling." The same rule applies to cross-examination of a witness. In Re Claire, 9 Cal.App.2d 749, 50 P.2d 1070, 1072, it is said: "We are of the opinion that the trial judge unduly limited this cross-examination. Counsel for contestant made no proffer of proof and did not inform the trial judge, and has not informed us, what he expected to prove by this witness. We cannot presume prejudice in an error of this kind."

[4] There is nothing in the record to show prejudice in the challenged ruling of the trial court. That ruling, assuming it was erroneous, can furnish no ground for a reversal of the judgment because prejudice must be shown and cannot be assumed.

It should be appropriate to observe that the affirmance of the judgment on the ground that there has been no arbitration and that there is no report and award of the arbitrators to be confirmed may not preclude Mr. and Mrs. Bewick from finding a remedy, if they have one, under the provisions of sections 1280, et seq., of the Code of Civil Procedure.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

49 Cal.App.2d 366

ROGERS v. ROGERS.

Civ. 13275.

District Court of Appeal, Second District, Division 2, California.

Jan. 28, 1942.

1. Appeal and error ⇐1040(7)

In suit by former wife to recover upon property settlement agreement, where defendant filed answer setting up an oral agreement releasing him from obligations of agreement, ruling sustaining demurrer to such defense could not be held harmless on ground defendant could have introduced evidence in support of such defense by reason of his denial of allegations in complaint that no further agreement had been entered into by the parties, where such allegation was nonessential and because it tendered no issue, an answer to it would have joined no issue.

2. Divorce ⇐331

In suit to recover balance due on property settlement agreement incorporated into Nevada divorce decree, wherein complaint alleged that no further agreement had been entered into by the parties, as court would not have to make a finding on the allegation which simply anticipated a defense and sought to avoid it, so likewise court would not err in refusing to receive evidence on it from either party.

3. Divorce ⇐331

A former husband sued for balance due on property settlement agreement incorporated into Nevada divorce decree, was not precluded from appealing from ruling which sustained a demurrer without leave to amend to his defense based on a subsequently executed oral agreement modifying the separation agreement, on theory that he could have introduced evidence in support of such defense under allegation in complaint that no further agreement had been entered into by the parties, where his contention was that monthly installments sued upon had been satisfied by way of an executed gift.

4. Compromise and settlement ⇐6(1)

At common law, a debt may be discharged in whole or in part only by an agreement under seal or by promise for a consideration, and hence agreement of creditor to discharge the whole or part of debt then due or as it should become due in consideration of payment of a lesser amount is unsupported by sufficient "consideration", since a debtor incurs no legal detriment by paying part or all of what he owes, and a creditor obtains no legal benefit in receiving it.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

5. Release ⇐12(2)

The statute providing for the extinguishment of an obligation by written release given to the debtor regardless of any new consideration, operates to make a written release the equivalent of a writing under seal at the common law. Civ.Code, § 1541.

6. Divorce ⇐331

An oral agreement modifying written property settlement agreement incorporated into Nevada divorce decree, whereby husband was released from obligation to make any payment thereunder except from such funds as he might have after paying his own necessary expenses was not an "executed oral agreement" as to each installment matured under settlement agreement, within statute providing that a contract in writing may be altered by an executed oral agreement, and hence monthly installments were not satisfied by oral agreement regardless of want of consideration. Civ.Code, § 1698.

See Words and Phrases, Permanent Edition, for all other definitions of "Executed Oral Agreement".

7. Divorce ⇐331

In suit to recover balance due upon written property settlement agreement incorporated into Nevada divorce decree, a defense which was based upon oral agreement modifying settlement agreement whereby husband was released from obligation to make any payment except from such funds as he might have after paying his own necessary expenses did not constitute a legal defense to count based on judgment incorporating the settlement agreement. Civ.Code, § 1698.

8. Husband and wife ⇐281

If oral agreement modifying property settlement agreement executed in New York was also executed in New York, then the New York law would govern the action to recover a balance due upon the property settlement agreement.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Frances Colby Rogers against Robert Cameron Rogers, plaintiff's former husband, to recover a balance allegedly due upon a property settlement agreement. From a judgment for plaintiff, defendant appeals.

Affirmed.

Heaney, Price, Postel & Parma, and Clarence A. Rogers, all of Santa Barbara, for appellant.

Horowitz & McCloskey, of Los Angeles, for respondent.

HANSON, Justice pro tem.

This is a suit by the former wife of defendant to recover a balance alleged to be due upon their property settlement agreement which had been executed in the State of New York and incorporated into a decree of divorce granted to the plaintiff by a Nevada court after an appearance therein by the defendant. The defendant filed an answer containing three affirmative defenses. The second of these defenses alleges that on July 1, 1936, the parties entered into an oral agreement modifying their separation agreement whereby defendant was released from the obligation to make any payment thereunder except from such funds as he might have after paying his own necessary expenses. In connection therewith he averred that from July 1, 1936, to the month of December, 1937, his income had at all times been insufficient to pay his own expenses, and that since December, 1937, he had no income whatsoever; and in view of the oral agreement he had made no payments to the plaintiff. The trial court sustained a demurrer thereto without leave to amend. Thereafter the defendant filed a motion for leave to file an amended answer, which was denied. The proposed answer merely stated in more detail the defenses set forth in the original answer. The case being at issue on the answer containing certain denials and two affirmative defenses which had not been attacked by demurrer, it was set for trial. Defendant did not appear at the trial but instead took this appeal.

[1, 2] In support of the ruling below plaintiff urges that even if we should hold the ruling to be erroneous the defendant nevertheless has no ground for reversal, since defendant could have introduced evidence in support of the defense by reason of the fact that he had denied an allegation of plaintiff's complaint reading as follows: "That no further agreement or contract of any kind or character has been entered into by the parties, and that the first agreement, as modified by the second and third agreements, is subsisting and in full force and effect." But this was not an allegation essential to the cause of action predicated upon the contract. It simply anticipated a defense and sought to avoid it. It could have been stricken out upon motion; and even though it had not been answered—because it was a nonessential allegation—it would not have been admitted. Moreover, as such an allegation tenders no issue an answer to it would join no issue. Boles v. Cohen, 15 Cal. 150; Canfield v. Tobias, 21 Cal. 349; Munson v. Bowen, 80 Cal. 572, 22 P. 253; Weinberger v. Weidman, 134 Cal. 599, 66 P. 869. As a court would not have to make a finding on the allegation (Souter v. Maguire, 78 Cal. 543, 21 P. 183; Bacon v. Bacon, 21 Cal.App.2d 540, 69 P.2d 884), so likewise it would not err in refusing to receive evidence on it from either party.

[3] To argue, then, as respondent does, that appellant could have introduced evidence to sustain his defense because there was a purported joinder of issue on the allegation, is inherently unsound. Moreover, appellant's contention was not that he had a collateral contract but that the monthly installments sued upon had been satisfied by way of an executed gift thereof by respondent to appellant.

Appellant argues that as each monthly installment matured under the written contract it was fully executed and satisfied by the terms of the oral agreement, regardless of a want of consideration therefor. We think there is no merit in the contention.

[4, 5] By the common law a debt may be discharged in whole or in part only by an agreement under seal or by promise for a consideration. Accordingly, the agreement of the creditor to discharge the whole or a part of the debt then due, or as it should become due in the future, in consideration of the payment of a lesser amount, is unsupported by a sufficient consideration. The reason is that "since a debtor incurs no legal detriment by paying part or all of what he owes, and a creditor obtains no legal benefit in receiving it, such payment if made * * * at or after maturity of the debt, is not sufficient consideration for any promise." Williston on Contracts, Permanent

Ed., sec. 120. In this state the rule of the common law has in part been modified by statute. Here not only has the seal been abolished, but an obligation is extinguished by a written release therefrom given to the debtor regardless of any new consideration. Civ.Code, sec. 1541. In short, this statute operates to make a written release the equivalent of a writing under seal at the common law. Moreover, still another statute—the statute here relied upon by appellant—provides that while a contract in writing may be altered by an executed oral agreement, it may not otherwise be altered short of a contract in writing. Civ.Code, sec. 1698.

In view of the statute just mentioned the particular question before us is the interpretation to be given to the phrase therein reading "executed oral agreement." In short, was the oral agreement in this case an "executed oral agreement" as each installment matured under the written contract? The Supreme Court in Julian v. Gold, 214 Cal. 74, 3 P.2d 1009, 1010, held that an oral agreement between a landlord and tenant for a reduction of the rent under a written lease became an "executed oral agreement" as to each current installment of rent when the tenant paid the reduced monthly rental installment and the landlord accepted it. The court predicated its holding on two distinct theories: (1) that the acceptance by a landlord of an orally reduced rent constitutes a gift of the excess to the tenant; (2) that the oral agreement was fully executed by Code of Civil Procedure, section 2076, which provides that a person to whom money is due must upon a tender of money specify any objection he may have to what is tendered or else he will be deemed to have waived it. It will be observed that there was a tender by the debtor in the Julian case. There was no tender at all in the instant case, nor is there any claim by the debtor that he advised the creditor at the time each monthly installment fell due that his net current earnings were insufficient to pay the installment and that no payment was being made in view of the oral agreement. We think it plain that the case of Julian v. Gold is not here controlling.

Appellant rests heavily upon Taylor v. Taylor, 39 Cal.App.2d 518, 103 P.2d 575, but we think the case is clearly distinguishable. In that case the defendant ex-husband rendered annual statements to the plaintiff ex-wife showing the amounts due her under the modified oral agreements as to property under his control, and she made like statements to him. Moreover, there was a new consideration for the oral agreement in that plaintiff was permitted to manage one of the properties and collect the rents and make disbursements for its upkeep, whereas the property settlement agreement gave full management and control of all the properties to the defendant.

Another case relied upon is Price v. Price, 24 Cal.App.2d 462, 75 P.2d 655, but in that case, as in the Julian case, the reduced monthly payments were made as they matured pursuant to an oral contract modifying a property settlement agreement and accepted by the former wife without objection. For the reasons heretofore indicated the case is not helpful here.

[6, 7] From what we have said the defense tendered was not a legal defense to the count based on the property settlement agreement. For the same reason the defense was not a valid one to the count based on the judgment which incorporated the property settlement agreement. Respondent's further contention, that even if the defense had been proper in a suit on the property settlement agreement it could not be urged as against a suit on the judgment, is a matter which calls for no expression of opinion on our part in view of our general holding.

[8] We should perhaps add that counsel on both sides have presented this case to us on the theory that the law of this state is applicable to the controversy. We note, however, that the written property settlement agreement, along with the written modifications thereof, were all executed in the State of New York, and that the decree of divorce incorporating the agreement with its subsequent written modifications was rendered by a Nevada court. Whether the oral contract was executed in New York State, as seems probable, is not disclosed by the record. If it was, the law of New York would govern the action on the contract, and not the law of California. In many states, unlike California, an executed oral agreement without consideration is no defense. What the rule in New York may be we have not had occasion to determine, as we are entitled on this record to assume the oral agreement was made in this state.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

49 Cal.App.2d 331

PALMER v. PALMER et al.

Civ. 2831.

District Court of Appeal, Fourth District, California.

Jan. 27, 1942.

Hearing Denied March 27, 1942.

1. Husband and wife ⇐14(5)

The joint tenancy of husband and wife was broken by wife's deed of undivided one-half interest in property to third person, and third person's reconveyance to wife, and property was thereafter owned by husband and wife as "tenants in common", so that wife had an undivided one-half interest in the property, title to which would be quieted in wife.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenant in Common".

2. Appeal and error ⇐1011(1)

Where evidence is conflicting and there is substantial evidence in record supporting findings and judgment, appellate court will not reverse judgment because of conflicts in the evidence.

3. Appeal and error ⇐996

Where either one of two inferences may fairly and reasonably be deduced from admitted or uncontradicted facts, question of fact should be determined by jury or by judge trying case without a jury, and their verdict or finding will not be set aside on ground that it is not sustained by evidence.

4. Appeal and error ⇐931(1)

In so far as evidence is subject to opposing inferences, it must upon a review thereof be regarded in a light most favorable to support of judgment.

5. Husband and wife ⇐232(3)

Evidence was sufficient to establish lien of judgment creditor of husband on undivided one-half interest in realty which had once been wife's separate property, and which wife had conveyed to third party who reconveyed to husband and wife as joint tenants, on ground that wife knew that instruments which she signed creating joint tenancy were deeds and not her will, and that such deeds created a present estate in her property in her husband.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action to quiet title and for cancellation of a portion of a deed by Adah Palmer against O. B. Palmer and others, and J. C. Swartzbaugh, individually and as guardian ad litem, etc., and others. From a judgment refusing to quiet plaintiff's title to the property and refusing to cancel a portion of the deed and awarding J. C. Swartzbaugh, individually and as guardian ad litem, etc., and others, a judgment lien on a one-half interest in the property, Adah Palmer appeals.

Partly affirmed, and partly reversed with instructions.

Dempster McKee, of San Diego, for appellant.

Gray, Cary, Ames & Driscoll, Burton D. Wood, and James C. Toothaker, all of San Diego, for respondents.

MARKS, Justice.

This is an appeal from a judgment refusing to quiet plaintiff's title to property in the city of San Diego, and refusing to cancel a portion of a deed and awarding defendants Swartzbaugh a judgment lien on a one-half interest in the property.

The complaint contains three causes of action. The first is in the usual form of an action to quiet title. The second cause of action sought cancellation of a portion of a deed dated May 3, 1929, from Adah Palmer and O. B. Palmer, husband and wife, to Bernice F. Crawford, and a deed from Bernice F. Crawford to Adah Palmer and O. B. Palmer for reasons of (1) lack of consideration, (2) lack of delivery, and (3) because plaintiff did not know she was signing, and did not intend to sign a deed, but thought she was making a will. No attention need be paid to the third cause of action because no question is raised as to the propriety of the trial court's order granting a nonsuit as to it.

Besides denying numerous allegations of the complaint defendants Swartzbaugh asserted a lien on the property by virtue of a judgment recovered on May 26, 1938, against O. B. Palmer, an abstract of which judgment was recorded on June 6, 1938. Mr. Palmer, a defendant in the action before us, was served with summons but made default.

The Palmers came to California from Iowa in 1912 or 1913. Mrs. Palmer brought $13,500 with her which admittedly was her separate property and represented her accumulations from a business

she had conducted there. Mr. Palmer had been in business in Iowa, but the only result of those ventures were judgments against him.

Mrs. Palmer invested her funds in real estate in San Diego, taking title to the several parcels in her own name. It is not questioned that up to May 3, 1929, the real estate was her separate property. Mr. Palmer had a small business in San Diego which he conducted with questionable success.

At various times prior to 1929 Mr. Palmer had requested Mrs. Palmer to convey title to some of the property to him. Mrs. Palmer refused to accede to these requests. Some time prior to May 3, 1929, the couple learned that a neighbor whose husband had died was having trouble in getting his estate settled; That it was taking considerable time and costing her quite a sum of money. Mr. and Mrs. Palmer reopened the discussion of their own affairs, particularly concerning the property owned by her. On May 3, 1929, they executed a deed conveying the real property belonging to plaintiff, to Bernice F. Crawford, who in turn on the same day reconveyed the property to them as joint tenants. The deeds were recorded on the following day.

Mrs. Palmer testified that she decided to make a will in favor of Mr. Palmer; that she consented to have her husband consult an attorney about this matter; that he subsequently told her that he had consulted an attorney whom he knew but with whom plaintiff was not acquainted; that this attorney agreed to draw the will; that she and her husband went to the office of the attorney who had prepared documents for her signature; that there were a number of papers there; that she told the attorney that she did not know what the papers were; that "What I was looking for was a will"; that the attorney said to her, "Well, Mrs. Palmer, this will cover exactly what you want"; that she replied that she wanted "a will and nothing more than that." She also testified that she told the attorney that what she expected was a will but that the paper given her to sign was different from what she expected; that she glanced through the paper and it was not what she expected; namely, a will; that nevertheless she signed it. The document she signed was the deed conveying her property to Bernice F. Crawford. She further testified that she did not see either this deed or the deed from Miss Crawford until early in 1938 and she did not know she had signed a deed until about that time.

Mr. Palmer was called as a witness for plaintiff for cross-examination under the provisions of section 2055 of the Code of Civil Procedure. He proved a most willing witness for plaintiff. He corroborated her testimony in many important particulars. He testified that Mrs. Palmer wanted to execute a will; that he knew when the deed to Bernice F. Crawford was signed that it was not a will but a deed; that for the first time in his life he put something over on his wife.

The attorney who prepared the deeds was called as a witness. He testified that he had been attorney for Mr. Palmer but had not met Mrs. Palmer prior to May 3, 1929. He further testified that:

"Mr. Palmer came to the office one day just prior to the execution of these joint tenancy deeds. He seemed perturbed—told me that a neighbor lady had been having some trouble over her husband's estate, and was not able to get any money out of it, and it was costing her a lot of money. He wanted to know if there was any way that his and Mrs. Palmer's estate could be fixed so as to avoid that kind of trouble in the event of the death of either of them. I told him my property was in joint tenancy; that in my opinion a joint tenancy estate would be the best for them. I told him also that in the event of the death of either one of them the entire estate would go to the survivor; there was probably more said, but that is the gist of the conversation at that time.

"Q. After this conversation with Mr. Palmer, did you prepare the joint tenancy deeds? A. Yes, I did."

He further testified concerning conversations on May 3rd:

"Mrs. Palmer referred again to the neighbor lady's difficulty over the probate matter; she wanted to be assured that what I was proposing to do would avoid probate, and avoid the trouble that the neighbor was having. At that time she told me that the houses—the property that was described in the deed—it was her separate property; that she had accumulated the money that bought those houses in the nursery business back in Iowa some place. She wanted to know what the effect would be in case of the death of either of them. She said that Mr. Palmer had told her

that I had told him (which is a lot of hearsay, of course), that in the event of the death of either one of them the estate would go to the survivor. I told her that that was correct.

"Q. Was there anything further said in that conversation that you recall by Mr. Palmer or Mrs. Palmer and yourself? A. I told Mrs. Palmer that my own and my wife's property was in joint tenancy. I felt that that was the best solution to the problem.

"Q. Did Mr. Palmer make that remark at that time, that you could be trusted to do what was right in the matter? A. My recollection is that he did say something along that line. I don't know just what it was.

"Q. In substance, that they could safely leave the matter in your hands? A. Yes, something of that sort. * * *

"Q. She did tell you, I believe you said, that Mr. Palmer had told her that you had recommended placing the property in joint tenancy? A. Yes, she said that.

"Q. She told you that he had said that on the death of either one of them the property would go to the survivor? A. Yes, she asked me if that was right.

"Q. She asked you if that was right? A. Yes.

"Q. And you told her that it was? A. Yes.

"Q. She also told you that Mr. Palmer had told her that you had said that handling it in that way was saving delay in case of the death of either one of them, and would save costs in the event of the death of either one of them, and would save taxes, perhaps; is that right? A. I don't remember—I don't think there was anything said about taxes. Whether she asked me that or whether I told her—yes, I did tell her that in the event of the death of either one of them it would be a very short procedure and rather inexpensive in comparison with probate, and that they would not be tied up so long.

"Q. And you told her that the way this transaction was handled was by giving the deed—giving of the deed to a third person to operate as a conduit of title, and then deed back from that person to them as joint tenants, did you not? A. In substance, I probably did tell that I had prepared the deed to my stenographer and from the stenographer back to them. I showed her the way the deeds were prepared, and showed her the deeds."

It is also in evidence that Mrs. Palmer had bought and sold property in Iowa and had given and received deeds there; that on four occasions she had bought property in California and had received and kept the four deeds conveying the respective properties to her. It is also in evidence that for twenty years she had conducted a business in Iowa. She had executed a number of wills.

It may be observed that on direct examination Mrs. Palmer appeared to be a witness of average intelligence and possessed of a good memory. On cross-examination her memory was bad and she was evasive to an extreme degree. This may be one of the reasons why the trial court seemed to give little weight to her testimony.

On October 8, 1937, Mr. Palmer was involved in an automobile accident. On March 5, 1938, J. C. Swartzbaugh and Jack Swartzbaugh brought suit against him for damages resulting from this accident. The case was set for trial on May 12, 1938, and went to trial on that day. At the conclusion of the trial the trial judge announced judgment for plaintiffs. On May 26, findings of fact and conclusions of law were filed reciting that plaintiffs were entitled to judgment in the total sum of $15,360.55. Judgment was signed and filed on the same day.

On May 11, 1938, Mr. and Mrs. Palmer signed, acknowledged and had recorded a declaration of homestead on Lots 36 and 37 in Block B of Wallace Heights Tract in San Diego. These lots compose one of the tracts described in the deed from Mr. and Mrs. Palmer to Bernice F. Crawford and in her deed to them as joint tenants. This property is not described in the complaint filed in this action.

On May 24, 1938, plaintiff Adah Palmer executed a grant deed conveying to Rosa L. Keller "my undivided one-half interest" in the property described in this complaint, being the same property described in the deeds to and from Bernice F. Crawford, excepting the property described in the declaration of homestead. On the same day Rosa L. Keller reconveyed this property to plaintiff. These deeds were recorded on June 2, 1938.

The trial court found all necessary facts in favor of the Swartzbaughs and that they had a valid and enforceable lien on an undivided one-half interest in the property described in the complaint. It was also particularly found that prior to May 3, 1929,

the property belonged to plaintiff as her separate property; that "it is true that said grant deeds (of May 3, 1929) were and are, and that each of them was and is, valid in every respect; that it is not true that said plaintiff at the time of the execution of the grant deed first in this paragraph mentioned, or at any other time or at all, either did not know that she was executing a deed to said real property or did not intend to execute a deed thereto, but on the contrary that it is true that at said time the said plaintiff knew that she was executing such a deed and intended to execute such a deed; that it is not true that at said time the said plaintiff believed said grant deed first in this paragraph mentioned to be a joint will or any other instrument other than a grant deed; that it is true that the grant deed first in this paragraph mentioned was executed and delivered by said plaintiff and the said O. B. Palmer to the said Bernice F. Crawford for the purpose of vesting title to the real property described therein in the said Bernice F. Crawford as a conduit of title for the purpose of conveying title thereto to said planitiff and the said O. B. Palmer as joint tenants, which last mentioned purpose was effectuated by the execution and delivery, as aforesaid, of the grant deed by the said Bernice F. Crawford to said plaintiff and the said O. B. Palmer, as hereinabove mentioned. * * * That it is true that the execution and delivery of said grant deeds, and each of them, were the result of an idea conceived by said plaintiff, and were not the result of any suggestion by or on the part of the said O. B. Palmer, or of anyone other than the said plaintiff acting under and pursuant to the advice of her attorney."

[1] There is no attack made on the deed from plaintiff to Rosa L. Keller nor upon the deed from her to plaintiff. It follows that the joint tenancy to the property described was thereby broken and that the property was thereafter owned by plaintiff and O. B. Palmer as tenants in common.

The trial court drew the conclusion of law that plaintiff could take nothing by her suit and rendered judgment against her, and that the Swartzbaughs had a valid and enforceable lien upon the one-half interest of O. B. Palmer in the property.

Plaintiff's principal ground of attack on the judgment is that the evidence fails to support the findings. Of course, if the testimony of Mr. and Mrs. Palmer be accepted as true in its entirety, and if contrary evidence and inferences to be drawn from the evidence were rejected, we would have to agree with plaintiff and reverse the judgment.

As we have observed, plaintiff furnished some ground for doubting her credibility by her attitude on the witness stand. Mr. Palmer impeached himself when he admitted that he had deliberately attempted to defraud his wife in the transaction of May 3, 1939.

The testimony of the attorney who prepared the deeds clearly indicates that Mrs. Palmer knew she signed a deed and not a will. To a certain extent Mrs. Palmer admitted the truth of this evidence when she grudgingly admitted that she glanced through this paper and knew when she signed it that it was not what she expected. She testified she expected a will.

Mrs. Palmer was not a person entirely ignorant of business affairs. She had conducted a successful business for twenty years in Iowa before coming to California. She had given and received deeds conveying real property. She took entire charge of her property in California and had paid mortgages on it. She had possession of the four deeds conveying title to the San Diego properties to her, the first of which was given in 1914. She had executed several wills.

When plaintiff conveyed "my undivided one-half interest" in the described property to Rosa L. Keller she certainly recognized that she was not the owner of the full title to the property, but that she had a co-tenant with a vested interest in it.

It should be worthy of note that the deed to Bernice F. Crawford and her deed to Mr. and Mrs. Palmer conveyed not only the property described in the complaint but also the property described in the homestead. How the fraud and mistake could go only to property not covered by a homestead, and not to property covered by a homestead and therefore exempt from execution, when all of the properties are described in the deed under attack, is not easy to understand.

[2] It is of course true that if the evidence is conflicting, and there is substantial evidence in the record supporting the findings and judgment, an appellate court cannot reverse the judgment because of conflicts in the evidence.

The evidence of the attorney who drew the deeds dated May 3, 1929, clearly shows

that plaintiff knew she signed a deed and not a will. The only question not covered by his evidence is whether or not it was explained to Mrs. Palmer that the deed she signed would vest a present estate in the property in Mr. Palmer.

[3, 4] There is a further rule that must control on this appeal. It is stated in Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 44, 26 A.L.R. 123, as follows: "This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence. Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 P. 212. In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 519, 520, 153 P. 951; Hassell v. Bunge, 167 Cal. 365, 367, 139 P. 800. 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff (the prevailing party) must be indulged by this court.' Bandle v. Commercial Bank of Los Angeles, 178 Cal. 546, 547, 174 P. 44, 45."

[5] There are strong inferences to be drawn from the evidence that Mrs. Palmer knew the legal effect of deeds and knew that the deeds of May 3, 1929, vested a present estate in her property in O. B. Palmer. We have already summarized that evidence and it is unnecessary to repeat it here. Under the rule last quoted we must also draw those inferences here and must conclude that the findings of fact and that portion of the judgment establishing a valid lien in favor of the Swartzbaughs on an undivided one-half interest in the property described in the complaint and judgment is supported by substantial evidence and must be affirmed.

It is not questioned here and it was not questioned in the court below that plaintiff was and is the owner of an undivided one-half interest in the property described in the complaint. The trial court so found and that finding is supported by the evidence. It follows that plaintiff was entitled to have her title to an undivided one-half interest in the property described in the complaint quieted in her. The portion of the judgment to the contrary cannot be supported.

The portion of the judgment establishing the lien of the judgment in favor of J. C. Swartzbaugh and Jack Swartzbaugh on the one-half interest of O. B. Palmer in the property described in the complaint and judgment is affirmed.

The portion of the judgment denying plaintiff any relief and refusing to quiet her title to an undivided one-half interest in the same property is reversed with instructions to the trial court to modify its conclusions of law and judgment in accordance with the views just expressed and to enter judgment accordingly.

Neither party will recover costs of appeal.

BARNARD, P. J., and GRIFFIN, J., concurred.



STROMERSON et ux. v. AVERILL.

Civ. 6683.

District Court of Appeal, Third District, California.

Jan. 24, 1942.

Rehearing Granted Feb. 21, 1942.

1. Pleading 129(2)

In action to quiet title, wherein answer denied that plaintiffs were "the equitable owners, or owners at all, of said real property, or any portion thereof", there was no admission, by failure to deny, of allegation of complaint that realty involved in action was community property of plaintiffs.

2. Frauds, statute of ⇐116(5)

The term "party sought to be charged", within statute providing that agreement for leasing for longer than one year or for sale of realty, if made by agent of party sought to be charged, is invalid unless agent's authority is in writing subscribed by party sought to be charged, is person charged in

court with performance of the obligation. Civ.Code, § 1624, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Party Sought to be Charged".

3. Principal and agent ⇐75

Whenever agent, improperly authorized in the first place, performs acts in execution of agency which are ratified by principal, principal is entitled to enforce his demands against agent for anything which agent has received on his account.

4. Frauds, statute of ⇐116(10)

Where agent, who was authorized to purchase land for principal but whose authority was not in writing, entered into written contract for purchase of land in his own name, and principal ratified contract, quieting of principal's title was not barred by statute of frauds. Civ.Code, § 1624, subd. 4; §§ 2309, 2310.

5. Evidence ⇐459(2)

Proof dehors a written contract that one of named parties thereto signed it as agent of real party in interest is not a violation of the parol evidence rule.

6. Quieting title ⇐51

Where agent authorized to purchase land for principal entered into contract for purchase of land in his own name and evidence authorized finding that agent used principal's money to make payments on contract and to farm land, but agent was contingently liable for balance of payments, decree quieting title in principal should do equity by requiring principal to relieve agent from liability under contract.

Appeal from Superior Court, Madera County; Ernest Klette, Judge Assigned.

Action to quiet title by H. C. Stromerson and wife against Roger Averill. From a judgment for defendant, plaintiffs appeal.

Modified and affirmed.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for appellants.

Barcroft & Barcroft, of Madera, and David E. Peckinpah and L. N. Barber, both of Fresno, for respondent.

CURLER, Justice pro tem.

This is an action to quiet title brought by H. C. Stromerson and Leone Stromerson, his wife, against Roger Averill. In his amended answer Roger Averill asked that his title be quieted against H. C. Stromerson and wife.

Prior to the transactions involved in this case, H. C. Stromerson had been acquainted with Averill for many years, and had worked under him on several public construction jobs. While Stromerson and wife were living in Los Angeles, California, Averill sought to interest them in going to Madera County, California, for the purpose of farming certain land there. On the 6th of November, 1933, the Stromersons moved to Madera County, and on the 1st day of November, 1933, entered into a contract with Miller & Lux, Inc., a corporation, for the purchase from said corporation of 160 acres of land in Madera County. Subsequently the Stromersons received a loan from the Federal Land Bank with which they paid up the balance due on the 160 acres of land and received a deed from Miller & Lux, Inc., to the land. On the 6th day of March, 1936, H. C. Stromerson entered into a contract with Miller & Lux, Inc., a corporation, wherein he agreed to buy from said corporation a tract of land adjoining the 160 acres already purchased. This later tract of land contained 562.55 acres and was located in Section 19, Township 11 South, Range 16 East, Madera County, California. (Title to the 160 acre piece of land is not involved in this suit.) At the time the Stromersons moved to Madera County, Averill already had associated with him in his land enterprises, a man by the name of P. A. Davis, and a man by the name of J. F. Lincoln. There were some 475 acres of land in Section 10 in said county standing in the name of P. A. Davis, and 650 acres in Section 23, standing in the name of Roger Averill. Upon the Davis land there was a loan of approximately $36,500 from the Federal Land Bank, and upon the land standing in the name of Roger Averill he had borrowed approximately $36,000 from the Federal Land Bank. All of the land, including that standing in the name of Roger Averill, that standing in the name of P. A. Davis, and the land involved in this suit, was jointly farmed. The money for the payment of the land, and for the farming of the same, came from personal advances by Roger Averill, and from money advanced by the San Joaquin Cotton Oil Company, for crops raised, and to be raised on the land, and also from sales of crops to parties other than the Cotton Seed Oil Company.

There is a great deal of evidence bearing upon the transactions and relationships existing between H. C. Stromerson, Roger Averill, P. A. Davis and J. F. Lincoln.

In their pleadings, and throughout the trial, H. C. Stromerson and Leone Stromerson, his wife, maintained that the contract entered into by Miller & Lux, Inc., a corporation, as seller, and H. C. Stromerson, as purchaser, was for the sole benefit of the Stromersons. On the other hand, Roger Averill maintained that in the entire transaction, H. C. Stromerson was acting as his agent.

The trial court found that the contract of purchase pertaining to the 562.55 acres by H. C. Stromerson, on the one part, and Miller & Lux, Inc., a corporation, on the other part, was in truth and in fact the contract of Roger Averill, and that he executed said contract by and through H. C. Stromerson, who was acting as his agent, and that Roger Averill had been in possession of the land ever since the date of the execution of the contract, and that H. C. Stromerson and Leone Stromerson, his wife, had neither in law nor in equity, any right, title or interest in or to the land, and that Roger Averill is in equity the owner of the same, and is entitled to receive a conveyance of said land from Miller & Lux, Inc., a corporation, upon full performance of the terms and conditions of said contract on the part of the purchaser. The trial court then gave judgment quieting the title of Roger Averill, and adjudging that H. C. Stromerson and Leone Stromerson, his wife, have no right, title or interest in the premises. From this judgment H. C. Stromerson and Leone Stromerson, his wife, appeal.

[1] One of the main contentions of the appellants is that their complaint contains the allegation "that the property involved in this suit is the community property of H. C. Stromerson and Leone Stromerson, his wife," and that inasmuch as this allegation is undenied in the amended answer of Roger Averill, that this fact is deemed as admitted and must be considered as found by the court. In the amended answer there is the following denial: "Denies that by reason of said contract of purchase and sale, or otherwise, the plaintiffs, or either of them, became, or ever since have been, or now are, or ever were, the equitable owners, or owners at all, of said real property, or any portion thereof, or the equitable owners, or any owners, of said contract." This appears to be a full denial of any ownership of plaintiffs, or either of them in the contract or the property mentioned therein. The balance of appellants' contentions, with the exception that the court erred in ruling on admissibility of evidence and that the judgment fails to do equity, falls into one class, namely, that agency was not proven, and that if it was proven the evidence admitted violated the parol evidence rule or the statute of frauds. The following sections of the statute of frauds seem to be applicable in this case:

Section 1624, Civ.Code—"The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: * * * 4. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged."

Section 2309, Civ.Code—"An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

Section 2310, Civ.Code—"A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof."

[2-4] Applying, first, section 1624, Civ. Code, we find that the term "party sought to be charged" is defined in the case of Harper v. Goldschmidt, 156 Cal. 245, 104 P. 451, 28 L.R.A.,N.S., 689, 134 Am.St.Rep. 124, as meaning the person charged in court with the performance of the obligation. If Miller & Lux, Inc., were being sued for performance of the contract, the section would not avail it, because it signed the contract, and if Stromerson was being sued by Miller & Lux, Inc., the same reasoning would apply to him. If Miller & Lux, Inc., were suing Averill, he could avail himself of this section, and also section 2309, Civ. Code, unless it were held that he had ratified the contract. However, Averill, by appearing in the suit and setting up the claim that he was the real purchaser under the contract, and that he was the equitable

owner of the land mentioned in the contract, in effect ratified the action of the agent in entering into the contract. This, however, is a suit between the principal and the agent. It has been repeatedly held that whenever an agent, improperly authorized in the first place, performs acts in the execution of the agency which are ratified by the principal, the principal is entitled to enforce his demands against the agent for anything which the agent has received on his account. McBride v. McCartney, 53 Cal.App. 707, 200 P. 756; Troendle v. Clinch, 125 Cal.App. 147, 13 P.2d 852. These cases were decided at a time when the provisions of sections 1624, 2309 and 2310 of the Civil Code read the same as they now do, and were cases in which the agent was attempting to hide behind the terms of the statute of frauds.

[5] Proof dehors a written contract that one of the named parties thereto signed it as the agent of the real party in interest is not a violation of the rule prohibiting the use of parol evidence to vary the terms of a written contract. Otten v. Spreckels, 24 Cal.App. 251, 141 P. 224; Hay v. McDonald, 21 Cal.App. 204, 131 P. 74.

[6] It is contended that the decree is fatally defective in its failure to require the defendant to do equity. So far as such a contention applies to payments on the contract, and to the cost of farming the land mentioned therein, we feel that it is unsound. The trial court decided that Stromerson was the agent and employee of Averill, and that he was paid a salary for his efforts. Although the evidence is conflicting as to where the money came from for the operation of the farm and the payments under the conditional sales contract, there was adequate proof to justify the court in believing that it was Averill's money, and although there is no specific finding on this point, it would of necessity follow from the court's decision. However, it is true that the Stromersons are contingently liable for the balance of the payments under the contract with Miller & Lux, Inc., and it would be entirely inequitable in this action to turn the fruits of the contract and the security of the equitable interest in the land over to Averill without requiring him to protect the Stromersons against future liability under the contract.

Appellants claim that numerous errors were committed by the trial court in rulings on admissibility of evidence. We find no errors in the rulings in the rejection or admission of evidence which would justify a reversal of the judgment.

It is ordered that the judgment be modified to require respondent to relieve appellants from their liability under the contract, within a reasonable time to be fixed by the court, and upon such being done, respondent's title in and to the contract and the equitable ownership of the land thereunder be adjudged quieted.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.



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COX v. TYRONE POWER ENTERPRISES, Inc., et al.

Civ. 12636.

District Court of Appeal, Second District, Division 3, California.

Jan. 29, 1942.

Hearing Denied March 27, 1942.

1. Automobiles ⇐244(11)

In action for injuries sustained in automobile collision at street intersection, evidence as to defendant motorist's failure to stop before entering a "through highway" and in continuing to point of impact, and that she could have seen plaintiff's automobile, was sufficient to support implied finding of defendant's negligence. Vehicle Code, § 82.5, St.1937, p. 413; § 577, St.1935, p. 190.

2. Automobiles ⇐244(43)

In action for injuries sustained in automobile collision at street intersection when defendant drove into through street without stopping, evidence *held* to support implied finding of plaintiff's freedom from contributory negligence. Vehicle Code, § 82.5, St. 1937, p. 413; § 577, St.1935, p. 190.

3. Appeal and error ⇐216(2)

In action for injuries sustained in automobile collision at intersection, in which plaintiff's theory was that defendant failed to stop before entering through street, instruction that any signal of intention to turn

right or left should be given continuously during the last 50 feet traveled by defendant's vehicle before turning, was proper and not misleading, in view of defendants' failure to qualify their instruction respecting their hypothesis that a stop was made for the through street at a place less than 50 feet from beginning of the turn. Vehicle Code, § 544(b), St.1935, p. 185.

4. Motions ⇐62
New trial ⇐163(2)

If language used in determining a motion, such as a motion for new trial, identifies with reasonable certainty the order which is made, the order, if otherwise tenable, will be given effect, since language is but a means of conveying thought, and certainty of its meaning is but relative.

5. New trial ⇐163(1)

An order granting a motion for new trial could be no more inclusive than motion therefor. Code Civ.Proc. §§ 657, 659.

6. New trial ⇐130

Where plaintiff's notice of intention to move for a new trial on issue of damage only was based solely on ground of insufficiency of evidence to justify verdict, it could be granted on no other ground. Code Civ. Proc. §§ 657, 659.

7. New trial ⇐163(2)

A statement, in order granting plaintiff's motion for a new trial on issue of damages only, that order was based on ground of inadequate damages, construed with language of motion that motion was based on insufficiency of evidence to justify verdict, constituted a specification that legal ground was insufficiency of evidence to justify verdict. Code Civ.Proc. §§ 657, 659.

8. New trial ⇐9

An order granting motion for new trial on issue of damages only, on ground of insufficiency of evidence to justify verdict, was within trial court's discretion. Code Civ.Proc. § 657.

9. New trial ⇐9

Where verdict for plaintiff in personal injury action was for $1,250, in response to claim for $450 doctors' bills, $361 hospital bill, and general damages, and items for doctors and hospitals were not disputed but extent of injuries was seriously contested, the granting of plaintiff's motion for new trial on sole issue of damages because of insufficiency of evidence to sustain verdict did not constitute an abuse of discretion on theory that, because award of only $439 for general damages was disproportionately small, jury must have compromised question of negligence by its inadequate award of damages. Code Civ.Proc. §§ 657, 659.

10. New trial ⇐163(1)

Under statute providing that, when new trial is granted for insufficiency of evidence to sustain verdict, order shall so specify in writing and shall be filed with clerk within 10 days, and that otherwise, on appeal from order, it shall be conclusively presumed that order was not based on that ground, a written order for new trial is equally valid whether deposited by clerk in a folder or kept by him in the minute book. Code Civ. Proc. §§ 657, 1003.

11. New trial ⇐163(1)

The purpose of the 1939 Amendment to statute providing that, when new trial is granted on all or part of issues on ground of insufficiency of evidence to sustain verdict or decision, order shall so specify in writing and shall be filed with clerk within 10 days after motion is granted, and that otherwise on appeal therefrom it will be conclusively presumed that order was not based on that ground, aside from purpose to make requirements applicable to cases tried without as well as to cases tried with a jury, was to set up, in effect, a statute of limitation on time within which trial court can, either by original action or by nunc pro tunc order, specify insufficiency of evidence as ground for an order granting a new trial. Code Civ. Proc. §§ 657, 659, 660, 1003.

12. New trial ⇐163(1)

Regardless of statute requiring orders granting new trials on ground of insufficiency of evidence to so specify in writing and to be filed within 10 days, it is fundamental that all orders of a court of record shall be recorded in writing. Code Civ.Proc. §§ 657, 659, 660, 1003.

13. New trial ⇐163(1)

In view of the well-established court practice of determining new trial motions by minute entry, Legislature will not be deemed to have banned such practice in whole or in part unless specific language to that end has been used in statute. Code Civ.Proc. §§ 657, 659, 660, 1003; Prob.Code, § 1221.

14. New trial ⇐163(1)

An order for a new trial on ground of insufficiency of evidence to sustain verdict,

written on a piece of paper in custody of the clerk by direction of the court and in, or to be placed in, court's minute book, is an "order in writing" "filed with the clerk" within statute requiring such orders to be in writing and filed with the clerk within 10 days; to "file" a document originally meaning to hang it on a string for preservation, but now importing that document shall be placed in official custody of proper person. Code Civ. Proc. § 657.

See Words and Phrases, Permanent Edition, for all other definitions of "File", "Filed with the Clerk", and "Order in Writing".

15. Courts ⇐107

It is a rule of construction that a judicial opinion must be construed with reference to facts on which it is based, and language used must be held as referring to the particular case and read in light of circumstances under which it is used, and it is particularly true that incidental statements of conclusions not necessary to decision are not to be regarded as authority.

16. New trial ⇐163(1)

The statute, as amended in 1939, providing that, when motion for new trial is granted for insufficiency of evidence, a written order specifying such grounds shall be filed within 10 days, is "mandatory" and applies to nunc pro tunc orders as well as to original orders. Code Civ.Proc. § 657.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

17. Courts ⇐107

Language in an opinion purporting to determine a question not necessary for decision of the appeal is "obiter dictum".

See Words and Phrases, Permanent Edition, for all other definitions of "Obiter Dictum".

18. Statutes ⇐243

Where a statute is susceptible of a narrow construction which will require reversal of an order for an error presumed directly contrary to the facts, and also to a liberal and reasonable construction which will give effect to every word and which attains the identical object with same certainty and does not impose unconscionable presumptions contrary to facts or record, court will adopt the latter construction.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Edwin F. Cox against Tyrone Power Enterprises, Incorporated, and others, for damages for personal injuries sustained in an automobile collision at a street intersection. From a judgment for plaintiff, and from an order denying defendants', and granting plaintiff's, motion for a new trial, defendants appeal.

Affirmed.

Stephen Tighe, of Los Angeles, for appellants.

Joseph L. Fainer and Thomas Connell, both of Los Angeles, for respondent.

SCHAUER, Presiding Justice.

This is an intersection automobile collision case, tried before a jury, in which the plaintiff was awarded a verdict of $1,250 for injuries which included multiple fractures of the right knee cap, and in the treatment of which injuries plaintiff had incurred hospital and medical expenses in the aggregate sum of $811.

Both plaintiff and defendants moved for a new trial, plaintiff's motion being limited by his notice of intention to "the issue of damages alone" on the sole ground of insufficiency of the evidence to justify the verdict, while defendants' motion was for a retrial on all issues and was predicated on several grounds including that of insufficiency of the evidence.

The only ruling on such motions was pronounced orally and entered in the clerk's minutes in writing in the following language: "Said motions being presented and argued on all of the grounds set forth in the notices of intention to move for a new trial, it is ordered that plaintiff's motion for a new trial be granted upon the grounds of inadequate damages; that defendants' motion for a new trial be denied." Such entry in writing was made the day the ruling was pronounced.

Defendants appeal from the judgment and from the order denying defendants', and granting plaintiff's motion for a new trial; they advance four propositions as grounds for reversal:

"I. There is no substantial evidence that defendant driver was negligent and on the contrary the preponderance of evidence establishes the negligence of plaintiff.

"II. The court erroneously instructed the jury under the evidence in this case that a left turn signal was required during the last fifty feet of travel.

"III. The court erred in granting plaintiff's motion for a new trial upon the issue of damages alone (if that was the intended effect of the order).

"IV. There is no authority in law for granting plaintiff's new trial motion in this case by an oral order of the court entered in the minutes."

We discuss such propositions in the order in which they are presented but find none of them sustainable.

I. Sufficiency of the Evidence to Sustain the Verdict on the Issues of Negligence and of Contributory Negligence.

[1, 2] The collision occurred in the early afternoon of March 16, 1939, when plaintiff, operating his automobile in a westerly direction on Pico Boulevard, a "through highway" (Vehicle Code, sec. 82.5, St. 1937, p. 413), arrived near the center of the intersection of that highway with Beverly Glen Boulevard, a public street, at the same time that defendant Anne L. Power, driving the defendant corporation's automobile with its consent, in a southerly direction on Beverly Glen, also reached such point. The briefs seem to assume that defendant Power (hereinafter referred to as defendant) was endeavoring to execute a left turn from Beverly Glen easterly onto Pico Boulevard but there is no evidence that she actually started a turn, unless it can be inferred from the positions of the cars as indicated on a diagram (Defendants' Exhibit A) coupled with defendant's statement that she extended her *"hand"* for a left turn after making the boulevard stop.

Neither car is shown to have been necessarily traveling at an excessive speed in the intersection, but there is substantial (though disputed) evidence that defendant failed to make a stop as required by law before entering the intersection. Vehicle Code, sec. 577, St.1935, p. 190. In this respect, although defendant said that she stopped and remained standing for two or three minutes, plaintiff testified that he observed the defendant's car from a time when it was about sixty feet back from the stop sign, that he expected it to stop, but that it continued on to the point of impact. Defendant testified that after entering the intersection she observed plaintiff's car approaching at a speed of thirty to thirty-five miles per hour, but that she proceeded straight ahead, in low gear, at ten miles per hour, without applying brakes, until the collision occurred. While she stated that her car moved only five or ten feet after she first observed plaintiff's car until they crashed, the jury may well have believed that she saw, or should have seen, plaintiff's car at a greater distance. Plaintiff's speed was fixed by other witnesses at twenty to twenty-five miles per hour. No sound signal was given by defendant. The plaintiff also fixed the point of impact as being north of the center line of Pico and *east* of the center line of Beverly Glen. The witness Trudeau testified that he saw defendant's car when it was fifteen feet north of the intersection, approximately at the stop sign, traveling fifteen miles per hour, and that it did not stop. He placed the point of impact at, or within ten feet easterly from, the center of the intersection. Police officer Durham found a mark on the street said to have been made by the bumper of plaintiff's car, and fixed the place of impact as three and one-half feet east of the center line of Beverly Glen and eight feet north of the center line of Pico. It was stipulated that persons approaching the involved intersection had "a clear visibility for five or six hundred feet back from either of those two streets."

The foregoing recital of facts disposes of defendants' Point I; such evidence amply supports the implied finding of defendant's negligence and plaintiff's freedom from contributory negligence.

II. Instruction to Jury on Law Governing Left Turn.

[3] The trial court instructed the jury that "Any signal of intention to turn right or left shall be given continuously during the last fifty feet traveled by the vehicle before turning." Such instruction accurately quoted the Vehicle Code, section 544(b), St. 1935, p. 185, and although on appropriate request defendants might well have been entitled to have had it specifically qualified with respect to the hypothesis of defendants that the boulevard stop was made at a place less than fifty feet from the beginning of a turn, no such request was made, and on the plaintiff's theory of the case, which negatives any stop and assumes an attempted left turn, the instruction was proper. In any event it does not appear reasonably possible that the jury was misled

by the instruction as given. In the case of Johns v. Mecchi, 1931, 116 Cal.App. 31, 2 P.2d 452, cited by appellant herein, the plaintiff appealed and sought a reversal of a judgment for the defendant therein on the ground that such defendant had not given the left turn signal continuously for fifty feet, *a stop having been made* about thirty-five feet from the point where the accident occurred. Obviously the affirmance of the judgment in that case on the ground that on the theory of the prevailing party *that a stop had been made* and hence the left turn signal was improper *before the stop* gives rise to no implication of error in giving the instruction in the case at bar, which was applicable on the theory of the prevailing party here that *no* stop had been made.

III. New Trial on Issue of Damages Only; Meaning of Order.

Defendants' attack under this point is threefold. They contend in effect that the language used by the court in granting plaintiff's motion for new trial (1) is inadequate to limit the retrial to the issue of damages only; (2) that it does not specify insufficiency of the evidence to justify the verdict as the ground of the order; and (3) if the order be interpreted to grant a new trial only as to the issue of damages on the ground of insufficiency of the evidence it was an abuse of discretion to so limit it.

[4] (1) Language is but a means of conveying thought; the certainty of its meaning is but relative. If the language used in determining a motion is such as to identify with reasonable certainty the order which is made, such order, if otherwise tenable, will be given effect. Here the plaintiff's motion for new trial was predicated on a document headed "Notice of Intention to Move for New Trial (Upon the issue of damages, only)" and which expressly states that "plaintiff intends to and will move the above entitled court to vacate and set aside the verdict heretofore rendered in favor of plaintiff and against the defendants in the above entitled action, on the issue of damages alone, and to grant the plaintiff, Edwin F. Cox, a new trial on said issue upon the following grounds: I. Insufficiency of the evidence to justify the verdict." Section 659 of the Code of Civil Procedure provides that the "notice shall be deemed to be a motion for a new trial on all the grounds stated in the notice." As hereinabove noted, defendants' notice of intention to move for new trial was general in scope and multiple in grounds. By minute entry the court "ordered that plaintiff's motion for a new trial be granted upon the grounds of inadequate damages; that defendants' motion for a new trial be denied."

[5-8] Since defendants' motion was denied, the only motion which could have been granted was plaintiff's, and the order granting it could be no more inclusive than such motion. Quevedo v. Superior Court, 1933, 131 Cal.App. 698, 702, 21 P.2d 998; Tripcevich v. Compton, 1938, 25 Cal.App.2d 188, 190, 77 P.2d 286. The specific reference (in the order) to the motion serves to emphasize applicability of the proposition recognized in the two last-cited cases that the order must be construed within the limits set up in the motion. (2) This proposition applies not only to determining the limits of the order but also to identifying the ground on which it is based. Since the motion was based solely on the ground of insufficiency of the evidence it could be granted on no other ground (Polk v. Boggs, 1898, 122 Cal. 114, 117, 54 P. 536) and the statement in the order that it was based on "the grounds of inadequate damages," construed with the language of the motion, constitutes a specification that the legal ground was "insufficiency of the evidence to justify the verdict". See Griffey v. Pacific Electric Ry. Co., 1922, 58 Cal.App. 509, 512, 209 P. 45; Lucerne Country Club v. Beal, 1937, 21 Cal.App.2d 121, 126, 68 P.2d 408; Secreto v. Carlander, 1939, 35 Cal.App.2d 361, 364, 95 P.2d 476. Such order for a new trial on the issue of damages only, on the ground stated, was within the trial court's discretion. Code Civ.Proc., sec. 657; Sanford v. Wilcox, 1936, 13 Cal.App. 2d 193, 194, 56 P.2d 548.

[9] (3) While the evidence amply supports the conclusion that the damages awarded were inadequate, we do not find that it is such as to justify us in concluding, contrary to the trial judge, that the jury *compromised the question of negligence* by its inadequate award of damages. Such a conclusion on this record would be more speculative than inferential. The verdict here was for $1,250 in response to plaintiff's claim for $450 doctors' bills, $361 hospital bill, and general damages. The items for the doctors and the hospital were not disputed, but the extent of the injuries was seriously contested. The verdict not only awards recovery for all the special

damages but includes $439 for general damages. That the general damage award is disproportionately small seems obvious and its inadequacy is the basis for the new trial order. But that merely because we regard the award as too low we must also infer that jurors stultified themselves by bargaining inadequate damages for unjustified liability is a non sequitur.

If such a conclusion is to be reached it must be supported by further circumstances.

In the case of Donnatin v. Union Hardware & Metal Co., 1918, 38 Cal.App. 8, at page 11, 175 P. 26 at page 27, 177 P. 845, the stated doctrine of which is relied upon by defendants, it is pointed out that "As shown by the evidence, there was no contest as to the extent of plaintiff's injuries; hence the real subject of the trial was the question of defendant's alleged negligence, as to which there was no justifiable verdict." (The verdict in that case was for $1.) In the case before us there was substantial contest as to the extent (permanence) of plaintiff's injuries. A medical expert for plaintiff testified that on examination three weeks before the trial he found plaintiff still suffering twenty-five per cent impairment of motion in his injured knee and that at least fifteen per cent impairment would be permanent, but defendants' expert said that more than three months before that date he found the plaintiff wholly recovered; also that plaintiff said he had been discharged from medical care approximately six months before the trial date. The conclusion which appears most reasonable to us from consideration of the entire record is that the jury correctly determined the issues of negligence and contributory negligence and that the granting of plaintiff's motion for a new trial solely on the issue of damages was within the discretion of the trial judge, who, as well as the jury, heard the evidence. Defendants suggest that (as asserted in the case of Zeller v. Reid, 1938, 26 Cal.App. 2d 421, 425, 426, 79 P.2d 449) the cases of Donnatin v. Union Hardware & Metal Co., 1918, supra; Bencich v. Market Street Railway Co., 1937, 20 Cal.App.2d 518, 67 P.2d 398, and Wallace v. Miller, 1938, 26 Cal.App.2d 55, 78 P.2d 745, are not necessarily inconsistent with Tripcevich v. Compton, 1938, supra. Regardless of any question of harmony among these decisions, we believe that the case before us is more akin to the case last cited and to Zeller v. Reid, supra, than to the others. Certainly we find no factual basis impelling us to hold that the order as made constituted an abuse of discretion, and we do not interpret any of the cited cases as requiring such a holding on the record before us.

IV. Validity of Minute Entry of Order Granting New Trial on Ground of Insufficiency of the Evidence.

[10] The decision of this point depends wholly on the question whether section 657 of the Code of Civil Procedure as amended in 1939 requires that an order granting a motion for new trial made solely on the ground of insufficiency of the evidence to justify the verdict or decision be inscribed on a piece of paper and deposited with the clerk otherwise than as a minute order is written and deposited with that officer; in other words, is an order on that ground, which would be valid if the paper on which it is written were deposited by the clerk in a folder, invalid if it is placed or kept by him in the minute book? We are satisfied that under a reasonable interpretation of the law the order is equally efficacious in either case.

In order to determine the intention and purpose of the legislature in making the amendments of 1939 (to Code Civ.Proc., sec. 657) it is necessary to consider briefly the history of that portion of the section which was amended. Prior to the year 1919 there was no requirement that an order granting a new trial specify the ground on which it was based and such an order, when general in terms, would be affirmed on appeal if sustainable on any ground stated in the motion. Rahmel v. Rost, 1918, 178 Cal. 15, 171 P. 1068. An order based on insufficiency of the evidence was sustainable if there was any appreciable conflict in the evidence (Newman v. Overland Pacific Ry. Co., 1901, 132 Cal. 73, 74, 64 P. 110), and it was the practice for appellate courts to assume, unless precluded by the order or by absence of that ground from the motion, that insufficiency of the evidence was the ground (see 2 Cal.Jur. 892, and cases cited under note 13). The courts indulged this practice to the extent shown in Newman v. Overland Pac. Ry. Co., 1901, supra, where the minute order being in general terms, although the court filed a written "opinion" specifying a different ground, it was presumed that insufficiency of the evidence was the legal ground on which the general order was based. The court said, at page 75 of 132 Cal., at page 111 of 64 P.: "This rule of procedure is not affected by the

fact that at the time of making the order the court files an opinion in support of its action, wherein it discusses one or more of the grounds presented. The order which is entered in the minutes is the only record of the court's actions, and is to be measured by its terms, and not by the reasons which the court may give for it." Apparently in an effort to stop the practice illustrated by the last-cited case, the legislature in 1919 added a new paragraph to section 657 reading, "When a new trial is granted upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order, it will be presumed that the order was not based upon that ground." (Stats. 1919, p. 142, chap. 100.) In 1929 (Stats. 1929, p. 841, chap. 479) this paragraph was again amended so that (up to 1939) it read: "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order it will be presumed that the order was not based upon that ground."

The amendments of 1939, with which we are particularly concerned, add to the same paragraph the words "or decision" after the word "verdict," to make the provisions applicable to trials *without* as well as to trials *with* a jury, apparently taking cognizance of the decision in Gruben v. Leebrick & Fisher, Inc., 1938, 32 Cal.App.2d Supp. 762, 84 P.2d 1078; add, after the word "specify," the words "this in writing and shall be filed with the clerk within ten days after the motion is granted"; also add the word "conclusively" in the stated presumption, so that the material provisions as now cast, read: "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict or decision, the order shall so specify this *in writing and shall be filed with the clerk* within ten days after the motion is granted; otherwise, on appeal from such order it will be *conclusively* presumed that the order was not based upon that ground." (Italics added.)

[11] No court or seasoned member of the legal profession will doubt that the purpose of the legislature in enacting the above quoted amendments of 1939, other than to make the quoted requirements applicable to cases tried *without* as well as to cases tried *with* a jury, was to set up, in effect, a *statute of limitation* on the *time* within which a trial court can, either by original action or by *nunc pro tunc* order, specify *insufficiency of the evidence* as a ground for an order granting a new trial. The time within which a notice of intention to move for new trial may be filed is limited (Code Civ.Proc., sec. 659) as is the time within which the motion must be passed upon by the court (Code Civ.Proc., sec. 660), and it seems entirely logical, particularly in view of the broad discretion vested in the trial judge in passing on motions based upon insufficiency of the evidence, that there be a limitation on the time, after actual granting of the motion, within which the fact that this particular ground is a basis for the order, if such be the truth, actually shall be made a matter of record "in writing * * * filed with the clerk."

It may be inferred with confidence that the legislature, in order to accomplish its purpose, deemed it necessary to require both that the ground be specified in writing and placed of record with the clerk within the limited period because it could be contemplated that records inevitably would appear before courts of appeal, declaring, by virtue of nunc pro tunc action subsequent to the ten-day period, that the trial court's records as originally inscribed failed to specify the mooted ground only through inadvertence, it having been truly a basis of the order (sustainable on no other ground)—and without the dual requirement, certainly such nunc pro tunc order, under a long line of cases, would prevail.

That the purpose of the legislature to establish such a limitation of time is attained equally well whether the entry "in writing * * * filed with the clerk" be in a folder in his official custody or in a minute book in his official custody, is obvious. If the paper, bearing a sufficient recital, is in the official custody of the clerk within the time limited, the object of the legislation has been accomplished.

[12] That an order inscribed on a sheet of paper by direction of the court is an order in writing equally whether that sheet of paper be placed in a minute book or loose in a folder is apparent from the mere statement of the fact. That the word "order" used as a noun in the Code of Civil Procedure, by its very definition requires a writing, and that the legislature in originally providing for "motions" and "orders" generally, contemplated that an order in

writing was an order in writing, of equal efficacy, whether made on a loose sheet of paper and deposited in a folder or inscribed on a page in a minute book, becomes apparent upon reading section 1003 of the Code of Civil Procedure: "Every direction of a court, judge, or justice, *made or entered* in writing, and not included in a judgment, is denominated an order. An application for an order is a motion." (Italics added.) Regardless of section 657 of the Code of Civil Procedure it is fundamental that *all* orders of a court of record shall be recorded in writing.

[13] In determining the intention of the legislature it seems of some significance that in making the amendments of 1939 it did *not* require that the order *be signed.* The legislature apparently took cognizance of court practices. There is probably no more well established court practice than that of determining new trial motions by minute entry. Had the legislature desired to ban that practice in whole or in part it would seem logical that specific language to that end should have been used. Particularly is this true with respect to a differentiation between orders to be entered in the minute-book and orders to be "signed by the judge and filed" in view of the precise language used by the legislature in making that discrimination elsewhere. In section 1221 of the Probate Code it is stated that, "All orders and decrees of the court or judge must be entered at length in the minute-book of the court, or else signed by the judge and filed; but decrees of distribution must always be so entered at length." Here we find certainty of differentiation between and identification of the two methods of placing orders of record, and also an apparent recognition that *entry at length in the minutes is the more formal* and desirable method for publishing and preserving the highly important decree of distribution.

[14] We should note also that the amendment does not require that the order be filed "by" the clerk; it says filed "with" him. To "file" a document originally meant to hang it on a string for preservation (16 Words and Phrases, Perm.Ed., 531; Holman v. Chevaillier's Adm'r, 1855, 14 Tex. 337, 339), but the word now imports that the document shall be placed in the official custody of a proper person. "Filing a paper consists in presenting it at the proper office, and leaving it there, deposited with the papers in such office." Tregambo v. Comanche, etc., Mining Co., 1881, 57 Cal. 501; Hoyt v. Stark, 1901, 134 Cal. 178, 180, 66 P. 223, 86 Am.St.Rep. 246; Dillon v. Superior Court, 1914, 24 Cal.App. 760, 765, 142 P. 503. In furtherance of the strict construction of the statute sought by defendants (appellants) it might be urged that to be filed "by" the clerk entailed placing of an endorsement on the filed paper and depositing it in a folder or "file." But that the words "filed with the clerk" are used contemporaneously in a much broader sense is evidenced by the highest judicial authority in this state. In Bastajian v. Brown, 1941, 19 Cal.2d 209, 120 P.2d 9, on pages 10, 11, we find the quoted words used to depict the mere placing of papers in the custody of a clerk, not to be *filed "by" him* but to be handed to the judge. Surely an order written on a piece of paper in the official custody of the clerk, by direction of the court, and in, or to be placed in, the court's minute-book, is as effectively "filed with the clerk" as is a paper temporarily in his possession for the purpose of handing it to the judge. A somewhat similar usage of the word "file" also occurs in People v. Tomalty, 1910, 14 Cal.App. 224, 232, 111 P. 513, 516, wherein the court says, "The account books of the treasurer, as such, are constructed in the treasurer's office, the records are made in such office, but when made they become and are records of the office, and are then *on file* and on deposit in such office, and are in the official custody and keeping of the treasurer."

It can scarcely be argued with conviction that the paper bearing the order was not "filed *with* the clerk" merely because he and not the judge or a party acted as scrivener. There is nothing in the statute which precludes the clerk from performing his usual duties in the premises or which suggests that the validity of the order depends on whose hand writes it. Permissively, provision is made that, "The court may direct a party to prepare the order," but the very fact that this provision is expressly permissive and that there is no mandatory requirement as to preparation, service of a copy, or signing, suggests contemplation by the legislature that this order normally, like the majority of all orders, might be prepared by the clerk, in routine discharge of his duties at the direction of the judge. The fact that this permission is declared seems, upon this analysis, not persuasive that the legislature intended to ban minute orders upon the

ground specified. In almost all cases in this jurisdiction (for exception as to decrees of distribution, see Probate Code, sec. 1221) it is discretionary with the trial judge whether orders granting or denying motions made in open court be written in the minute-book or on loose paper; under *either* procedure it is not uncommon practice for counsel to suggest or for the judge to request, that an attorney for a party prepare, or assist in preparing, the form of order. Forms of orders intended to be *signed by the judge* and filed otherwise than as minute orders are more likely to be the subject of preparation by counsel on direction of the judge, but this method is not exclusive; such forms of orders for signature are often prepared by the clerk. Likewise, forms of minute orders are more likely to be prepared by the clerk, but probably every trial lawyer of mature experience has had occasion many times, either on his own initiative or by request of the judge, to himself prepare the form of minute order to be entered in a case requiring some unusual technical exactitude. Such is precisely the case of an order granting a new trial on the ground of insufficiency of the evidence to justify the verdict or decision. It is a case, since the amendments of 1939, demanding some technical exactitude in preparation of the order, but not requiring an order signed by the judge, and hence is exactly the type of case in which the trial judge, either on his own initiative or by request of counsel, might occasionally want to direct counsel to prepare the order for entry in the minute-book.

[15] Our attention has been directed to no case in which a court of appellate jurisdiction has had presented to it the precise point which we must determine. We have discovered two cases, not discussed in the briefs, in which the amendments of 1939 (to Code Civ.Proc, sec. 657) which we are considering were before the District Court of Appeal and the Supreme Court, respectively (Thomas v. Driscoll, 1940, 42 Cal. App.2d 23, 108 P.2d 43, and Whitley v. Superior Court, 1941, 18 Cal.2d 75, 113 P.2d 449), and some language is included in the decisions of those cases which, if it had been used when actually considering our problem, would probably determine it contrary to the conclusion we reach here. But it is a rule of construction that "a judicial opinion must be construed with reference to the facts on which it is based, the language used must be held as referring to the particular case, and read in the light of the circumstances under which it is used" 21 C.J.S., Courts, § 222, p. 409. Particularly is it true that incidental statements of conclusions not necessary to the decision are not to be regarded as authority. People v. McAllister, 1940, 15 Cal.2d 519, 523, 102 P.2d 1072; Hills v. Superior Court, 1929, 207 Cal. 666, 670, 279 P. 805, 65 A.L.R. 266. Neither the Thomas case nor the Whitley case involved a construction of the statute on the point we are considering.

In the Thomas case (Thomas v. Driscoll, 1940, supra, 42 Cal.App.2d 23, 108 P.2d 43) the court was concerned not at all with the validity of a minute order specifying insufficiency of the evidence as the sole ground of the order, entered in writing within ten days after oral granting of the motion; there was before it only the question of validity of a *nunc pro tunc order made after the expiration of the time limited.* The court itself makes the distinction when it says, at page 26, of 42 Cal.App.2d, at page 45 of 108 P.2d: "There was no written order granting a new trial upon insufficiency of the evidence until the nunc pro tunc order of July 17th, five and one-half months after entry of the minute order." As to its conclusion we are entirely in accord with the statement on page 27 of 42 Cal.App.2d, on page 46 of 108 P.2d that, "If the court could make a *nunc pro tunc* order in cases where the grounds are the insufficiency of the evidence five months after the granting of the motion for a new trial, it would thereby effectively abrogate the statute which emphatically proscribes such an order after the lapse of the time designated. * * * It was to prevent just such *entries* that the legislature must have intended by the amendment." (Italics added.)

[16, 17] The case of Whitley v. Superior Court, 1941, supra, was an application for a writ of certiorari to annul two nunc pro tunc orders purporting to grant a motion for new trial on the ground of the insufficiency of the evidence to justify the verdict. The court itself states the problem before it as follows (18 Cal.2d page 77, 113 P.2d page 451): "The question for decision on this appeal, therefore, is whether these nunc pro tunc orders awarding a new trial on the ground of the insufficiency of the evidence are valid, since neither was made within ten days after the

motion was granted or 'filed with the clerk'." On such question the court concluded, as stated on page 82 of 18 Cal.2d, on page 453 of 113 P.2d, "that the legislature by its amendment to section 657, Code of Civil Procedure, subdivision 7, intended to make it mandatory that a written order granting a new trial on the ground of the insufficiency of the evidence to sustain the verdict or decision be filed within ten days after the motion is granted or not at all, and that this time limitation applies to nunc pro tunc orders as well as to original orders made pursuant to this statutory provision." With that conclusion we are, of course, wholly in accord. There is, however, a statement on page 81 of 18 Cal.2d on page 453 of 113 P.2d that, "The entry of the minute order on May 28, 1940 [which specified insufficiency of the evidence as its ground], did not satisfy the requirement that a written order specifying the insufficiency of the evidence be filed within ten days after the motion is granted." Descriptive of this statement, so far as it appears to affect the case before us, is the language of the Supreme Court speaking through Mr. Justice Curtis in Hills v. Superior Court, 1929, supra, 207 Cal. page 670, 279 P. page 807, 65 A.L.R. 266, "It is quite evident that the question * * * was not before the court, and therefore that any language found in the opinion purporting to determine that question was not necessary for the decision of said appeal, and must be regarded as obiter dictum."

We have, in the case now before us, no nunc pro tunc order; we have here no attempted modification or correction of an order; we have here no failure to enter an order within the time provided; we have here no neglect to specify that the order was made on the ground of insufficiency of the evidence to justify the verdict. We *do* have filed with the clerk a notice of intention to move for new trial "on the issue of damages alone" on the *sole ground* of insufficiency of the evidence to justify the verdict; we do have the presumption declared by section 659 of the Code of Civil Procedure that "said notice shall be deemed to be a motion for a new trial on all the grounds [the sole ground] stated in the notice"; we *do* have the order of the court stated *in writing* (Code Civ.Proc., sec. 1003), which order in writing was on deposit with the clerk as a part of the court's official records within ten days after the order was made, and which order in writing, construed with the notice of intention, does unmistakably specify "insufficiency of the evidence to justify the verdict" as its *sole ground.*

[18] But because it is the sole ground and because the paper on which it is inscribed is kept by the clerk in the minute-book instead of in a folder, defendants (appellants) contend that an order in writing has not been filed with the clerk, that the conclusive presumption is operative, and that we must regard the order as groundless. If we adopt defendants' strict construction of the law this court will be in the abhorrent position of legally setting up and acting on the fiction of a hypothesis, the utter falsity of which appears of record; we shall be required to reverse an order for an error presumed directly contrary to the fact; all this by virtue of an unnecessarily narrow construction of language which is equally subject to a liberal and reasonable construction that gives effect to every word, attains the identical object with the same certainty, and does not impose the unconscionable presumption contrary to the facts of record. Under such circumstances, we deem it our plain duty to adopt the latter construction. See Martin v. Gibson, 1941, 48 Cal.App.2d 449, 119 P.2d 1012; Code Civ.Proc., secs. 4 and 1866; In re LaBelle, 1940, 37 Cal.App.2d 32, 98 P.2d 778.

Another consideration strongly supports the conclusion we have reached. The procedure of recording orders determining new trial motions by minute entry is as old as our judicial system. It is inevitable that a statute radically altering that procedure in one isolated application, making it void as to an order granting a motion for new trial on one particular ground but leaving it with full vitality as to an order denying that same motion or granting it on any other ground, will constitute a trap for the unwary (see People v. Bryant, 1929, 207 Cal. 450, 452, 278 P. 1025) and produce a multiplicity of miscarriages of justice before its mischievous form can be remedied by further legislative action. It would be unjustifiable to place a strict and narrow construction on the statute to attain such an unfortunate result when the same enact-

ment reasonably construed accomplishes every good object sought, but without the mischief.

The judgment and order are affirmed.

PARKER WOOD, J., concurred.

SHINN, Justice (concurring).

I concur. I am in agreement with all that is said in the main opinion including the conclusion stated.

There is an additional reason which in my opinion requires us to hold that there was no deficiency in the proceedings for a new trial which prevents us from recognizing insufficiency of the evidence as the ground upon which the order granting a new trial was based. I am unable to see that the provision of section 657, Code of Civil Procedure, which requires that an order granting a new trial upon the ground of insufficiency of the evidence shall so state, has any application to an order granting such a motion which has been noticed and presented upon that ground alone.

By the several amendments of the section certain definite procedural improvements have been accomplished through the elimination of practices which had proven themselves to be unsatisfactory. These are pointed out in the main opinion and I shall refer to them but briefly. It was desired to remove all uncertainty in the consideration of appeals from orders granting new trials as to whether such orders had been granted upon the ground of insufficiency of the evidence. That objective was attempted to be reached by the amendment of 1919 and was accomplished by the amendment of 1929. The uncertainty that had theretofore existed arose from the failure to state in orders granting new trials whether insufficiency of the evidence was one of the grounds or the sole ground for the order. Of course there never was any uncertainty in situations in which insufficiency of the evidence was specified in the notice of intention as the sole ground of the motion, which is the one before us. The order and the notice of intention must be read together. The notice of intention is deemed to be the motion upon all grounds specified in the notice. Code Civ.Proc., sec. 659. The notice is the first step in the proceeding and is essential to give the court jurisdiction to grant a new trial, and to it the court must look for a statement of the grounds which may be considered and acted upon by the court in granting the motion. Where it appears that there was a notice specifying legal grounds it will not be presumed that the court granted the motion upon a ground not specified in the notice or upon no ground whatever. The same presumptions as to regularity of procedure apply to orders as apply to judgments or other judicial acts. Code Civ.Proc., sec. 1963, subds. 15, 16; Galvin v. Palmer, 1901, 134 Cal. 426, 66 P. 572.

It is almost invariably the case that several grounds are stated in the notice, including insufficiency of the evidence, and it was due to this widely used practice that the amendments of 1919 and 1929 were considered necessary for the purpose of removing uncertainty as to the basis of the orders in such cases. The fact that it was not essential that corrective legislation be provided for those cases where no uncertainty existed does not necessarily limit the scope of the amendments but it does aid materially in ascertaining what the purpose and intention of the legislature were in amending the section. Where one construction of a statute will attribute to the legislature reasonable and purposeful motives and another will lead to absurd and unjust consequences which the legislature could not have reasonably or fairly intended to bring about, it is our duty to adopt the first construction if we can do so without exercising the forbidden legislative function. If we should hold that the amendments were intended to apply to the facts before us, where the sole ground of the motion was insufficiency of the evidence (laying aside for the moment the holding of the main opinion that the record shows full compliance), we would have to say that notwithstanding the indisputable fact that the motion was granted upon the sole ground of insufficiency of the evidence, it will be conclusively presumed that it was not. We would then have to reverse the order, not because of any uncertainty or deficiency of the record to speak the truth, but because we would have decided that the legislature, through ignorance or indifference, had imposed upon the courts a wholly superfluous formality of procedure which not only bordered upon the absurd, but served no purpose, accomplished no improvement over established practices, either by the correction of existing evils or otherwise, substituted fiction for fact in the courts' records, multiplied instead of

reducing the opportunities for clerical errors, and without reason or necessity unjustly deprived a litigant of a substantial right. I cannot believe that the legislature intended anything of the sort. Awareness of the fact that the legislative function has taken on a vastness of proportion and complexity hitherto unknown should restrain the courts from holding to too narrow a conception of their own powers of interpretation and should incline them to be as helpful as possible in forwarding the obvious purposes of remedial legislation.

These, in brief, are the reasons which have inclined me to the opinion that the requirement that the ground of insufficiency of the evidence must be stated in the order was not intended to apply to a case where such specification already appears in the record.

It seems unnecessary to cite or discuss the several rules of statutory construction which have application to such a situation. I know of none which under a fair application would require this court to reach a conclusion contrary to the one herein expressed. They all harmonize with the fundamental rule stated by Mr. Justice Field in United States v. Kirby, 1869, 7 Wall. 482, 486, 19 L.Ed. 278, that "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." General terms only are before us for construction. The duty of recognizing a proper occasion for an exception to those general terms furnishes the reason for this separate concurrence.

The requirement as to making the order a matter of record within ten days after it is made, which of course can only be done in writing, as in the case of all orders, applies to the present case only to the extent that it places a limit of time upon the act of completing the record in the new trial proceeding. Too often that had been done under the former practice through the medium of nunc pro tunc orders made long after the time had elapsed for ruling upon the motion, the evil of which, as stated in the main opinion, led to the amendment of 1939. However, it means no more in cases of the class we are considering than that an order consisting of a direction of the judge to the clerk, if such could be called an order, cannot remain in the embryo state of a mere good intention for more than ten days. The order now before us was entered promptly, and had it been couched in general terms, without specifying insufficiency of the evidence, it would have been sufficient to comply with the requirement as to filing, as well as with the requirement for specification of the ground therefor, when read with the notice of intention.



GOLD MINING & WATER CO. v. SWINERTON et al.

Civ. 6602.

District Court of Appeal, Third District, California.

Jan. 27, 1942.

As Modified on Denial of Rehearing Feb. 21, 1942.

Hearing Granted March 23, 1942.

1. Mines and minerals ⇐66

In action for damages for breach of gold mining lease, evidence sustained finding that lessees repudiated the lease on ground of lessor's refusal to consent to assignment of the lease.

2. Mines and minerals ⇐66

The doctrine of "anticipatory breach", which is a breach committed before the time has come when there is a present duty of performance and is the outcome of words or acts evincing an intention to refuse performance in the future, applied to relationship of landlord and tenant under a gold mining lease.

See Words and Phrases, Permanent Edition, for all other definitions of "Anticipatory Breach".

3. Mines and minerals ⇐70(2)

The rule that lessee's repudiation of a lease does not at once mature the installments of rent not due so as to make them recoverable at once as rent does not apply to a gold mining lease where consideration for use and occupancy of premises is not a

fixed sum but is based upon a percentage of the gross yield of gold extracted in mining operation.

4. Licenses ⇐43
Mines and minerals ⇐82

The rule of "profit à prendre" which is the right to take something out of the soil of another as a right of common and also some minor rights as a right to fish, hunt, and hawk or to mine metals, dig for oil or take oil from the land, applies to extraction of gold.

See Words and Phrases, Permanent Edition, for all other definitions of "Profit à Prendre".

5. Mines and minerals ⇐68(2)

A lessor under gold mining lease which provides for consideration for use and occupancy of premises on basis of a percentage of gross yield of gold extracted in mining operation has right to insist that lessee proceed with the operation of mining and extracting the gold and is entitled to the equivalent of full performance just as he would for the anticipatory breach of any other contract.

6. Mines and minerals ⇐70(6)

Where gold mining lease provided that 300,000 yards of auriferous gravel should be worked the first year and evidence disclosed that there were over 300,000 yards of gravel which carried a value in gold of $150,000, and lease provided for a gross royalty of ten per cent., court adopted proper measure of damages in awarding to lessor $15,000 for failure to conduct mining operations.

7. Mines and minerals ⇐68(2)

The doctrine of anticipatory breach applied to lessor's action before breach of gold mining lease for lessee's failure to make improvements upon mining property as required by the lease.

8. Mines and minerals ⇐70(6)

Lessees who failed to make improvements upon mining property as required by gold mining lease were properly required to pay as damages the cost of making the improvements even if damages were required to be based upon injury done to the reversion, since if the improvements cost a certain sum the value of property or the reversion would be enhanced to that extent.

9. Trial ⇐54(1)

In action for breach of gold mining lease for lessees' failure to make improvements as required by lease, a letter written by lessor's president to lessees' counsel prior to execution of lease to effect that cost of improvements had been budgeted at certain sum, which letter was offered in evidence and its effect not limited to purposes of impeachment, was in evidence for all purposes and could be considered by court in determining amount of damages recoverable for failure to make the improvements.

10. Appeal and error ⇐931(1)

Lessees who were required to pay a certain sum as damages for failure to make improvements upon mining property could not complain that court arrived at such sum solely by reason of a letter introduced in evidence which had been written by lessor's president to lessees' counsel prior to execution of lease stating that cost of improvements had been budgeted at a sum which equaled the sum awarded, notwithstanding court stated that the sum awarded was the amount "contemplated on" by the parties as the cost of improvements, where court's findings disclosed that the amount awarded was not based solely upon such letter.

11. Appeal and error ⇐931(1)

The appellate court must adopt that construction of findings which will support the judgment.

12. Mines and minerals ⇐68(2)

That lessor of gold mining land lost lessor's rights in the lease subsequent to date when lease was breached by lessees did not affect lessor's right to recover damages for breach of such lease, since right of action accrued on date of breach prior to date when lessor lost its rights.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by the Gold Mining and Water Company against A. B. Swinerton and others to recover damages for breach of a mining lease. From a judgment for plaintiff, defendants appeal.

Affirmed.

Hartley F. Peart and Howard Hassard, both of San Francisco, for appellant Swinerton.

Edward R. Solinsky, of San Francisco, for appellant Morrison.

John L. McNab and S. C. Wright, both of San Francisco, and Virgil Airola, of San Andreas, for respondent.

TUTTLE, Justice.

This action was brought to recover damages for breach of a mining lease. The first cause of action concerns an agreement by appellants to make certain improvements upon the mining property, while the second arises out of the alleged failure of appellants to conduct mining operations. Findings were made in favor of respondent upon both causes of action, and judgment entered upon the first in the sum of $25,000, and upon the second in the sum of $15,000. The appeal is from the judgment.

On and prior to the 21st day of September, 1937, plaintiff was the owner of certain real property in the county of Calaveras, and water rights connected therewith. It also held a lease and option to purchase from the Emery Company, covering contiguous mining ground, ditches, reservoirs and water rights. Through all of said property ran an ancient river channel, containing auriferous gravel, thirty to one hundred feet beneath the surface, and extending for over a mile through said property. In early days the channel had been mined in several places by hydraulic process. Practically all of the improvements to be made were upon the Emery property, and they were connected with the development of a water supply for mining, together with a system of ditches. It was provided in the Emery lease that all such improvements should revert to the lessor upon the termination of its lease to respondent.

[1] It is first contended by appellants that there is no evidence to sustain the findings of the trial court that they repudiated the lease. We are satisfied that there was sufficient evidence to justify the finding. Defendant Swinerton testified as follows, with respect to what took place at a conference between him and the officers of plaintiff corporation on November 11, 1937—about a month and a half after the lease had been executed:

"Q. But you did state on that occasion that neither you nor Morrison would proceed under the lease? A. I could not speak for Morrison, but I said as far as I am concerned I would have nothing further to do with the contract unless they would assign the contract."

Defendant Morrison gave the following version of the same meeting:

"Q. In what connection did he make the statement that he was going away to Europe? A. After the discussion, we started to leave and he said he was going to Europe the next day.

"Q. Was it at that time he stated they could either consent to the assignment, or cancel? A. He made the statement 'cancel the lease' in the same sentence when he asked for permission to assign.

"Q. You were present during the entire conversation? A. I was.

"Q. Did you participate in the conversation? A. Very little.

"Q. To what extent? A. The conversation started out by discussing the effect on the Gold Mining and Water Company of a change in the royalty provisions, changing from a sliding scale to a straight ten per cent, providing that prospecting showed yardage to justify.

"Q. Who brought up that subject? A. I imagine, I think it was Mr. Swinerton, but I don't recall who did.

"Q. Did you participate in that discussion? A. I did.

"Q. Did you request a change in the lease? A. I joined Mr. Swinerton in his request, when he said that.

"Q. And when he made his statement that they could either accept an assignment of this lease, or cancel it, did you join in that also? A. Yes.

"Q. And you left the office with him? A. I did.

"Q. When you left the office, it was with the distinct understanding in your mind, was it not, that if they did not consent to the assignment of this lease to Mr. Johnson, you would both be through with the property? A. Yes. * * *"

The conference arose out of a request made previously by appellants for permission from respondent to assign the lease. Such permission was denied. The foregoing evidence, together with other testimony in the record, was sufficient to support a finding that appellants had repudiated the lease, and brought the action clearly within the principle announced in 17 C.J.S., Contracts, § 472a, page 973:

"Strictly an 'anticipatory breach' of a contract is one committed before the time has come when there is a present duty of performance, and it is the outcome of words or acts evincing an intention to refuse performance in the future. Where a party bound by an executory contract repudiates his obligation before the time

for performance, the promisee has, according to the great weight of authority, an option to treat the contract as ended so far as further performance is concerned, and to maintain an action at once for the damages occasioned by such anticipatory breach."

It is contended, however, by appellants that the doctrine of anticipatory breach is not applicable. They rely upon the case of Bradbury v. Higginson, 162 Cal. 602, 123 P. 797. That case involved the sufficiency of the complaint. It was alleged that the parties, on December 13, 1904, executed a lease to certain real property, at a monthly rental of $100 per month, for a term of five years; that the rental was paid up to and including the month of June, 1909, and that on August 17, 1909, the defendants repudiated the lease. Judgment was prayed for in the sum of $600. This was the entire rental due to the end of the term. The trial court sustained a demurrer to the answer, and gave judgment for said amount. This judgment was reversed, with directions to dismiss the action. It was held that the complaint failed to state a cause of action, upon the ground that the lessor was not entitled to recover rental which was to accrue subsequent to the date of the repudiation. The decision turned upon the measure of damages—a matter of evidence and proof rather than a question of substantive law. This clearly appears from the following language found on pages 608, 609 of 162 Cal., page 800 of 123 P.:

"But is argued that the plaintiff had the right to recover on the doctrine of 'anticipatory breach.' Alderson v. Houston, 154 Cal. 1, 96 P. 884. That is to say, that the defendant's repudiation of the obligations of his lease gave the plaintiff the right to treat the entire contract as broken, and to recover at once the damage sustained by such breach. But in an action to recover for such breach, the measure of damage would be, not the total rent reserved, but the difference between the rent to accrue and the value of the remaining portion of the term. See cases cited in the foregoing opinion of James, J. The complaint does not aver that plaintiff has sustained any damage by the defendant's repudiation, nor does it state any facts from which the amount of such damage may be inferred. It avers merely the nonpayment for two months, and the repudiation, and then asks judgment for $600. There is no allegation that the premises could not have been rented, during the rest of the term, for an amount equal to the rent agreed to be paid by the defendant."

[2] We are therefore unable to agree with appellants when they state that the doctrine of anticipatory breach does not apply to the relationship of landlord and tenant.

[3-5] The court also observes that there was contained in plaintiff's complaint no statement that she was damaged other than by the rental which would become due thereafter. We are of the opinion that other damage not so arising might be recovered in a similar action. We believe that the rule in the Bradbury case does not apply to a lease of the character we have here, where the consideration for the use and occupancy of the premises is not a fixed sum, but is based upon a royalty—in this case, a percentage of the gross yield of gold extracted in the mining operation. Turning to another branch of mining, the common oil and gas lease under which the lessee is entitled to enter the premises of the lessor and develop and remove oil or gas is a "profit à prendre." The latter expression is defined as "a right to take something out of the soil of another, as a right of common, and also some minor rights as a right to fish, hunt, and hawk, or to mine metals, dig for oil, take oil from the land." Richfield Oil Co. v. Hercules Gasoline Co., 112 Cal.App. 431–434, 297 P. 73. The same rule applies to extraction of gold. Such principles do not apply to a lease of the character involved in the Bradbury case. The lessee here is obligated to do more than merely pay a fixed monetary consideration. He must proceed with the usual mining operations. If no gold is found, the lessor receives nothing by way of rental or royalty. The cases cited by appellants point out the injustice which would result if the lessor could recover future rent and then proceed to lease the property again. Here, the lessor may still have the gold in the ground, but this is a far cry from having it in his hand. He has a right to insist that the lessee proceed with the operation of mining and extracting the gold. It is idle to say that he could contract with another to proceed with the same operation. In such a case he is entitled to the equivalent of full performance, just as he would for the antici-

patory breach of any other contract. In 12 Am.Jur. § 392, page 970, it is said:

"A majority of the courts have reached the conclusion that a renunciation of a contract before the time for performance, which amounts to a refusal to perform it at any time, gives the adverse party the option to treat the entire contract as broken and to sue immediately for damages as for a total breach."

We are therefore of the opinion that the rule laid down in the Bradbury case is not applicable to the situation here.

[6] It is next contended by appellants that the trial court adopted the wrong measure of damages in respect to the award of $15,000. We think there was sufficient evidence to justify the award. The lease provided that 300,000 yards of gravel should be worked the first year—1937–1938. The evidence showed that there was over 300,000 yards of gravel, and that it carried a value, in gold, of fifty cents per yard. This would make a gross value of $150,000. The lease provided for a gross royalty of ten per cent, which is the amount for which judgment was given. A leading authority upon the measure of damages in a case of this character is Texas Pacific Coal & Oil Co. v. Barker, 117 Tex. 418, 6 S.W.2d 1031, 1032, 60 A. L.R. 936, which involved a lease providing for royalty arising from oil to be extracted from the premises. It was alleged that the lessee (plaintiff in error) had breached the terms of the lease, in the following particulars:

"That after drilling said well, plaintiff in error moved away its drilling equipment and tools, and since failed and refused to further drill or test the land, or to permit any other person to drill or test the land, notwithstanding the oil and gas in the land were being drained away by numerous specified wells within short distances of the land—all in violation of the express and implied covenants of the lease binding plaintiff in error to fully develop the oil and gas in said premises and to protect the minerals on said premises from drainage from nearby wells on adjacent lands * * *."

The court held that the measure of damages for such breach was the agreed royalty upon all oil and gas which the proof showed was in the ground and should have been produced. We quote the following portions of that opinion:

"The purpose of the law to give compensation for breach of contract is subserved by allowing the injured party to have the value to him of the contract's performance. 3 Williston on Contracts, §§ 1338, 1339, pp. 2392 to 2394. Performance of a covenant to produce a certain quantity of oil or gas, under a contract promising royalty, is worth to the lessor as much as the value of his royalty at the time the oil or gas should have been produced and delivered or marketed. Therefore, to allow the lessor the value of royalty wrongfully withheld from him complies with the law's fundamental purpose of adequate compensation. The lessor is put in the same position as though the contract had been performed. Freeport Sulphur Co. v. American Sulphur Royalty Co. [117 Tex. 439], 6 S.W.2d 1039 [60 A.L.R. 890].

"Under sound fundamental principles, no deduction should be made from the value of the lessor's royalty on account of the value of unmined minerals which the lessee was entitled to remove from the leased premises. The lessor pays the consideration for the lessee's performance by his conveyance to the lessee of the oil and gas where the lease is in the ordinary form. Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566. As declared by Professor Williston: 'Where a unilateral contract is broken, the only performance to be valued is that of the defendant promisor. The plaintiff ex hypothesi has already performed and is therefore entitled to the full value of the defendant's performance. The situation is the same where the contract was originally bilateral but the plaintiff has fully performed his part.' 3 Williston on Contracts, §§ 1349 and 1350, p. 2408. * * * Summers says: 'The nature of the subject-matter is such that it is practically impossible to determine with certainty how much a lessor has lost in the way of royalties or rentals by the failure of his lessee to fully develop the premises or drill wells to offset those on adjoining lands. The difficulty lies in the proof rather than in the measure of damages. If it can be shown with reasonable certainty that the land would have produced a certain amount of gas or oil, or a certain amount more than it did produce, had the lessee exercised reasonable diligence in drilling additional or offset wells, the proper measure of damages is the value of the lessor's royalty of such oil or gas

at the time it should have been produced and marketed.' Summers', Oil & Gas, § 139, p. 449."

We therefore conclude that the trial court adopted the proper measure of damages, upon the second cause of action.

[7] The doctrine of anticipatory breach should also be applied to the first cause of action arising out of a breach of covenant to make improvements. The rule in the Bradbury case has never been applied to an action for damages arising out of such a situation, but appears to be applicable only to actions by a lessor to recover rent to the end of the term.

[8] It is contended by appellants that the evidence is insufficient to sustain the award upon the first cause of action, and that the trial court adopted the wrong method of measuring the damages. Under the lease, appellants agreed to make certain improvements upon the property, in the following language:

"Lessees agree, upon execution of this lease agreement, to enter into immediate possession of leased mining properties, and to diligently and constantly operate and develop same, and to have all water facilities, improvements from Jesus Maria Creek, (Juri Properties), fully completed, and all machinery in full operation to take advantage of water run-off for season 1937-1938, to wash and clean up for such materials or metals, or other valuable substances, (not reserved herein by lessor), as lessees may be able to discover and mine within limits of said placer mining properties, and to extract, mill, and reduce, and to otherwise treat said minerals, metals, and other valuable substances."

No work of the character mentioned, or of any character, was done upon the property, and the court so found. An engineering expert testified that such work would cost $167,735. There is ample evidence in the record to support a finding that the damage for failure to perform such covenants amounted to $25,000. Appellants assert, however, that damages must be based upon the injury done to the reversion, and not upon the cost of making the improvements. Conceding that appellants state the correct rule, we see little or no distinction between the two methods, and in any event do not see how any prejudice would arise by the adoption of the method pursued by the court. An analogous situation exists with reference to the rule applying to damages to an automobile. It is stated in Huddy's Enc. of Automobile Law, 17-18, § 253, pp. 527-528:

"Although the difference in value before and after an injury is the technical measure of damages for an injury to a motor vehicle, as a practical proposition this difference in many cases is represented by the cost of repairing the machine. The difference in value of the property before and after the injury is presumptively the amount it would cost for repairs."

In Menefee v. Raisch Impr. Co., 78 Cal.App. 785-789, 248 P. 1031, 1032, it is said: "As held in Overpeck v. Rapid City, 14 S.D. 507, 85 N.W. 990, the difference in value of the property before and after the injury is presumptively the amount it would cost for repairs."

If the improvements cost $25,000, the value of the property or the reversion would be enhanced to that extent.

[9, 10] It is further contended by appellants that the court arrived at the sum of $25,000 solely by reason of a letter which they introduced in evidence, for the purpose of impeachment only. That letter was written by the president of plaintiff corporation to counsel for defendants. It was dated August 16, 1937, some weeks prior to the execution of the lease. It was stated therein that the cost of the improvements had been budgeted at $25,000. When the letter was offered in evidence, its effect was not limited to purposes of impeachment. According to the record, it was in evidence for all purposes. The court could therefore have considered it in finding the facts. However, we do not believe that the findings should be so narrowly construed. The court does state that the sum of $25,000 was the amount "contemplated" by the parties as the cost of the improvements. Elsewhere, however, the court found on the issue as follows:

"The court finds that the defendants, and each of them, failed to enter on the property, to bring water to the mining properties, to repair the water system to make it usable for mining, or to do or perform any other agreement on their part to be performed with respect to said properties. The court further finds that the defendants, and each of them, without attempting to perform under said agreement,

repudiated the lease agreement of September 21, 1937, never attempted to perform any of the covenants of said lease agreement, and that such repudiation by the defendants was at a time when all of the leaseholds and property interests embraced in said mining properties and described in said lease agreement of September 21, 1937, were all in good standing; the court finds that at the time of the repudiation by the defendants of said lease, and at the time of their refusal to perform thereunder, there was no default on the part of the plaintiff with respect to any of the leasehold interests transferred under said lease, but all of said leases and other properties were in good standing, free from default, and that the repudiation by the defendants, and refusal to proceed on their part, was without justification or legal excuse. The court finds that the defendants made no attempt at any time to take over possession of said premises; to improve the water facilities; to mine said properties; or to do anything whatsoever to comply with the provisions of the lease, all to the damage of the plaintiff in the sum of $25,000.00."

[11] It is the duty of this court to adopt that construction of the findings which will support the judgment. We are satisfied that the finding has sufficient evidentiary support.

[12] Appellants contend that the lease was terminated by loss of title. It was set up in the answer that the lease to the Emery property was abrogated on February 1, 1938. This was property held by plaintiff under a lease from the Emery interests, and constituted a major portion of the mining land. Conceding that proper proof was made showing that plaintiff lost its rights in said lease on the date mentioned, we do not believe it would affect the right of recovery here. The lease involved here was breached in October, 1937. The right of action then accrued. It was not incumbent upon plaintiff, nor was it under the legal duty to thereafter maintain the lease in full force and effect. It may be, and apparently is, the fact in this case that the breach by defendants was the direct cause of the failure of respondent to carry out the terms of the Emery lease. To adopt the theory of appellants would, in effect, permit them to take advantage of their own derelictions. The law does not countenance such conduct.

Several other points are relied upon by appellants. We have considered them, and do not find them worthy of extended discussion, due to lack of merit.

The judgment is affirmed.

THOMPSON, Acting P. J., concurred.

49 Cal.App.2d 371

SIMPSON v. SALVATION ARMY.

Civ. 11736.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1942.

1. Mandamus ⇐154(5)

In mandamus proceeding to compel reinstatement of officer of religious association, petition which alleged only that court-martial had found officer guilty of disobedience and disloyalty and had recommended that he be dismissed, did not state a cause of action because of failure to allege an actual dismissal.

2. Mandamus ⇐163

In mandamus proceeding to compel reinstatement of officer of religious association, allegations stating that petitioner had been an officer and referring to his "alleged expulsion" were mere "conclusions" of law, the truth of which was not admitted by demurrer.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

3. Evidence ⇐20(2), 52
Mandamus ⇐154(5)

In mandamus proceeding to compel reinstatement of officer of religious association, petition filed on February 20, 1941, stating that on January 22, 1941, the petitioner sent air mail letter to chief of staff of the association in London, England, making application for leave to appeal and that he had received no reply, was demurrable in that it showed on its face the failure to exhaust remedies within the association, since court would take judicial notice that, in view of world conditions, a period of 29 days was not a reasonable time within which to expect a reply.

4. Associations ⇐7

A member of an association must first exhaust rights afforded him by the tribunals of the association before he may secure redress from the courts.

5. Insurance ⇐805(1)

Where an organization has violated its own laws and regulations and has arbitrarily violated a member's property rights, such as the right to sick benefits, member need not exhaust his remedies within organization before resorting to the courts.

6. Evidence ⇐11, 20(2)

The court would take judicial notice of general unsettled world conditions existing in January, 1941, and that, in view of those conditions, a period of 29 days was not a reasonable time within which to receive a reply to an airmail letter sent from San Francisco to London, England.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Mandamus proceeding by Robert H. Simpson against the Salvation Army to compel the reinstatement of the petitioner in his office in the defendant association. Judgment for the defendant, and the plaintiff appeals.

Judgment affirmed.

William F. Herron and Arthur J. Barrett, Jr., both of San Francisco, for appellant.

Robert W. Scott, of San Francisco, for respondent.

PETERS, Presiding Justice.

Petitioner appeals from a judgment entered in favor of respondent after the trial court had sustained a general and special demurrer without leave to amend to his petition for a writ of mandate. The prayer of the petition is that respondent be directed to reinstate petitioner in his office in respondent organization, and for $25,000 damages.

[1] The petition alleges that The Salvation Army is an association organized for religious and charitable purposes; that for many years petitioner was an officer in said organization, holding the rank of major; that on December 30, 1940, petitioner received a letter from the Chief Secretary for the Western Territory of respondent notifying him that charges had been preferred against him, that a court martial had been appointed to try him on these charges, telling him in detail what his rights were and what the procedure would be, and enclosing a copy of the purported charges; that on January 17, 1941, the court martial convened in San Francisco; that petitioner filed with the court martial objections to the alleged charges and to the appointment and power of the court; that the court disregarded these objections and proceeded with the hearing; that no

accuser appeared in the proceedings, the entire evidence being letters and parts of letters written by petitioner to officers of respondent and letters written by such officers to petitioner; that petitioner was not permitted to see or read all of the correspondence introduced into evidence; that on January 20, 1941, petitioner received a copy of the decision of the court martial; that by its decision the court martial found petitioner guilty of disobedience and disloyalty and "recommended to the said respondent that petitioner be dismissed as an officer of The Salvation Army"; that the court martial was convened by the Chief Secretary of the Western Territory; that such person had no authority or right to call or convene the court; that thereafter petitioner addressed a letter to Commissioner D. McMillan, the territorial commander for the western territory of respondent, notifying him that he desired to appeal and requesting information as to procedure; that under date of January 23, 1941, he received a reply from McMillan discussing his case in detail, informing him that his letter would be treated as a request for an appeal, and denying the request for reasons stated; that on January 22, 1941, petitioner mailed a letter from San Francisco, *"Via Air Mail Atlantic Clipper"*, to Commissioner A. G. Cunningham, Chief of Staff of respondent in London, England, making application for leave to appeal; that "your petitioner has received no reply thereto to date, although more than a reasonable time has elapsed since said appeal was forwarded to said Chief of Staff;" that "petitioner has exhausted all his remedies within The Salvation Army." The petition was filed on February 20, 1941.

From this recital of the essential allegations of the petition it is obvious that it does not state a cause of action. This is so for at least two reasons.

In the first place, it is not alleged that petitioner has been dismissed, or that any penalty has been imposed upon him as a result of the court martial. The petition and its exhibits affirmatively show that the court martial's finding is advisory only, and amounts to nothing more than a recommendation to the territorial commander. There is no allegation that the territorial commander has taken any action aimed at removing or demoting petitioner—the allegation is simply that such officer denied petitioner's request to appeal. From the allegations of the petition, and its accompanying exhibits, it is apparent that the decision of the court martial had no legal effect of itself, and that the only way appellant's position in respondent organization could be affected or jeopardized was by order of the territorial commander. No such order is pleaded.

[2] Appellant does not argue this point in his opening brief and has not seen fit to file a reply brief to answer the points made by respondent. It is true that in par. II of the petition it is alleged that "for many years past, your petitioner has been and until the acts complained of, was an officer of said respondent," and in par. XIII reference is made to his "alleged expulsion." Under the facts here alleged these allegations are mere conclusions of law, the truth of which is not admitted by a demurrer. The petition and exhibits demonstrate to a certainty that at the time of filing this petition no dismissal or suspension of petitioner had taken place. Since this is so, no cause of action has been pleaded.

[3, 4] In the second place, the demurrer was properly sustained, because the petition shows on its face that petitioner has not exhausted his remedies within The Salvation Army. It is well-settled in this state that a member of an association of this type must first exhaust the rights afforded him by the tribunals of the association before he may secure redress from the courts. Lawson v. Hewell, 118 Cal. 613, 50 P. 763, 49 L.R.A. 400; Levy v. Magnolia Lodge, I. O. O. F., 110 Cal. 297, 42 P. 887; Coffey v. Los Angeles Firemen's R. Ass'n, 22 Cal.App.2d 510, 71 P.2d 328; Hughes v. American Trust Co., 134 Cal.App. 485, 25 P.2d 491; Greenwood v. Building Trades Council, 71 Cal.App. 159, 233 P. 823; Dingwall v. Amalgamated Ass'n, of Street Railway Employees, 4 Cal. App. 565, 88 P. 597.

[5] It is true that there is a limited exception to this rule. Where the organization has violated its own laws and regulations and has arbitrarily violated a member's property rights, such as the right to sick benefits, the member need not exhaust his remedies within the organization before resort is had to the courts. Neto v. Conselho Amor, etc., 18 Cal.App. 234, 122 P. 973; Schou v. Sotoyome Tribe,

No. 12, 140 Cal. 254, 73 P. 996. Obviously, that exception is not here involved.

[6] In the instant case the petition affirmatively shows that appellant had not exhausted his remedies within the organization at the time he filed his complaint —in fact, the petition shows that at that very time he was pursuing a remedy provided for by his contract with The Salvation Army. Par. XI of the petition alleges that after receipt of notification of the court martial's recommendation, on January 22, 1941, "petitioner did direct to Commissioner A. G. Cunningham, Chief of Staff, The Salvation Army, International Headquarters, London, England, an appeal from said decision, in accordance with the Orders and Regulations for Courts of Reference. * * *" The petition for mandate was filed within twenty-nine days of the date this letter was sent. It is true that the petition also alleges in the same paragraph "that your petitioner has received no reply thereto to date, although more than a reasonable time has elapsed since said appeal was forwarded to said Chief of Staff." When the petition is read as a whole these allegations are no more than conclusions of law. The trial court was permitted to, and apparently did, take judicial notice of the fact that in January, 1941, England was at war, and that a period of twenty-nine days, in view of the general unsettled world conditions, was not a reasonable time within which to receive the reply. Respondent states in its brief, and this is not denied by appellant, that after this action was commenced appellant received notice from London that his appeal had been granted. It would be doubtful, even if conditions were normal, if twenty-nine days would be a reasonable time to expect a letter to go from San Francisco to London, for the sendee to read and study the case, and for a reply to reach San Francisco. Certainly, in view of conditions then existing, of which we can properly take judicial notice, it is obvious that appellant did not wait a reasonable time for a reply. In Holt v. White, 221 App.Div. 558, 224 N.Y.S. 507, affirmed in 248 N.Y. 613, 162 N.E. 546, an expelled member of an association appealed to a tribunal within the association. Without awaiting that decision, sixty-eight days thereafter he instituted a court action. Judgment was rendered in his favor. This was reversed on the ground that, as a matter of law, he had not waited a reasonable time to permit the association tribunal to act. The rule of this case is clearly applicable here. Included within the requirement that members of such organizations must exhaust their remedies within the association before resorting to the courts, is the requirement that when a remedy is resorted to the member must give the association a reasonable time to act. The appellant not having waited a reasonable time, has instituted his action prematurely. For that reason, and for the other reason heretofore mentioned, the trial court properly sustained the demurrers.

The judgment appealed from is affirmed.

WARD, J., and B. C. JONES, Justice pro tem., concurred.



49 Cal.App.2d 354

SUNSET NUT SHELLING CO. v. JOHNSON, State Treasurer.

Civ. 11909.

District Court of Appeal, First District, Division 1, California.

Jan. 28, 1942.

1. Constitutional law ⇐100
Taxation ⇐113

The 1935 amendment to Franchise Tax Act, raising rate of tax from two per cent. to four per cent. of net income of preceding year is not unconstitutional as applied to a corporation which had paid its tax in full according to the original rate for the calendar year 1935 prior to enactment of the amendment, notwithstanding that amendment did not become effective until after tax became a lien, since corporation's payment did not confer a "vested right" to privilege of exercising its corporate franchise for the year 1935. St. 1935, p. 1246 § 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Right".

2. Taxation ⇐319(1)

A taxpayer has no legal or constitutional right to have current excise taxes

computed at the rate in existence at commencement of the calendar year.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Action by Sunset Nut Shelling Company against Charles G. Johnson, as State Treasurer, etc., wherein Charles J. McColgan, as Franchise Tax Commissioner, etc., was substituted as defendant, to recover portion of corporate franchise taxes paid under protest. From a judgment for plaintiff, the defendant appeals.

Reversed.

Earl Warren, Atty. Gen., and James J. Arditto and Valentine Brookes, Deputy Attys. Gen., for appellant.

Newmark & Strong, of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Sunset Nut Shelling Company, paid a portion of its franchise tax for the calendar year 1935 under protest. Thereafter, this action was instituted by the taxpayer to recover the amount so paid. The trial court overruled the demurrer of the State Treasurer. The latter elected to stand upon the demurrer, and judgment was entered in favor of plaintiff, from which this appeal is taken.

[1] The problem involved is whether a 1935 amendment to the Franchise Tax Act, effective June 25, 1935 (Stats. of 1935, p. 1245, at p. 1246; Deering's Gen.Laws, 1935 Supp.Act 8488), raising the rate of the tax from 2 per cent to 4 per cent is applicable to this taxpayer for the calendar year 1935.

The complaint alleges that plaintiff is a California corporation; that on March 13, 1935, it made its return to the Franchise Tax Commissioner; that according to the law then in effect it was the duty of the plaintiff to pay for the privilege of exercising its corporate franchise in the state a franchise tax measured by its net income at the rate of 2 per cent upon the basis of its net income for the next preceding year; that the tax constituted a lien upon the property of plaintiff in California, which lien attached on March 4, 1935; that the tax was computed in the manner then provided by law and a remittance so computed made to the Franchise Tax Commissioner on March 13, 1935; that thereafter the legislature changed the rate from 2 per cent to 4 per cent by an enactment which became effective June 25, 1935; that on September 20, 1935, the Franchise Tax Commissioner served notice upon plaintiff demanding an additional tax computed according to the 4 per cent rate; that on October 2, 1935, plaintiff paid the additional tax under protest, and this action was thereafter instituted.

There can be no doubt but that the legislature intended that the 1935 amendment raising the rate should apply to taxes payable for the calendar year 1935. Section 4 (8) of the 1935 amendments expressly so provides. Stats. of 1935 at p. 1247. The question is not whether the legislature intended the tax to apply in the calendar year 1935, but whether the statute so providing is constitutional.

Under the terms of the act the tax for each year is measured by the net income of the taxpayer for the preceding year. The tax involved in the instant case accrued on January 1, 1935, and became a lien on the taxpayer's property in California on the first Monday in March, 1935. One-half the tax becomes due and payable on or before the fifteenth day of the third month following the close of the taxable year, and the balance on or before the fifteenth day of the ninth month following the close of the taxable year, and is delinquent if not paid by those dates. As already pointed out, plaintiff paid its tax in full on March 13, 1935. It is the theory of respondent that since it paid the tax on March 13, 1935, and since on that date the tax was a lien, it acquired a vested right to the privilege of exercising its corporate franchise for the year 1935, which was unconstitutionally impaired by the imposition of the additional tax in June of 1935. The theory is untenable.

[2] The question as to the power of the state to amend existing excise tax laws or to pass new ones during the taxable year, and to make such new or amended tax laws retroactive to the commencement of the taxable year has frequently been presented to the courts of this and other states. It is settled law that a taxpayer has no legal or constitutional right to have current excise taxes computed at the rate in existence at the commencement of

the calendar year. Taxes for the current year may be changed any time during the year, or additional taxes may be imposed during the current year on the same subject of taxation. In Holmes v. McColgan, 17 Cal.2d 426, 431, 110 P.2d 428, 431, the Supreme Court stated that: "The constitutional validity of such retroactive provisions is now too well established to be questioned."

The basis of the rule is that the power to tax is proportioned to the public needs. So long as there exists public needs there exists the liability of the individual to contribute thereto. It is impossible to know at the beginning of the year what the needs of that year may be. If situations arise calling for the raising of more money (and the legislature is empowered to determine that question) new taxes may be levied or the rates of old taxes raised without impairment of any constitutional rights of the taxpayer. Patton v. Brady, Executrix, 184 U.S. 608, 22 S.Ct. 493, 46 L.Ed. 713; Wisconsin & Michigan Ry. Co. v. Powers, 191 U.S. 379, 24 S.Ct. 107, 48 L.Ed. 229; Brushaber v. Union Pac. R. R., 240 U.S. 1, 36 S.Ct. 236, 60 L. Ed. 493, L.R.A. 1917D, 414, Ann.Cas.1917B, 713; Roth Drug, Inc., v. Johnson, 13 Cal.App.2d 720, 57 P.2d 1022.

These principles have been applied by the appellate courts of this state to the very tax statute here involved. In Fullerton Oil Co. v. Johnson, 2 Cal.2d 162, 39 P. 2d 796, the problem involved was whether an amendment to the statute effective February 27, 1931, was applicable in computing the 1931 tax. In disposing of the contention that the taxpayer was entitled to compute the allowance without regard to the 1931 amendment, the Supreme Court stated (page 176 of 2 Cal.2d, page 802 of 39 P.2d):

"Based on these sections, respondent contends that since its tax for 1931 accrued on January 1, 1931, based on its net income for 1930, at which time 1928 values could be used in computing depletion, the 1931 amendment denying that privilege cannot be used to compute the 1931 tax. To permit the February 27, 1931, amendment to apply in computing the 1931 tax, according to respondent, would be to give that amendment an unlawful retroactive effect. Respondent strenuously contends that its tax liability for 1931 became a determined and accrued liability before the effective date of the amendment. To this contention there is a conclusive answer. The retroactivity alleged is more apparent than real. If the 1931 amendment be applied in computing the 1931 tax, such application is to give the amendment a prospective rather than a retroactive operation. Although under the act the net income earned in 1930 is used as a base for computing the tax due for 1931, the tax collected in 1931 is not for the privilege of doing business in 1930 but is a tax for the privilege of doing business as a corporation in California for 1931. It is a tax for the privilege of exercising a corporate franchise for the entire year 1931—that is, the current year when the act here involved became effective. The privilege being taxed is a present and continuing privilege, the amount of the tax being measured by the transactions of a prior year. Although, under the act the tax accrued on January 1, 1931, and became a lien on the first Monday in March, 1931, the tax imposed for that year was for the entire current year. There is no reasonable or legal basis for contending that a taxpayer is entitled, regardless of legislative action, to have current taxes computed on the same basis as past taxes have been assessed. *It is well settled that taxes for the current year may be changed any time during the year, and, in fact, additional taxes may be imposed during the current year on the same subject of taxation.*" (Italics ours.)

The same conclusion was reached in Filoli, Inc., v. Johnson, 4 Cal.2d 662, 51 P.2d 1093, as to the legal effect of another amendment to the Franchise Tax Act effective February 27, 1931. In Holmes v. McColgan, supra, the rule of the Fullerton Oil Co. case, supra, was applied to an amendment of the state personal income tax law. It was held that an amendment to that act adopted June 13, 1935, was applicable retroactively to January 1, 1935.

Respondent argues that although in the Fullerton Oil Co. and Filoli cases, supra, it was held that amendments to the Franchise Tax Act could be applied retroactively, that those amendments became effective in February, 1931, before the tax became a lien. It is urged that after the tax became a lien on March 4, 1935, and was paid on March 13, 1935, respondent acquired the right to do business in this state for the taxable year 1935; that this right was a vested property right; that such

right was unconstitutionally impaired by the tax passed after the lien date. In respondent's analysis the lien date marks the limit of time when the legislature may increase the tax burden for the current year. This very contention was considered in American States W. S. Co. v. Johnson, 31 Cal.App.2d 606, 88 P.2d 770. In that case an additional assessment was levied on the taxpayer for the year 1935 under the Franchise Tax Act by reason of an amendment to that act effective in June of 1935—after the date the tax became a lien. The court rejected the identical contentions made by respondent in the instant case, holding that "the tax is in the nature of an excise which is always within the power of the legislative department of government to change or increase during the term for which it is imposed" (page 613 of 31 Cal.App.2d, page 774 of 88 P.2d); that the payment of an excise tax for the privilege of doing business creates no contract with the state; that no vested property or contract was unconstitutionally affected by the retroactive amendments passed after the tax became a lien; that such excise taxes constitutionally may be changed or increased "any time during the term for which they are imposed" (page 617 of 31 Cal.App.2d page 776 of 88 P.2d); that the "taxpayer acquires no added rights by virtue of the lien" (page 618 of 31 Cal.App.2d, page 776 of 88 P.2d); that, "Neither the payment of taxes nor the vesting of the lien prior to the amendment of the act conferred upon the appellant vested rights which prevented the legislature from increasing the taxes during that current year" (page 618 of 31 Cal.App.2d, page 776 of 88 P.2d). The opinion considers the exact problem here involved at length and with thoughtful deliberation, and disposes of the arguments urged in the present appeal. A hearing was denied by the Supreme Court. The decision of the trial court in the present case was rendered before the appellate court filed its decision in the American States W. S. Co. case. Respondent's arguments are simply an attempt to revive the issue decided adversely to its contentions in that case, and in the other cases heretofore cited.

The judgment appealed from is reversed.

KNIGHT and WARD, JJ., concurred.

LAMB v. CALIFORNIA WATER & TELEPHONE CO.

Civ. 2720.

District Court of Appeal, Fourth District, California.

Jan. 27, 1942.

Hearing Granted March 23, 1942.

1. Waters and water courses ⇐257(1)

The Railroad Commission had power and jurisdiction to fix rates for furnishing of water from river to irrigate riparian owner's land by corporation which was public utility and dedicated waters of river to public use before it entered into contract with such owner to furnish him water for specified sum per acre.

2. Eminent domain ⇐276

A riparian landowner, allowing construction of large irrigation dam in river by public utility company without protest, has no right to injunction against invasion of his riparian rights by intervening public use of water from river, but can only sue such company for damages.

3. Waters and water courses ⇐257(1)

The fact that corporation's articles of incorporation authorized it to act as public utility is not conclusive, but may be considered, in determining whether it was public utility and dedicated waters of river to public use before entering into contract with riparian landowner to furnish water therefrom for irrigation of his land at specified rate per acre, so as to empower Railroad Commission to fix rates for such corporation's water service to such owner.

4. Eminent domain ⇐13

Condemnation of land lies only in public interest.

5. Waters and water courses ⇐257(1)

Evidence *held* sufficient to justify trial court's finding that defendant's predecessor dedicated whole capacity of its water system to public use before execution of such contract, so as to empower Railroad Commission to fix defendant's rates for water service to plaintiff.

6. Action ⇐6

In riparian landowner's action against water company for declaration of rights under arbitration agreement, respecting pipeline right of way and water right, between

previous owner of plaintiff's land and water company which defendant succeeded, and injunction against repudiation of such agreement by defendant, it was unnecessary for defendant to plead as defense that plaintiff was estopped by his predecessor's acquiescence in construction of dam in river by defendant's predecessor to deny Railroad Commission's power to fix defendant's rates for water service to plaintiff, but finding that all waters of dam were dedicated to public use, as alleged in answer, was sufficient.

7. Appeal and error ⇐717, 854(2)

The reasoning expressed in trial court's opinion does not constitute part of record on appeal from such court's judgment, which will be affirmed, if appellate court finds it correct on any ground or for any reason, regardless of reason given by trial court.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Walter C. Lamb against the California Water & Telephone Company for a declaration of rights under an arbitration agreement, respecting a pipe-line right of way and water right, between a riparian owner and a water company, and injunction against repudiation of such agreement by defendant as such company's successor in interest. Judgment for defendant, and plaintiff appeals.

Affirmed.

Hearing granted; HOUSER, J., not participating.

Lowell Howe, of Chula Vista, and Charles C. Loosli, of San Diego, for appellant.

Bacigalupi, Elkus & Salinger, of San Francisco, and Philip Storer Thacher, of El Cajon, for respondent.

GRIFFIN, Justice.

This is an action for declaratory relief and injunction. Generally speaking, the facts are not in dispute. In June, 1868, one Pioche, as a common grantor, owned the Mexican grant known as the Rancho de la Nacion, which included the lower valley of the Sweetwater River in San Diego County, together with certain mesa lands adjacent to it on either side and now in part occupied by the cities of National City and Chula Vista. He entered into a contract to sell that grant to Frank Kimball and Warren Kimball upon installment payments. Under this contract the Kimballs were entitled even before completing their payments to Pioche, to resell at agreed prices per acre. Pioche agreed, when requested by them, to join in deeds to the purchasers. In May, 1869, the Kimballs organized a corporation known as the Kimball Brothers Water Company, and on June 9, 1869, executed to it a deed, undertaking to grant to it "all the water flowing in the stream called the Sweetwater River * * *" with the right to divert the same from its natural channel to, over and upon said lands for purposes connected with the handling of such water supply. This deed was not filed for record until October 9, 1869. Pioche did not join in it. Meanwhile, on October 6, 1869, Pioche and the Kimballs jointly conveyed to Norman Watkins 169 acres out of the said Rancho de la Nacion. This deed was filed for record on October 16, 1869. The property conveyed by it included the 15 acres or thereabouts affected by the present action. By a deed executed in 1882, as corrected by another made in 1884, Watkins conveyed the 15 acres to one Eratus Lake, by whom it was eventually conveyed to the present plaintiff, Lamb. The Kimballs having completed their payments, Pioche, on July 8, 1871, conveyed to them the Rancho de la Nacion, excepting the parcels, such as that deeded to Watkins, which Pioche had already conveyed to persons to whom the Kimballs had made sales.

In 1880 the Kimballs Brothers Water Company conveyed to one Pratt all of its property, and the following year that property was conveyed by Pratt to the San Diego Land & Town Company, a Kansas corporation, authorized by its charter to engage in the business of supplying water to the public. In November, 1886, this corporation commenced, and early in 1888 completed, the construction of what is known as the Sweetwater Dam for the purpose of impounding the waters of the Sweetwater River at a point some distance above the Lake land (the 15 acres here involved). At the same time it commenced constructing the water mains and distributing systems necessary to the devotion of the water so impounded to beneficial uses. About March 10, 1887, the San Diego Land & Town Company filed an action in the Superior Court of San Diego County against George Neale et al., to condemn a portion of lot G of Jamacha Rancho for use as reservoir and necessary margin

lands for the Sweetwater Dam. Neither appellant nor his predecessors in interest, however, were parties to this action. This complaint recited that its corporate purposes were the construction and maintenance of dams, canals and water works for domestic, irrigation and manufacturing purposes.

Meanwhile, on February 15, 1888, and before the execution of the Lake agreement hereinafter referred to, in anticipation of sales of water service to the residents of National City, the San Diego Land & Town Company commenced receiving applications therefor. On February 29, 1888, the city of National City passed an ordinance authorizing the San Diego Land & Town Company to lay and maintain pipe lines on the streets of National City and to supply the inhabitants thereof with water, and on the same day passed an ordinance establishing the rates to be charged for such water service. These ordinances did not become effective until July 1, 1888. Up to May 29, 1888, the San Diego Land & Town Company received 212 applications for water. For a more complete history of the nature of the proceedings leading up to the construction of the dam and the establishing of the rates for the city of National City see Lanning v. Osborne, C.C., 76 F. 319. Meanwhile, however, certain differences which had previously arisen between Eratus Lake and the San Diego Land & Town Company regarding a pipe-line right of way and Lake's water rights were arbitrated in National City on April 17, 1888. On May 29, 1888, the agreement in controversy was executed "in confirmation and enlargement of the aforesaid agreement under the arbitration of April 17," 1888. This agreement was recorded the following month. It provides, among other things, that "For and in consideration of a perpetual right to him and his assigns, said right to be appurtenant to and run with the land, to use all the water necessary for the irrigation at all times" of Lake's 15-acre tract at a rate not to exceed $3.50 per acre per annum, "* * * confirm a grant by him to the San Diego Land & Town Company of the right to lay and maintain its main water pipes and necessary taps over and upon said land forever," and under certain restrictions granted to that corporation "the right to enter upon said land at all times for the purpose of inspecting and repairing its water pipes and taps upon said lands" and "expressly waiving all claims for other or further compensation or damage, which said tract of land or said Eratus Lake as the owner thereof, may have already sustained or which may hereafter be sustained by said tract of land or said (Eratus Lake) by reason of the diversion of the waters of said river by the said San Diego Land & Town Company," or the construction and maintenance of the pipe line or the entry upon the lands for the inspection and repair thereof.

It is conceded that the appellant's 15-acre tract was, when the Sweetwater Dam was built, riparian to the Sweetwater River. By mesne conveyances the Sweetwater Dam and the water system had become the property of the respondent California Water & Telephone Company. From May 29, 1888, to June 19, 1937, a period of 49 years, appellant and his predecessor received water service pursuant to the terms of the above-mentioned agreement. On June 19, 1937, respondent notified appellant by letter that it had completed the construction of a new water main through which he was being served across other properties than his; that respondent had abandoned the easement created by the grant from Lake, and that after July 1, 1937, service to him would be rendered pursuant to the company's applicable rules and regulations and to the company's rates applicable for such services on file with the Railroad Commission of the State of California. Thereupon, on August 7, 1937, appellant filed the present action for declaratory relief, seeking, as Lake's successor, a decree enjoining the respondent from repudiating the agreement between Lake and the San Diego Land & Town Company, and the adjudication of his perpetual right to receive, for the irrigation of his 15-acre tract, water from the respondent's system at the rate of $3.50 per acre per annum.

Respondent filed its answer, setting forth several defenses, most of which were either abandoned by respondent or ordered stricken by the court. The gist of the second defense, on which the discussion mainly hinges, was that immediately upon the completion of the dam and before the making of the Lake contract, the San Diego Land & Town Company dedicated to the public use all the water rights that it owned, and assumed the position of a

public utility, and that having once so done, it could make no subsequent contracts affecting waters from the Sweetwater Dam, which would be immune from public regulations.

The ultimate question before the trial court was whether the rights of the respective parties continued to be governed by the Lake agreement, or, contrariwise, the respondent's obligation to render service to the appellant's 15-acre tract is merely that of a public utility corporation and subject as such to regulation by the Railroad Commission and to the rates from time to time established by it to be charged to the respondent's consumers generally.

The court found that "as respects that part of the water supply impounded by the Sweetwater Dam and controlled by the San Diego Land & Town Company, other and different from that destined for use within the City of National City, the company had, prior to the execution of the Lake contract, become a public utility"; that "when the Lake contract was made, the San Diego Land & Town Company was entitled, in the capacity of a public utility, to make use of all of the flow of the Sweetwater River effectively impounded by the dam"; that plaintiff is not "entitled to either injunctive relief or relief in the form of specific performance"; that "the Lake contract * * * providing for water from the defendant's system at the rate of $3.50 (per acre per annum) has not been cancelled by the nonuser of the pipeline easement, but remains a valid subsisting contract subject, however, to the regulation of the Railroad Commission of the State of California."

Appellant complains and now argues that the court went outside of the pleadings and the theory upon which the case was tried, and decided the case upon the theory of "estoppel" when that defense was not even pleaded or argued; that the trial court decided adversely to the appellant on the theory that appellant's predecessor (quoting from the trial court's written opinion filed herein) "stood by and allowed the erection of a dam manifestly designed and intended by the San Diego Land & Town Company to accomplish the devotion to the use of a public utility of the whole flow of the stream susceptible of being effectively impounded by it"; and that, therefore, appellant cannot deny that the agreement now before the court is subject to public regulation, even though the effect of such a decision is to deprive appellant of his riparian rights; that it reached that result solely by charging appellant's predecessor in interest with knowledge of an allegation in the complaint filed by the San Diego Land & Town Company in the Neale case alleging the construction of the dam, etc., and "that said use is a public use."

It is apparent that the trial court found in favor of appellant on all defenses except the one above mentioned. It is also apparent from the court's written opinion that the court recognized the rule stated in Allen v. Railroad Commission, 179 Cal. 68, 82, 175 P. 466, 472, 8 A.L.R. 249, wherein it was said: "a company having a single and undivided supply of water * * * may devote its properties and a part of those waters to public service and may retain a part for the advantages of private sale, and not become a public service corporation as to all by virtue of the dedication of a part."

It becomes apparent that the court's determination that the whole capacity of the system had been dedicated to public use prior to the execution of the Lake contract was based partly on the filing of the suit in condemnation above mentioned.

Appellant, in analyzing the position assumed by the trial court, claims that it (a) extended the rule of "estoppel" by substituting imputed knowledge for actual knowledge; (b) charged Lake with knowledge of the contents of the complaint in the Neale case where there was no evidence in the record that Lake knew of the existence of the complaint, and the issues raised thereby were not finally determined until almost three years after the agreement now before the court had been consummated; (c) ignored the necessary element in the rule of estoppel requiring a change in position on the part of the public in reliance on the acquiescence of the riparian owner; and (d) ignored the fact that the estoppel had not been pleaded.

At the time the Sweetwater Dam was constructed by the San Diego Land & Town Company, appellant's predecessor in interest, Eratus Lake, was admittedly a lower riparian owner. The San Diego Land & Town Company could have condemned his riparian rights, but until it did so, Lake was entitled to the continuous

flow of the Sweetwater River across his land. The parties entered into the agreement in controversy, the necessary effect of which was, in part, in the nature of an exchange. Lake gave up his right to receive at least a greater portion of his riparian waters from the Sweetwater River and received in return the right to receive his riparian waters from the pipe line and system of the San Diego Land & Town Company. The Supreme Court has held that where the riparian owner transfers his riparian rights to a company and simultaneously receives from the company a right to receive a quantity of water for the irrigation of his land, the water conveyed to him retains its riparian character, and the riparian right of the land is thereby preserved to it even though the land no longer borders on the stream. Copeland v. Fairview Land & Water Co., 1913, 165 Cal. 148, 131 P. 119. In the Copeland case the owner of the riparian land transferred to the company his riparian rights, receiving in return therefor, and as part of the same transaction, a perpetual right to receive a certain quantity of water from the company for the irrigation of his land.

[1] The trial court, however, stated that as to the water which continued to flow past appellant's land notwithstanding the existence of the dam, "that his riparian rights have not been severed from the land and remain a part of it, but, as to the right here in controversy to a water supply from the dam * * * Lake in effect elected to substitute for his riparian rights a different status involving the taking of water from a public utility." Regardless of the correctness of this statement, if the San Diego Land & Town Company, at the time the Lake contract was entered into, was a public utility and the waters had been dedicated to a public use, the Railroad Commission had the power and jurisdiction to fix the rates. Wallace Ranch Water Co. v. Foothill Ditch Co., 5 Cal.2d 103, 121, 53 P.2d 929, 938. It should also here be noted that counsel for appellant, in open court, in the presence of respondent's counsel and during the arguments on the merits of this appeal, stated in response to a question propounded by this court inquiring if the Railroad Commission had assumed jurisdiction of this controversy and fixed the rates applicable to appellant, that, "There was a proceeding to have this contract abrogated. The Railroad Commission denied that without prejudice."

It was stated in Wallace Ranch Water Co. v. Foothill Ditch Co., supra, that if the Railroad Commission, with full knowledge of the claimed rights of appellant, fixed rates applicable to the consumers of respondent company, including appellant, "the trial court had no jurisdiction directly or indirectly to overrule an order of the Railroad Commission. The power to reverse, review, correct, or annul orders of that commission rests solely in the Supreme Court (section 67 of the Public Utilities Act [Stats.1915, p. 115, as amended]), and the superior court is without jurisdiction in the premises."

[2] It has been heretofore determined that where a riparian owner has allowed, without protest, the construction of a large irrigation dam and a public use of his water has intervened, such a riparian owner has no right to an injunction against an invasion of his riparian rights, but can merely sue for damages. Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 P. 1032, 65 L.R.A. 940; Barton v. Riverside Water Co., 155 Cal. 509, 101 P. 790, 23 L.R.A.,N.S., 331; Collier v. Merced Irrigation District, 213 Cal. 554, 2 P.2d 790; Reed v. Oakdale Irrigation District, 46 Cal. App. 139, 188 P. 832. It was the ultimate theory of the trial court that as there was no dispute that the appellant's predecessor, Lake, as the owner of the lands here involved, was originally a riparian appropriator downstream from the dam, his right to the use of the stream as it was accustomed, prior to the erection of the dam, to flow past his lands, could only be held to have been modified or abridged on the theory of estoppel based on his having stood by and allowed the erection of a dam manifestly designed and intended by the San Diego Land & Town Company to accomplish the devotion to the use of a public utility of the whole flow of the stream susceptible of being effectively impounded by it. Such a devotion to public use is recognized in several cases. In Conaway v. Yolo Water & Power Co., 204 Cal. 125, 266 P. 944, 58 A.L.R. 674, it was held that (quoting from syllabus):

(1) "While not even a corporation possessing the power of eminent domain may under the constitution (Art. 1, sec. 14) take or damage private property without

first making adequate compensation, this right may be waived by the owner and in order to prevent the obstruction of progress he must be held to diligence in ascertaining his right as against a concern administering a public use; and if he allows his property right to be invaded and either taken or damaged for a public use and the public right has so far intervened as to justify the belief that objection has been waived, in law the property right so taken or damaged is to that extent dedicated to the public use."

And paragraph (5) of syllabus: "The private owner who stands by in such a case inactive, hesitating or half consenting, until the burden to his land becomes a part of the public use must content himself with legal as distinguished from equitable remedies for relief."

See, also, Collier v. Merced Irrigation District, supra.

In Williamson v. Railroad Commission, 193 Cal. 22, at page 29, 222 P. 803 at page 806, it was stated: "While it is true that purposes avowed in articles of incorporation do not fix the character of the corporation in its future activities as being a public service corporation, as stated in Allen v. Railroad Commission, supra, and that the additional act of dedication is necessary to the creation of a public use, it is also true that when the original appropriators of water from a stream, having declared by broad terms that its purposes are to secure the commodity for a consumption or use which cannot be otherwise than to supply a general public use, organize a corporation which in its articles of incorporation declare its purposes to be that of utilizing the water thus *acquired for sale,* for manufacturing, mining, mechanical, chemical, agricultural, and for general domestic purposes, to be conducted by means of canals, flumes, aqueducts, reservoirs, pipes, and other necessary conduits to a vast area of gold-bearing regions, agricultural lands, and to inhabited districts and communities widely separated from each other, and to all other places lying adjacent to the route of its main system and its lateral branches, and when such corporation proceeds under such declared purposes and does establish a distributing system, and actually furnishes water for mining, irrigation and domestic purposes in large quantities through a period of many years to thousands of consumers indiscriminately, and without refusal to any one who made application or request for the use of its water for any purposes whatsoever, at rates adjusted to the uses to be made of the water, and has apparently held itself in readiness to comply with its declaration of purposes as rapidly as the growth of the communities to which it extends would permit or has required, it must be held that substantial evidence of such a carrying into effect of the originally declared purposes of the original appropriators of such water and of the corporation formed by them has been presented as would suffice, in the absence of countervailing facts, to justify a finding that the water thus acquired and utilized by such corporation had from its inception been dedicated to a public use and that such corporation was a public utility." (Italics added.)

In that case, in consideration of a conveyance of a right to the water company to construct a canal upon petitioner's property, by written agreement, the water company agreed to perpetually furnish such waters as petitioner might thereafter require at a price not to exceed $5.00 per calendar year per acre. It was held that the water company was a public utility and that the Railroad Commission had jurisdiction over the rate to be charged notwithstanding the agreement. To like effect is Miller & Lux v. Enterprise Canal, etc., Co., 169 Cal. 415, 147 P. 567.

In Limoneira Co. v. Railroad Commission, 174 Cal. 232, 162 P. 1033, it was held that (quoting from syllabus): "A contract, made subsequent to the adoption of the constitution of 1879, whereby a public utility undertook to furnish water for a certain period to a mutual water company, is subject to the power of the state, vested in the railroad commission, to modify and practically to annul it in so far as the prescribed rate is concerned in the regulation of the public use." See, also, Leavitt v. Lassen Irrigation Co., 157 Cal. 82, 106 P. 404, 29 L.R.A.,N.S., 213.

We have next to inquire whether the evidence shows and supports the finding that on or before the completion of the Sweetwater Dam in February of 1888, the San Diego Land & Town Company definitely indicated the intention to devote all of the flow of the river to be effectively impounded by it to public use, as distinguished from private use or private sale, and, if it did, whether the evidence shows such purpose to have been so manifested

as to charge Lake as a lower riparian owner, with the notice of such intention essential to invoke the so-called doctrine of estoppel against him. In doing this, we assume, without holding, that such dedication to public use before the date of the Lake contract must appear before the judgment can be affirmed. It is, of course, not to the point in this inquiry that the defendant California Water & Telephone Company may now be a public service corporation and nothing else (except to the extent that it is, if indeed it be, serving Lake in a different capacity). Neither is it to the point that the defendant's predecessor, the San Diego Land & Town Company, has in many decisions been recognized as an out and out public utility, insofar, at least, as these decisions are based on its conduct at times subsequent to the Lake contract. What concerns us now is what the situation was and appeared to be when the Lake contract was made.

Under article XIV, section 1 of the State Constitution it was provided that "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law * * *."

Under the Statutes of 1881, chapter LII, section 1, page 54, and Statutes of 1885, chapter CXV, sections 1 and 2, page 95, the board of supervisors or legislative body of the city was authorized to annually fix the rates to be charged by any company for water furnished to any such county or city respectively.

[3] With these principles above mentioned and with these laws in mind, we will analyze the evidence. Under the San Diego Land & Town Company's articles of incorporation it was authorized to act as a public utility. While not conclusive, this fact may be considered in the determination of the ultimate question. Brewer v. Railroad Commission, 190 Cal. 60, 79, 210 P. 511; Del Mar Water, etc., Co. v. Eshleman, 167 Cal. 666, 140 P. 591, 948.

There is no dispute about the fact that the construction of the Sweetwater Dam was commenced in 1886 and completed early in 1888. The evidence shows that on February 29, 1888, the San Diego Land & Town Company was authorized by ordinance of the city of National City to "lay and maintain water pipes in and upon any or all of the streets of National City, for the purpose of supplying water to the said city and the inhabitants thereof for domestic, irrigating and mechanical purposes for the term of 50 years from and after the passage of this ordinance, and to charge and collect therefor such fees or rates as may be established by the board of trustees or common council of said city." On the same day, by another ordinance, the board of trustees of said city proceeded to fix the rates which, on and after the first day of July following, it should be lawful "for any person or association of persons or water company supplying water to the inhabitants of the city of National City or to any corporation, company or persons doing business or using water therein to charge, collect and receive therefor." It appears that the San Diego Land & Town Company provided a form of application for water service which was in general used by it, one of which is in evidence and is dated February 15, 1888, and made by Frank A. Kimball as applicant. This application was dated at National City and was apparently intended to apply to premises therein. However, there appears as a printed foot-note on the bottom of the application, the following: "(This contract shall remain in force until the first day of next January, when it may be terminated at the request of either party, but in case no such request is made, then the same shall continue in force for one year thereafter, and so on from year to year, until such request is made; which request, when made, shall be to terminate this contract on the then following January 1st.)" The records of the San Diego Land & Town Company show that prior to May 29, 1888, some 212 such applications had been made to it. By the condemnation complaint entitled The San Diego Land & Town Company, plaintiff, v. George Neale, et al., defendants, and verified on March 10, 1887, the defendant's predecessors set up that one of its corporate purposes was "the construction and maintenance of dams, canals, and water works, for domestic, irrigation, and manufacturing purposes"; that it "has constructed upon land of its own, to wit, the Rancho de la Nacion, a dam across the valley of the stream called the Sweetwater River, in said county and across said stream, for the purpose of collecting and holding and distributing the water thereof for the use of the inhabitants of the said Sweetwater

Valley, the said Rancho de la Nacion, the Mission Rancho, National City, and a portion of the city of San Diego, and the lands adjacent thereto, in said county, for domestic, farming, irrigating, manufacturing, and all other purposes to which water may lawfully be applied." It was also in this complaint alleged "that said use is a public use, and that plaintiff is in charge of the same." Insofar as the city of National City is concerned, the courts have fully recognized as a fact that the San Diego Land & Town Company is and was, at least subsequent to the date of the Lake agreement if not before, a public utility and that the rates to be charged were subject to regulation and control in the manner prescribed by law. Osborne v. San Diego Land & Town Co., 1899, 178 U.S. 22, 20 S.Ct. 860, 44 L.Ed. 961; Lanning v. Osborne, supra, 1896; San Diego Land & Town Co. v. City of National City, C.C.1896, 74 F. 79; San Diego Land & Town Co. v. City of National City, 1899, 174 U.S. 739, 19 S.Ct. 804, 43 L.Ed. 1154.

The evidence in the case at bar makes it entirely clear that, as respects such portions of its water supply as the San Diego Land & Town Company intended for distribution within the city of National City and to the inhabitants thereof, the said company was, by every test, a public utility, at least some months before it entered into the Lake contract.

[4, 5] As it has been held that a water company may be a public utility as to a portion of the supply controlled by it, but not as to the rest, the next question presented is the sufficiency of the evidence to support the court's finding as respects that part of the water supply impounded by the Sweetwater Dam and controlled by the San Diego Land & Town Company, other and different from that destined for use within the city of National City, viz., that the company had, prior to the execution of the Lake contract, become a public utility. There is no dispute that the San Diego Land & Town Company had already begun actual service of water to areas under the flow of its pipes outside of the city of National City, including principally that part of the Sweetwater Valley below its dam and the mesa now occupied by the city of Chula Vista. It is not claimed that any application to the Board of Supervisors was made to fix rates for service in the region outside the city of National City until a subsequent time. This, however, in nowise militates against the contention that the company was already supplying this water in the capacity of a public utility. Public utilities were, at the time, authorized in unincorporated areas, to fix and collect rates for water supplied by them even in the absence of supervisorial action on the subject. Stats.1885, chap. CXV, page 95 et seq.

There is no dispute that the company used condemnation to acquire portions of its reservoir lands. It is, of course, only in the public interest that condemnation lies and, as has been already observed, the complaint in the Neale case distinctly alleges the company's character as a public utility. That is a declaration of its then present status, made by it at a time long anterior to the Lake contract. It may perhaps be assumed that a corporation acting in respect of part of the water supply controlled by it as a public utility might not in all circumstances be disqualified to maintain a condemnation suit even in case, as to the other parts of such supply, it were not so acting. The nature of this condemnation suit, however, hardly admits of that construction. That which was condemned was not anything, in the use of which any differentiation could be made between the company's public functions and any private functions that it might claim to be performing. The company had built the dam on its own land. What it sought was more land for a reservoir, and "for the necessary margin and protection thereof for the uses and purposes aforesaid." Such uses and purposes were specified as being not only the use of water in National City but also over the whole of the general region which has since been supplied by the system, and it is with respect to all of this that there is used in the complaint the above-quoted language that "said use is a public use." This seems to be explicit. In thus availing itself of the right of eminent domain and for that purpose making use in its complaint of the most sweeping language in respect of the whole use stated as in contemplation, there seems to be no reservation whatever. Nothing was suggested about any intention to confine the public character of the use to the municipality of National City and to act as a mere retailer of water at private sales elsewhere. On the contrary, all the use of water contemplated is expressly placed in

the same category of a "public use" and on that representation the company condemned the Neale lands, portions of which would appear, from the language of its complaint, to be on the marginal of the reservoir site and, as may be inferred, to be flooded only when the reservoir should be filled to its utmost capacity. There is a plain inference that the company intended to represent and did represent that the entire capacity of the reservoir, that is, all of the water effectively to be impounded, was to be devoted to the public use. When this declaration was made the dam was nearly finished and, therefore, its capacity to impound largely if not entirely complete.

Correlating all of these facts and circumstances, the trial court was justified in finding that there was a dedication of the whole capacity of the system to public use, insofar, at least, as it was within the capacity of the San Diego Land & Town Company to so dedicate it. In Byington v. Sacramento Valley, etc., Co., 170 Cal. 124, 132, 148 P. 791, 794, it was said that: "At the trial it was proven that the Sacramento Valley West Side Canal Company in developing the system of irrigation canals and ditches had prosecuted suits in eminent domain. This shows that it was a public service corporation." See, also, Knox v. Roehl, 153 Wis. 239, 140 N.W. 1121; State ex rel. Wood v. Consumers' Gas Trust Co., 157 Ind. 345, 61 N.E. 674, 55 L.R.A. 245. It also should be noted here that the San Diego Land & Town Company had laid and maintained its main water pipes over and upon the tract of land owned by Lake. It was from these facilities that Lake made use of the water from the dam. In 1937 respondent constructed a new water main which was apparently not constructed upon appellant's land but through which facilities he was to be served such water as he cared to take from the water system under the contract.

In Wallace Ranch Water Co. v. Foothill Ditch Co., supra, the court held that the plaintiff had a perpetual easement in the ditch to convey its water to its properties, but subject to regulation by the Railroad Commission. In that case plaintiff's easement and right to one-third of the waters flowing in defendant's ditch was created at a time when neither owner was a public utility. The interests of defendant's predecessor were subsequently transferred to defendant, a public utility corporation. Plaintiff company was not charged for its proportionate share of the use of the ditch through which plaintiff had the easement to divert its agreed and established share of the water. The Railroad Commission determined it had jurisdiction over the question of rates and so fixed them, contrary to and different from that determined by the trial court. The Railroad Commission's order was sustained for reasons therein expressed. However, at page 120 thereof in 5 Cal.2d, 53 P.2d 929, the Supreme Court points out that there was an order of the Railroad Commission discussed in the briefs to which the court referred. It reads in part as follows: "'In the Matter of the Application of Foothill Ditch Company, a Corporation, to Increase Rates for Water Supply.' * * * This opinion recites in detail the controversy over the ownership of the Foothill Ditch and over plaintiff's claims therein, and specifically holds that that question should not be decided by the commission but by the courts. The opinion holds, however, that since the evidence in that proceeding shows (as does the evidence in the present case) that the utility is furnishing plaintiff a service, the commission has the power to fix rates for that service, whether plaintiff owns a part of the ditch or an easement therein or not. The commission thereupon fixed a rate applicable to the consumers of defendant, including plaintiff * * *."

In the instant case the appellant must make use of the facilities of the respondent corporation, a public utility, in securing water from the dam for his lands. If the above-quoted interpretation is to be given effect and applied here, the Railroad Commission, notwithstanding the other question presented, would have the power to fix rates for that service.

From our understanding of the evidence and the question in dispute, respondent has not, and appellant does not contend that the respondent has refused to deliver water under the contract. The only dispute about the contract is over the price or rate to be charged. The judgment specifically declares that "the Lake contract * * * providing for water from the defendant's system at the rate of three and 50/100 dollars ($3.50) per acre per annum, has not been cancelled by the nonuser of the pipe line easement, but remains a valid,

subsisting contract, subject, however, to the regulation and control of the Railroad Commission of the State of California" and that "plaintiff is not entitled to either injunctive relief or relief in the form of specific performance." This conclusion is amply supported.

Appellant lays particular stress in his brief on the fact that estoppel was not pleaded as one of the defenses and he was not afforded an opportunity to show, in rebuttal thereto, that the San Diego Land & Town Company issued "water right certificates" purporting to entitle the holders thereof to a perpetual right to water at a specific rate. The so-called "certificates" were fully described, discussed, and considered in Osborne v. San Diego Land & Town Co., supra, and held not to be determinative of a like issue there presented.

[6, 7] Whether the so-called rule of estoppel invoked by the trial court should have been pleaded will therefore be considered. Respondent's contention that all waters of the Sweetwater Dam were dedicated to public use is plainly set forth in the second defense of respondent's answer. The manner in which it was dedicated was a matter of proof. The finding that it was dedicated to public use would suffice. The reasoning expressed by the trial court in its written opinion, no matter how well expressed, does not constitute a part of the record on appeal. Since an opinion is not part of the record, it must be carefully distinguished from a finding and from a decision. If the appellate court finds that upon any ground or for any reason the action of the court below was correct, its action will be affirmed regardless of the reason which the court may have given for it. White v. Merrill, 82 Cal. 14, 22 P. 1129.

The case of Conaway v. Yolo Water & Power Co., supra, involved a property right taken under the theory of laches, and to that extent dedicated to public use. In their answer the defendants did not plead laches as a defense, but did plead the "intervention of a public use." This was held sufficient. There is no merit to this argument. From the trend of the reported decisions and the ultimate finding of the trial court, the judgment must be affirmed.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

49 Cal.App.2d 591

TOBINSKY v. BOARD OF MEDICAL EXAMINERS OF STATE OF CALIFORNIA et al.

Civ. 13365.

District Court of Appeal, Second District, Division 2, California.

Feb. 9, 1942.

1. Physicians and surgeons ⇐11(3)

Evidence of woman's symptoms before visiting physician, purposes for which she went to physician's office, manner of operation performed by physician and admissions of physician supported findings of board of medical examiners that physician had performed an abortion and supported order revoking physician's certificate to practice. St.1937, p. 1274, § 2377.

2. Physicians and surgeons ⇐11(3)

Under rule that administrative board passing upon the issue of the revocation of a license to practice medicine is not limited by the strict rules applicable to the trials of a criminal case, hospital records introduced in evidence before the board of medical examiners hearing unprofessional conduct charges against a physician did not have to be authenticated in manner as to be admissible in accordance with the strict rules of procedure followed in criminal cases. St. 1937, p. 1274, § 2377.

3. Physicians and surgeons ⇐11(3)

In proceedings before board of medical examiners hearing unprofessional conduct charges against a physician, introduction in evidence of hospital record describing former patient of accused physician as suffering from post-abortive abscess was not prejudicial to physician in light of testimony by hospital resident surgeon fully explaining basis for use in the records of the term "post-abortal". St.1937, p. 1274, § 2377.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding in mandamus by John Jerome Tobinsky against Board of Medical Examiners of the State of California to compel annullment of order revoking a certificate to practice medicine wherein a demurrer to the petition was sustained without leave to amend. From a judgment for respondent, petitioner appeals.

Affirmed.

Charles A. Thomasset, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Thomas Coakley and J. Albert Hutchinson, Deputy Attys. Gen., for respondents.

W. J. WOOD, Justice.

Petitioner seeks by writ of mandate to compel the Board of Medical Examiners to annul an order revoking his certificate to practice medicine as a physician and surgeon. The trial court sustained a demurrer to the petition without leave to amend. Petitioner has appealed from the judgment denying redress and discharging the alternative writ which had been issued.

Petitioner was charged before the respondent board with unprofessional conduct as defined in the Business and Professions Code, section 2377, St.1937, p. 1274, § 2377, in that on or about April 3, 1940, petitioner did "procure, and/or abet, and/or attempt, agree and/or offer to procure a criminal abortion upon a pregnant woman, to-wit: Mrs. Shirley Reece." Upon a hearing on this charge petitioner was found guilty. Attached to the petition filed in the lower court is a transcript of the proceedings had before the respondent board, including all of the testimony and evidence presented.

It is now claimed by petitioner that the evidence received by the board was insufficient to justify the board's action in revoking petitioner's license. It is asserted that there was no evidence that Mrs. Reece was pregnant and that petitioner had performed an abortion or attempted to do so. From the transcript of the proceedings before the board it appears that Mrs. Reece testified that before going to the office of petitioner she had experienced nausea and dizziness for about six weeks and that she had missed one menstrual period; that she knew she was pregnant and went to petitioner's office for the purpose of having an abortion performed; that she visited petitioner's office on April 1, and had a discussion with a nurse; that she returned on April 3, at which time petitioner operated upon her using instruments in her vagina; that her husband paid $60 to the nurse in petitioner's office and that this nurse was in the room while the operation was being performed. Mr. Reece testified that petitioner told him in a conversation subsequent to the operation that "it couldn't have been a very long pregnancy." Agents of the respondent board testified that they had had a conversation with petitioner concerning his treatment of Mrs. Reece and at this conversation petitioner stated: "I just want to make a clean breast of the thing and I am giving you the whole story." At this conversation petitioner was asked, "Well, in other words, it was just a plain out and out abortion?" To this question petitioner responded, "Well I guess it is that way if you want to put it that way." There was also testimony that after the operation petitioner had paid $130 to Mr. Reece. This sum was claimed by petitioner to be a "loan" to Mr. Reece. We are satisfied that the evidence is sufficient to sustain the order of the respondent board in revoking petitioner's license.

After the operation Mrs. Reece was taken to the Los Angeles County General Hospital for treatment and it is now contended that the respondent board erred in admitting in evidence the records of the hospital concerning the case. Dr. Heldfond, the resident surgeon at the hospital, testified that he examined Mrs. Reece on April 19, 1940, and that she remained in the hospital until May 13, 1940; that Mrs. Reece told him that an abortion had been performed on her on April 6, 1940; that she had had slight bleeding for some two days following the abortion and then was apparently well; that one week later she had chills and fever; that his diagnosis was post-abortal abscess; that he had made this diagnosis from statements made by Mrs. Reece but that in so far as his examination disclosed he could not tell whether her trouble had resulted from an abortion or from gonorrhea. The hospital records contain notations by physicians other than Dr. Heldfond in which Mrs. Reece's trouble was characterized as "post-abortal."

[2, 3] Whether the hospital records were authenticated in such manner as to be admissible in accordance with the strict rules of procedure to be followed in criminal cases need not be decided, for an administrative board passing upon the issue of the revocation of a license to practice medicine is not limited by the strict rules applicable to trials of criminal cases. See In re Hardenbrook, 135 App.Div. 634, 121 N.Y.S. 250; Matter of Danford, 157 Cal. 425, 430, 108 P. 322. Moreover, we are satisfied that petitioner could not have been prejudiced by the introduction of the hospital records. The testimony of Dr. Heldfond fully informed the members of the board concerning Mrs. Reece's condition

while she was at the hospital. The basis for the use in the records of the words "post-abortal" was fully explained to them.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.



49 Cal.App.2d 427

ANDREWS v. SEIDNER et al.

Civ. 12742.

District Court of Appeal, Second District, Division Three, California.

Jan. 30, 1942.

1. Master and servant ⇐302(1), 305, 306

Under statute making a principal responsible to third persons for wrongful acts committed by his agent in transacting business of the agency, responsibility of the principal results from acts so committed even though they are contrary to the principal's explicit instructions or otherwise unauthorized or are malicious or willful. Civ.Code, § 2338.

2. Master and servant ⇐302(1)

In considering whether an agent's unauthorized wrongful act is attributable to his principal, the court cannot look to the nature of the act alone to determine whether it was committed in transaction of principal's business but must consider as well the activity of agent on behalf of principal in connection with which act was committed, and the inquiry is not whether act itself was authorized, but whether it was committed in the course of a series of acts of the agent authorized by the principal. Civ.Code, § 2338.

3. Master and servant ⇐302(1)

Where an agent, for however brief a period, has ceased to serve his principal, the agent alone is responsible for his acts during period of such cessation, but fact that questioned act was unauthorized or, if wrongful, that it was not committed to further principal's interests, will not show such a departure from principal's service as will absolve principal if act was committed while agent was still occupying himself with principal's business within the scope of his employment. Civ.Code, § 2338.

4. Master and servant ⇐330(3)

In action against beer hall owner and his employee for assault and battery, evidence showed that quarrel between plaintiff and employee was precipitated by employee's efforts to collect for drinks which had been served to customers and that argument over bill and encounter both occurred in course of employee's unfinished effort to induce plaintiff to pay for drinks, and hence trial judge properly held that assault was committed as part of business which employee was authorized to transact for owner and that therefore owner was liable to plaintiff. Civ. Code, § 2338.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Paul Andrews against Milton Seidner and another to recover damages for assault and battery. From a judgment for plaintiff, defendants appeal.

Affirmed.

Kent Rogers, of Los Angeles, for appellants.

Harry Alkow and Samuel A. Rosenthal, both of Los Angeles, for respondent.

SHINN, Justice.

In this action for assault and battery respondent was awarded $1,535 as damages against Seidner, owner of a cafe and beer hall, and Haimsohn, his employee. Both defendants appeal, urging the insufficiency of the evidence to support the findings.

Respondent entered the beer hall, sat on a stool in front of the bar and had several glasses of beer. He was asked by Haimsohn, who was known to the customers and is referred to in the record as Murphy, and who was behind the bar and in charge of the place in the absence of the owner, to pay for drinks consumed by two women who sat at the bar on stools next to respondent. An argument ensued between respondent and Haimsohn, in which the former denied ordering the drinks and insisted that if he was to be charged for them he would credit the amount, 60 cents, upon a debt for carpenter work which he had done for Seidner which he claimed was unpaid. Haimsohn declined to settle on this basis. Respondent proceeded to the end of the bar where a small gate led into the bartender's domain.

The argument continued. Thus far the evidence was without conflict. Plaintiff testified that as he stood outside the gate he was suddenly struck by either Haimsohn or one Brazelton, a customer, and was shoved through a door into the kitchen, where he was beaten by both men, receiving severe lacerations, bruises, and a broken leg. The testimony of other witnesses was that respondent entered the area behind the bar through the gate and attacked Haimsohn; that the latter retreated through the door into the kitchen, where he was followed by respondent. The court accepted the testimony of respondent, found that he was not the aggressor, that he was an invitee and not a trespasser, that Haimsohn was not acting in defense of his person, and that his claim that he used only the force necessary to expel respondent from a portion of the premises where he had no right to be was unfounded. The court also found that Haimsohn was acting at the time within the scope of his employment and upon this finding based the judgment against the employer Seidner.

The facts found with relation to the manner in which the brawl occurred find support in the evidence, and we conclude that the finding that Haimsohn was acting within the scope of his employment, which is challenged by appellant Seidner, is likewise supported. In the attack make on this finding it is argued that upon a view of the evidence most favorable to respondent this court must hold, as a matter of law, that the employee was acting solely on his own behalf and responsibility in committing the assault.

[1-3] The statutory law on the subject is found in section 2338 of the Civil Code, which provides in substance that a principal is responsible to third persons for wrongful acts committed by his agent in and as a part of the transaction of the business of the agency. Responsibility of the principal results from acts so committed even though they be contrary to the principal's explicit instructions or otherwise unauthorized, or malicious or wilful. In considering whether an unauthorized wrongful act of an agent is attributable to his principal, we cannot look to the nature of such act alone to see whether it was committed in and as a part of the transaction of the principal's business, but we must consider as well the activity of the agent on behalf of the principal in connection with which the act was committed. The inquiry is not whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal. Of course, where the agent, for however brief a space of time, has ceased to serve his principal, he alone is responsible for his acts during the period of such cessation. But the fact that the questioned act was unauthorized or, if wrongful, that it was not committed in order to further the interests of the principal, will not show such a departure from the service of the principal as will absolve the latter if the act was committed while the agent was still occupying himself with the principal's business within the scope of his employment. Support for these statements, with full citation and discussion of authorities will be found in Johnson v. Monson, 1920, 183 Cal. 149, 190 P. 635; Ruppe v. City of Los Angeles, 1921, 186 Cal. 400, 199 P. 496; Hiroshima v. Pacific Gas & Elec. Co., 1936, 18 Cal.App.2d 24, 63 P.2d 340; Stansell v. Safeway Stores, Inc., 1941, 44 Cal.App.2d 822, 113 P.2d 264.

[4] In applying the foregoing rules to the facts of the instant case we find that the quarrel between respondent and appellant Haimsohn was precipitated by the efforts of the latter to collect for the drinks that had been served to customers. There was no other contributing cause nor was the controversy a personal one between the participants. The argument over the bill furnished the sole cause of the encounter and both occurred in the course of an unfinished effort of the agent to perform an authorized act for his principal, namely, to induce the customer to pay the price of the drinks. The argument was still under way when the fight started and Haimsohn had not then abandoned his effort to collect the bill. We must take this view of the facts because it is obvious that the trial judge accepted the testimony of respondent in all important particulars and his story is not incredible.

Under these circumstances the trial judge properly held that the assault was committed in and as a part of business which the employee was authorized to transact for his employer; from this fact the liability of the latter necessarily results.

The judgment is affirmed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

49 Cal.App.2d 459

PEOPLE v. ROCHE.

Cr. 3535.

District Court of Appeal, Second District, Division 3, California.

Jan. 30, 1942.

1. Criminal law ⇐409

If the proof independently of any extrajudicial admission or declaration of the accused makes out a prima facie case of the commission of the crime charged, including all the essential elements thereof, a sufficient foundation has been laid for the receipt of evidence of such admissions or declarations.

2. Criminal law ⇐409

In prosecution for failure to stop and give information and render aid to a bicyclist struck by motorist, statements of accused that she had observed girl on bicycle while driving, had heard a slight noise and felt her automobile skid, and that she looked back and saw the girl standing in the road brushing her clothes were admissible under evidence showing automobile in passing bicycle in the daytime struck the rear end and passed to its left, that motorist drove off rapidly and that the noise of the collision was heard some 50 feet away, there being no showing that accused suffered from impairment of her faculties. Vehicle Code, § 480, St.1935, p. 170.

3. Automobiles ⇐336

Knowledge that a bicyclist has been struck by an automobile and has been thrown to the ground is sufficient evidence of injury to the rider to call into operation the provisions of the statute requiring motorist involved in an accident resulting in injury to any person to stop, give information and render assistance. Vehicle Code, § 480, St.1935, p. 170.

4. Automobiles ⇐355(8)

In prosecution for failure to stop, give information and render aid to injured bicyclist, evidence that motorist in overtaking the bicycle struck rear end of the bicycle and passed to the left in the daytime, that the noise of the collision was audible 50 feet away and motorist left scene rapidly, constituted a substantial showing motorist had knowledge her automobile had been involved in an accident resulting in personal injury. Vehicle Code, § 480, St.1935, p. 170.

5. Criminal law ⇐351(10)

In prosecution of motorist for failing to stop after an accident resulting in injury to a bicyclist, statements of accused denying and then admitting she was driving the automobile involved in the collision were admissible as tending to prove consciousness of guilt. Vehicle Code, § 480, St.1935, p. 170.

6. Automobiles ⇐355(8)

Evidence was sufficient to establish guilt of motorist in leaving the scene of an automobile accident resulting in injury to a bicyclist without stopping to give information and render assistance. Vehicle Code, § 480, St.1935, p. 170.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Floy May Roche was convicted of failing to stop and give information and render aid to a bicyclist struck by her while driving an automobile and she appeals.

Affirmed.

William G. Kenney, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., for respondent.

SHINN, Justice.

An automobile driven by appellant struck a bicycle ridden by a young girl, throwing the latter to the street. In a prosecution of appellant for violation of section 480 of the Vehicle Code, St. 1935, p. 170, which requires a driver involved in an accident resulting in injury to any person to stop, give his name, render assistance if necessary, etc., admissions of appellant, consisting of statements made to police officers, were received in evidence over her objection. Her statements were related as follows: "She then told us that she had been using the Dodge, that she was driving north on Hillhurst or some street, she was not quite certain of the street. She observed this girl on the bicycle and heard a slight ping and felt her car skid apparently to one side; that she looked back and observed the girl standing in the road brushing her clothes off. She thought there was no damage that amounted to anything and drove on." The basis of the objection to this testimony was that no evidence had been presented which tended to show that appellant knew that her car had been involved in an accident or that any person

had been injured. It is contended that such knowledge was an essential element of the corpus delicti; that it could not be established by the extra-judicial admissions of appellant; that proof of knowledge by independent evidence was necessary in order to lay a foundation for her admissions or declarations; that such proof was lacking and that it follows from such deficiency of evidence not only that her statements were erroneously admitted but that she stands convicted without competent evidence of one of the necessary elements of the crime charged. People v. Simonsen, 1895, 107 Cal. 345, 40 P. 440.

Without discussing the legal premises upon which the argument proceeds, we will examine the evidence touching the question of appellant's knowledge that she had been involved in an accident. The record discloses that the accident occurred at about 9 or 9:30 a. m. on a well-traveled street. The vehicles were traveling in the same direction, the car overtook the bicycle, struck the rear end of it, and passed to its left. Appellant immediately speeded up her car and left the scene rapidly, driving through an intersection just as the signals changed. These facts were testified to by a passenger who witnessed the accident from a car which was closely following that of appellant. The noise of the collision between the car and the bicycle and the fall of the bicycle into the street attracted the attention of a witness who was some 50 feet away, and was also heard by the witness in the other car. The victim lay in the street until she was assisted to her feet and to the sidewalk, and while in the street did not stand alone or brush off her clothes.

[1] If the proof independently of any extra-judicial admission or declaration of the accused makes out a prima facie case of the commission of the crime charged, including all of the essential elements thereof, a sufficient foundation has been laid for the receipt of evidence of such admissions or declarations. The rule is stated with full citation of authorities in People v. Kaye, 1941, 43 Cal.App.2d 802, 111 P.2d 679.

[2] We find no insufficiency of evidence to justify the receipt of the statements of the accused. There is no contention on the part of appellant that she suffered from any impairment of her faculties which would prevent their use in a normal manner. While it was not stated in so many words, the inference is to be drawn from the testimony of eyewitnesses to the accident that the weather was clear and there was no limitation of visibility. From the absence of any evidence that one vehicle swerved into the other or that either altered its course immediately before the accident, it was to be inferred that the front part of appellant's car struck the bicycle. The noise of this collision and of the bicycle as it fell would naturally have attracted the attention of appellant if she had not actually seen or felt the impact.

[3] Knowledge that a rider on a bicycle which has been struck by an automobile has been thrown to the ground is sufficient evidence of injury to the rider to call into operation the provisions of the statute.

[4] From all of the foregoing we conclude that the evidence, apart from any admission on appellant's part, constituted a substantial showing that she had knowledge that her car had been involved in an accident resulting in personal injury. There was no error in the admission of her statements to the police officers.

[5, 6] It was in evidence that appellant at first denied to the officers but later admitted that she was driving the car that was involved in the accident. Her contradictory statements were admissible as tending in some degree to prove a consciousness of guilt. People v. Cole, 1903, 141 Cal. 88, 74 P. 547; People v. Singh, 1934, 136 Cal.App. 233, at page 240, 28 P.2d 416; People v. Martin, 1936, 16 Cal.App.2d 515, at page 517, 60 P.2d 1014. Appellant did not testify in her own behalf nor offer other evidence to rebut the case of the People. Her statements made to the officers containing the admissions and contradictions to which we have referred, taken with proof of the circumstances of the accident, including the conduct of appellant in speeding up her car immediately thereafter, were sufficient to establish her guilt.

The judgment is affirmed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

49 Cal.App.2d 484

In re MORELAND'S ESTATE.

SAMPLE et al. v. CANHAM.

Civ. 11952.

District Court of Appeal, First District, Division Two, California.

Feb. 3, 1942.

Hearing Denied April 3, 1942.

1. Appeal and error ⇐224

Where order granting motions to vacate an order confirming a probate sale of realty to successful bidder was based on motions showing that order of confirmation was made through mistake and inadvertence, question of whether a mere statement of intent to increase a bid is a sufficient ground to vacate probate sale of realty after confirmation was not presented for review.

2. Appeal and error ⇐224

Where order granting motions to vacate an order confirming a probate sale of realty to successful bidder was based on motions showing that order of confirmation was made through mistake and inadvertence, question whether the court may vacate an order of confirmation for the sole purpose of seeking further bids where purchaser is ready, willing, and able to buy was not presented for review.

3. Appeal and error ⇐957(2)
Judgment ⇐363

The statute authorizing a court to relieve a party from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect is addressed to the legal discretion of the trial court, and in absence of a clear showing of abuse in the exercise of that discretion, an appellate court will not disturb an order of the trial court. Code Civ.Proc. § 473.

4. Executors and administrators ⇐379

That prospective bidders made no binding promise to increase bid at a new hearing did not show an abuse of discretion by trial judge in vacating order confirming probate sale of realty. Code Civ.Proc. § 473.

5. Executors and administrators ⇐379

The probate court had jurisdiction to vacate an order of confirmation of sale of realty on motion of either a prospective bidder or an administrator under statute authorizing a court to relieve a party from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, as against contention that the probate court has no power to vacate a sale except where proceedings are unfair or the price is disproportionate to the value as provided in probate code provision. Code Civ.Proc. § 473; Probate Code, § 785.

Appeal from the Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Proceeding in the matter of the estate of James A. Moreland, deceased, wherein S. C. Sample and another made motions to vacate an order confirming the probate sale of realty to J. S. Canham, the successful bidder. From an order granting the motions, J. S. Canham appeals.

Affirmed.

Henry F. Boyen and Frank J. Fontes, both of San Francisco, for appellant.

Oscar Samuels and Tevis Jacobs, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

This appeal is taken by the successful bidder from an order granting motions to vacate an order confirming a probate sale of real property to him. The motions were made by the administrator of the estate and the original bidder upon the grounds that the administrator had, by inadvertence and mistake, notified both the original and a prospective bidder that the hearing upon the return of sale would be held on September 5, 1940, instead of on September 4, the day for which said hearing had been duly noticed and was in fact held; that, because of such error, the original and the prospective bidder, each of whom intended and was prepared to make a substantially higher bid, were led to remain away from the court and failed to take any part in the proceedings. At the hearing of the motions to set aside the order of confirmation the court had evidence of the intention and purpose of both the original and the prospective bidder that they would increase the amount bid by the appellant, and we must assume that the court found that it would be of benefit to the estate to call for new bids.

[1] The appellant states three questions upon which he relies for a reversal of the order. (1) "Is a mere statement of

intent to increase a bid a sufficient ground to vacate a probate sale of real estate after confirmation?" As stated, the question must of course be answered in the negative, but this record does not present that question. The order appealed from was based upon the motions showing that the order of confirmation was made "through mistake and/or inadvertence" and not upon the "mere statement of an intent to increase a bid."

[2] (2) "Where the purchaser is ready, willing, and able to buy, may the Court vacate the order of confirmation for the sole purpose of seeking further bids?" This statement is open to the same objections. It does not present a debatable question on appeal since the grounds of the motions are incorrectly stated. If the probate court had jurisdiction to grant relief under section 473 of the Code of Civil Procedure such jurisdiction attached as a result of a motion made in compliance with the terms of that section—a motion based upon the ground that the order sought to be set aside had been taken against the mover "through his mistake, inadvertence, surprise or excusable neglect."

(3) "Has the Probate Court any power to vacate an order of confirmation of sale of real estate under Section 473 C. C. P. on motion of either a prospective bidder or the administrator?" This is the real question raised by the appeal. If this section of the code applies to such an order in probate the attack on appeal must rest upon a clear case of abuse of discretion. On this subject it is said in 14 Cal.Jur., page 1075, that "The policy of the law is to have every litigated case tried upon its merits; and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. The discretion of the court ought always to be exercised in conformity with the spirit of the law and in such manner as will subserve rather than defeat the ends of justice."

[3, 4] It is the settled law that the section is addressed to the legal discretion of the trial court "and in the absence of a clear showing of abuse in the exercise thereof an appellate court will not disturb the order of the court below," Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148, where numerous cases are cited. Here the appellant does not claim that the trial court abused this discretion, except by the inferences running through the briefs and arising from the fact that no definite or binding promise was made by the prospective bidders that they would increase the bid at a new hearing. Aside from the fact that this is a matter which should concern the respondent administrator rather than the appellant, it is wholly insufficient to show an abuse of discretion justifying a reversal.

[5] Turning to the direct question raised—the jurisdiction of the court to grant relief from a probate order under section 473—we find the authority expressly confirmed in Levy v. Superior Court, 139 Cal. 590, 73 P. 417. In that case the superior court, sitting in probate, made an order setting aside a homestead. In due time the executors and an heir moved to set aside the order upon grounds stated in section 473. The only question raised on the appeal was whether the court had jurisdiction to proceed under that section. The Supreme Court held that both the executor and the heir were interested parties entitled to move for relief from the order under the code section. To the same effect is Estate of Hickey, 129 Cal. 14, 61 P. 475. Jurisdiction under the section was assumed in Lilienkamp v. Superior Court, 14 Cal.2d 293, page 301, 93 P.2d 1008, 1012, where the real question involved was what notice was required under the section, but the court said that the jurisdiction of the superior court following the order of partial distribution "extended to the hearing and determination of a motion pursuant to section 473 of the Code of Civil Procedure, after due notice, as required by that section." In Estate of Nolan, 145 Cal. 559, 79 P. 428, it was held that, in the absence of an appeal from an order in probate, and in the case of a non-appealable order, the only remedy was under section 473. Similar rulings as to the application of the section are found in Estate of Tymms, 78 Cal.App. 79, 82, 247 P. 1091; and Estate of Hunter, 99 Cal.App. 191, 195, 278 P. 485.

The appellant relies upon a portion of the syllabus in Estate of Leonis, 138 Cal. 194, 71 P. 171, stating that the probate court has no power to vacate a sale except under section 1552 of the Code of Civil Procedure (now section 785, Probate Code). The opinion does not support the statement. On page 200 of 138 Cal., on page 174 of 71 P. it is said: "It is claimed that the court had the power to relieve the heirs from the order un-

der Code Civ.Proc. § 473, which provides that the court may relieve a party 'from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect.' If it be conceded that the above statute applies to a case like this, the showing was not sufficient to justify the order of the court." It should be noted that the author of the foregoing also wrote the opinion in Estate of Nolan, supra, and there is no indication of a ruling that the power to proceed under section 473 did not exist. On the other hand, the statement referred to is clearly explained in Estate of Verwoert, 177 Cal. 488, 492, 171 P. 105, 107, where the court said: "The decision in the Estate of Leonis does not, as appellant contends, hold that the court is without any power whatever to vacate a sale of real property made by an administrator or guardian, except where the proceedings are unfair or the price disproportionate to the value, as provided in section 1552 of the Code of Civil Procedure. All that the case really decides on that point is that, under the facts shown in that case, the court had no power to vacate the sale, except for those reasons."

We find no error in the record.

The order is affirmed.

STURTEVANT and SPENCE, JJ., concurred.



In re KACHIGIAN'S ESTATE.

KACHIGIAN v. KACHIGIAN.

Civ. 2694

District Court of Appeal, Fourth District, California.

Feb. 4, 1942.

Hearing Granted April 3, 1942.

1. Homestead ⇐84

Prior to 1929 amendment to statute providing that a homestead may be selected from community property or the separate property of the husband or with consent of wife, from her separate property, a homestead could not be selected by owner or spouse, nor a probate homestead set aside to surviving spouse, out of land held in common or joint tenancy by one spouse and a third party, and the amendment did not extend the right of one of spouses to select a homestead to property owned by other spouse and third party as tenants in common. Civ.Code, § 1238; Probate Code, § 661.

2. Homestead ⇐137

Where deceased at time of his death and his brother owned vineyard lands as tenants in common, which they operated together and on which they both lived, probate court was not required under statute to select a homestead out of the lands upon petition of deceased's widow. Civ.Code, § 1238; Probate Code, § 661.

3. Homestead ⇐137

The section of Probate Code providing for setting apart of a homestead for use of surviving spouse does not purport to enlarge the field of property from which such a homestead must be selected beyond that from which one may be voluntarily selected or to require setting apart to the surviving wife of property interests which did not belong to decedent, or in which others have an undivided interest. Civ.Code, § 1238; Probate Code, § 661.

4. Homestead ⇐139

The purpose of a probate homestead is to set certain property apart for use of a decedent's family. Probate Code, § 661.

5. Executors and administrators ⇐177

Even if farming tools and implements used on vineyard lands owned by decedent and his brother as tenants in common were exempt from execution provided for in Code of Civil Procedure, the setting apart to decedent's surviving spouse of such exempt personalty was a matter left to discretion of probate court.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Proceeding in the matter of the estate of Harry Kachigian, deceased, wherein Aghavnie Kachigian filed a petition to have the court select as a homestead and set apart for her use an undivided one-half interest in certain real property and to set apart to her, as exempt from execution, certain personal property, opposed by Toros

Kachigian. From an adverse order, the petitioner appeals.

Affirmed.

Harold M. Child and L. N. Barber, both of Fresno, for appellant.

Harry Sarkisian, of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order of the probate court denying a petition of the surviving wife of the deceased to have the court select as a homestead and set apart for her use an undivided one-half interest in certain real property and to set apart to her, as exempt from execution, certain personal property.

The facts are undisputed. From February 4, 1928, to July 29, 1940, when Harry Kachigian died, he and his brother, the respondent herein, owned 40 acres of vineyard land as tenants in common, which they operated together and on which they both lived. They also owned together certain farming implements used on this property. The deceased and the appellant had no children, and the property in question was his separate property.

[1, 2] The main question presented is whether, under section 661 of the Probate Code, it was the duty of the court to select a homestead out of the real property thus owned by the deceased and his brother as tenants in common. The possibility of such a question arising was suggested in 11A Cal.Jur. at page 631.

Prior to the 1929 amendment to section 1238 of the Civil Code a homestead could not be selected by the owner or his or her spouse, nor a probate homestead set aside to the surviving spouse, out of land held in common or joint tenancy by one spouse and a third party. Schoonover v. Birnbaum, 148 Cal. 548, 83 P. 999; Watson v. Peyton, 10 Cal.2d 156, 73 P.2d 906. In the latter case, it was held that under the 1929 amendment to this section a husband could select a homestead, without the consent of his wife, out of property owned by them as joint tenants since his interest was an "estate" which vested in him an immediate right of possession although such right was not exclusive. It was pointed out that prior to that amendment a valid declaration of homestead upon property held by a husband and wife as joint tenants could only have been declared by the wife or by the husband and wife together. The appellant now contends that a wife's right to select a homestead is also extended by this amendment to property owned by her husband and a third party as tenants in common and that such an interest, being "property" as now defined in section 1238, must be set apart to her use as a probate homestead under section 661 of the Probate Code, which provides that a homestead must be set apart out of the separate property of the decedent when there is no community property and no property which was owned in common by the spouses. A consideration of this contention involves not only the meaning of section 1238 of the Civil Code but a construction of section 661 of the Probate Code keeping in mind its purpose and object.

Prior to 1929, section 1238 of the Civil Code provided "* * * the homestead may be selected from the community property, or the separate property of the husband, or, with the consent of the wife, from her separate property." The 1929 amendment added the following: "Property, within the meaning of this section, includes any freehold title, interest, or estate which vests in the claimant the immediate right of possession, even though such right of possession is not exclusive." This section applies to a homestead to be selected by one of the spouses during the lifetime of both and the 1929 amendment includes, among the property which may be thus selected, any interest in property which the selecting spouse then has which then vests in him or her an immediate right of possession. This includes, of course, a joint tenancy interest where the other spouse is the co-owner since it is then an estate in which each has a right of possession, though not exclusive. The ordinary meaning of the language used would not, however, include the selection by a wife during the lifetime of her husband of land held by a husband and a third person as tenants in common, the husband's interest being his separate property, since the wife, as claimant, would not have a present interest which vested in her the immediate right of possession. The right to select a homestead from separate property of a husband which he holds with a third person as tenants in common is not specifically given to a wife under the terms of section 1238, as amended in 1929. In speaking of that amendment the court in Re Miller, D.C., 27 F.Supp. 999, 1001, said: "This amendment obviously pertains to cotenancies, the most fre-

quently used in California by married persons in acquiring real property for homesites being joint tenancies." The views we have expressed are somewhat confirmed by the fact that in 1937 section 1238 was again amended by omitting the words "or, with the consent of the wife, from her separate property" and inserting in lieu thereof the words "or, subject to the provisions of section 1239, from the property held by the spouses as tenants in common or in joint tenancy or from the separate property of the wife." While property owned as tenants in common by the spouses is thus specifically included, property owned as tenants in common by one of the spouses and a third person is not expressly authorized to be selected as a homestead. That fact not only suggests that the latter was not intended but, taken in connection with the provision that the claimant must then have a vested right of possession, indicates an intent to make the homestead selectable out of property actually belonging in some way to one of the spouses and not to him and third parties as tenants in common, and tends to negative any intention to change the long-existing rule that such a homestead could not be selected from property owned by one spouse and a third person as tenants in common. Property rights have long been acquired in reliance upon that rule and any change should be particularly and definitely declared by the legislature.

[3] Section 661 of the Probate Code relates to a so-called probate homestead, which is the one here involved. That section was enacted in 1931, being based in part upon certain former sections of the Code of Civil Procedure. It provides, among other things, for the setting apart of a homestead for the use of the surviving spouse (1) out of the community property, (2) out of property owned in common by the spouses or if there be no such property, (3) out of the separate property of the decedent, in which event it may be set apart only for a limited period. This statute also mentions property owned in common by the spouses and does not expressly mention property held by one of the spouses and a third person as tenants in common. No intent appears, in the wording of the statute, to enlarge the field of property from which such a homestead must be selected beyond that from which one may be voluntarily selected, under section 1238 of the Civil Code, or to require the setting apart to the surviving wife of property interests which did not belong to the decedent, or in which others have an undivided interest.

[4] This construction is in accord with the purpose of a probate homestead which is to set certain property apart for the use of a decedent's family. The object is to provide the family with a home (Estate of Schmidt, 94 Cal. 334, 29 P. 714; Estate of Adams, 128 Cal. 380, 57 P. 569, 60 P. 965), and that very object indicates an intent that this use of the property should be exclusive. It is unthinkable that it was intended that this use should be one which must be shared with a stranger who as a tenant in common has an equal right to such use. A homestead would be useless for the purpose intended unless an exclusive right to use the property as a home is given.

A further consideration is that to construe these statutes as so changing the prior law as to require a court to set apart for the use of a surviving wife property which was held as tenants in common by the decedent and a third party, would subject the third party to a loss of the use of his property or a part thereof, without compensation and without due process of law, in which event it would be unconstitutional. In many instances, this would lead to rather absurd results. For example, it would be hardly reasonable to believe that it was intended to provide that where ten persons owned a parcel as tenants in common and one died the court must set apart the entire property for the use of the family of one who had himself owned but a small part of the property, and this without regard to the rights of the co-owners. It would be equally unreasonable to suppose that it was intended to compel the setting apart of a portion of the property for the use of the family of the one, such use to be shared with the other co-owners. It is not to be assumed, in the absence of any specific indication thereof, that the legislature intended to require anything of this kind in adopting these statutes.

[5] The order appealed from also refused to set apart to the appellant, as property exempt from execution, certain personal property of the value of about $700 and consisting of farming tools and implements situated and used upon the real property in question. In support of her

contention that this part of the order is erroneous the appellant argues that under the holding in Stanton v. French, 83 Cal. 194, 23 P. 355, the exemptions from execution provided for in the Code of Civil Procedure include "the interest of a tenant in common." Be that as it may, the setting apart to the surviving spouse of such exempt personal property is a matter specifically left to the discretion of the court. Estate of Mattingly, 19 Cal. App.2d 550, 65 P.2d 1338. No facts indicating an abuse of that discretion are here called to our attention.

For the reasons given the order is affirmed, the respondent to recover costs on appeal.

MARKS and GRIFFIN, JJ., concurred.



49 Cal.App.2d 476

WESTLAKE v. SILVA et al.

Civ. 11865.

District Court of Appeal, First District, Division 2, California.

Feb. 2, 1942.

1. Deeds ⇐121

A quitclaim deed transfers whatever present right or interest the grantor has in the property.

2. Easements ⇐1

An "easement" is an incorporeal hereditament in the servient estate.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement".

3. Easements ⇐24, 28

An easement appurtenant to land cannot be severed from the land and transferred separately so as to convert it into an easement in gross, but it may be extinguished by a surrender or release to the owner of the servient estate.

4. Deeds ⇐121
Easements ⇐28

A "quitclaim deed" is a transfer and release to the grantee of whatever present title or interest the grantor has in the property quitclaimed and hence, when made by the owner of an easement to the owner of the servient tenement, operates as a "release" extinguishing the easement.

See Words and Phrases, Permanent Edition, for all other definitions of "Quitclaim Deed" and "Release".

5. Easements ⇐28

Where defendants in settlement of any claims which they had for a right of way over lot owned by plaintiff executed and delivered to plaintiff a quitclaim deed to property owned by plaintiff, and in exchange for deed a lot was conveyed to defendants and a road was built thereon to enable defendants to reach their property, the quitclaim deed operated as a "release" of any easement of right of way which defendants had over plaintiff's lot.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Frederick L. Westlake against John W. Silva and others to quiet title to land. From a judgment for plaintiff, defendants appeal.

Affirmed.

A. Q. Lomba, of Oakland, and W. L. Albert, of San Francisco, for appellants.

Paul A. Brom and John Paul Jones, both of Oakland, for respondent.

DOOLING, Justice pro tem.

This is an appeal from a judgment quieting plaintiff's title to a certain lot of land against defendants' claim of an easement for a right of way over a ten foot strip at the rear of said lot. The case was submitted upon an agreed statement of facts supplemented by certain evidence. At the time of the creation of the easement the lot here in question was a part of a much larger tract of land, which has since been subdivided, and the easement was created by the owner of this larger tract by the same deed which conveyed to defendants' and appellants' predecessor the land which they now own and to which they claim the easement is appurtenant.

The agreed statement of facts contains the following recitals:

"In 1927 certain lands now known as the 'East 14th Street Homesites' were subdivided and roads laid out, graded and dedicated to the use of the public. The defend-

ants used these dedicated roads since that time for a portion of the way to their property. For the remainder of the way they cut across certain lots, among said lots being the lot of land now owned by the plaintiff.

"On or about August 22nd, 1939, the plaintiff herein attempted to build on the lot owned by him and described in the complaint, but the defendants objected to such use and refused to permit the plaintiff to build.

"Subsequently and in settlement of any claims the defendants may have had for a right of way over the lot owned by the plaintiff, the defendants on September 15, 1939, made, executed and delivered to plaintiff a quitclaim deed to the property owned by the plaintiff. * * * In exchange for this quitclaim deed the defendants were deeded a lot in the tract and a road built thereon to enable them to have proper and uninterrupted way to the property."

In the face of these agreed facts, and in an apparent attempt to both eat their cake and have it, appellants claim that an easement appurtenant to a dominant tenement cannot be released or surrendered to the owner of the servient tenement by a quitclaim deed. The basis of this claim is not entirely clear from a reading of their brief, but on no conceivable ground is their position tenable.

[1-3] A quitclaim deed transfers whatever present right or interest the grantor has in the property. Thornton v. Middletown Educational Corp., 21 Cal.App.2d 707, 709, 70 P.2d 234. An easement is an incorporeal hereditament in the servient estate. Kripp v. Curtis, 71 Cal. 62, 63, 11 P. 879; Zlozower v. Lindenbaum, 100 Cal.App. 766, 771, 281 P. 102. An easement appurtenant to land cannot be severed from the land and transferred separately so as to convert it into an easement in gross but it may be extinguished by a surrender or release to the owner of the servient estate. 28 C.J.S. Easements, § 45, p. 708; Tiffany, Real Property, 3d Ed., vol. III, p. 383.

[4] A quitclaim deed, being a transfer and release to the grantee of whatever present title or interest the grantor has in the property quitclaimed, when made by the owner of an easement to the owner of the servient tenement operates as a release and extinguishment. Uihlein v. Matthews, 172 N.Y. 154, 64 N.E. 792; Flaten v. City of Moorhead, 58 Minn. 324, 59 N.W. 1044; La Plant v. Schuman, 197 Iowa 466, 196 N.W. 280.

The court briefly disposes of the question in La Plant v. Schuman, supra, 196 N. W. at page 284: "The quitclaim deed was a method universally recognized as proper under the law to release any claim plaintiff had of an easement of a right of way over lot 11."

[5] In view of the facts quoted from the agreed statement this was the effect that the quitclaim deed was intended to have in this case, and no reason appears not to give effect to the intention of the parties.

Judgment affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.



49 Cal.App.2d 456

PEOPLE v. VAN OSDOLL.

Cr. 3532.

District Court of Appeal, Second District, Division 3, California.

Jan. 30, 1942.

Criminal Law ⇐553

In prosecution for negligent homicide and drunk driving, evidence on issue whether defendant or decedent was driving the culpably operated automobile supported conviction in view of physical facts as disclosed by collision that defendant was driving. Vehicle Code, §§ 500, 501, St.1935, pp. 173, 174.

Appeal from Superior Court, Los Angeles County; Vaughan N. Thompson, Judge Assigned.

Clifford William Van Osdoll was convicted of negligent homicide and drunk driving, and he appeals.

Affirmed.

Neil G. McCarroll, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., for respondent.

SCHAUER, Presiding Justice.

Defendant appeals from the judgment pronounced after he was found guilty of (1) violation of section 500 of the Vehicle Code, St.1935, p. 173 (negligent homicide), and (2) violation of section 501 of the Vehicle Code ("drunk driving").

The sole ground of appeal is alleged insufficiency of the evidence to support the judgment, and the only particular wherein the sufficiency of the evidence is challenged is that which identifies the defendant as the driver of the culpably operated automobile. The judgment must be affirmed.

No witness was produced who testified that he had seen and recognized the defendant as the driver of the automobile while it was in motion. The defendant himself testified that he owned and had driven the car from the city of Glendale to a point about eight miles south of the town of Palmdale, and that there, after a brief stop, he and his companion, one Odin Hatfield, who was the brother-in-law of defendant, exchanged places and that Mr. Hatfield was driving, with defendant riding as a passenger, at the time of an accident in which the former was fatally injured. Immediately after the crash the defendant stepped out of the car and during the ensuing several minutes he told various persons that he was the driver; to quote his own language as a witness, he testified, "I told everybody that I met that I was driving." Defendant further testified, however, in effect, that he made such statements not because they were true but because he "felt morally responsible for the whole thing."

On this appeal it is argued that the evidence, other than defendant's extrajudicial admissions, not only fails to prove that defendant was driving at the time of the collision but by a clear preponderance establishes the untruth of defendant's admissions and the truth of his presently asserted hypothesis that he was the passenger and Hatfield the driver. The evidence from which defendant draws his inferences is in substance as follows: Defendant was only slightly injured, while the decedent suffered a broken leg and severe head and chest injuries; photographs of the car in which they were riding show that most of its damage was on its left side; the steering wheel was bent, and the windshield, which was in two sections, was more extensively damaged in the left than in the right section; defendant's exhibits A and B (photographs) disclose a jagged hole near the right side of the left section adjacent to the center post. It may be inferred that it was decedent's body which crushed the steering wheel and decedent's head which crashed the glass. But that does not place him in the driver's seat.

The evidence shows without contradiction that when the collision occurred defendant's car, traveling between fifty and sixty miles per hour, was endeavoring to negotiate a curve to the right—a turn in a cut from south towards the north on the west slope of a hill—a curve sharp enough that the car at its operating speed left the right side of the highway and bulged out left of the center line into the southbound traffic lanes where its front and left sides collided with an approaching car. Reasonable inferences would be that inertia and centrifugal force combined to throw the passenger sitting on the right side, who apparently was not protected by a safety belt or other support, forward and to the left, crashing him into the steering wheel, dashboard, and windshield, and that the driver, braced by the door at his left and the wheel in front, could well have escaped with less injury than his unfortunate companion.

In addition to the circumstances related, a witness, Thomas McConnell, testified that immediately after the collision he saw defendant "get out on the lefthand side, walk around to the front and open the door" on the right side and that at that time the decedent was sitting "practically in the center" of the front seat. Another witness, Mrs. Lyon, saw one of two persons in defendant's car leave it by the left door; she did not recognize defendant but she did state that the person remaining in the car, on the righthand or passenger side, was the decedent Hatfield. Although Mrs. Lyon apparently became somewhat confused between right and left a fair import of her testimony places defendant at the left or driver's position and the decedent in the center of the seat. Such uncertainties and inconsistencies as appear in her narrative may have affected its weight but they are not such as to render its evidentiary value legally unsubstantial.

The position of the two automobiles after the collision, more or less side by side athwart the east side of the highway, heading east, with the defendant's car two or three feet nearer than the other to the bank at the edge of the highway, is not inconsist-

ent with the testimony of either Mr. McConnell or Mrs. Lyon. In view of the position of the vehicles, facing the bank with defendant's car several feet closer to it than was the car in which Mrs. Lyon was seated, her statement that the "other man" (defendant) "got out next to the bank" is certainly not inconsistent with Mr. McConnell's testimony that defendant got out on the left and walked around the front of his car. The witness Brown, who did not see the crash but arrived shortly afterward, testified that the left front door of defendant's car was open. In the light of this testimony and other evidence, the trial judge was not bound, as argued by defendant, to find that the two automobiles were so close together as physically to have precluded defendant from leaving his car via the left door.

Even without defendant's admissions we find the evidence ample to support the convictions. The judgment is affirmed.

SHINN and PARKER, WOOD, JJ., concurred.

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SECOND SERIES

19 Cal.2d 540

NATIONAL AUTOMOBILE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 18078.

Supreme Court of California.

Feb. 16, 1942.

Rehearing Denied March 16, 1942.

1. Insurance ⇐379(7, 8)

Where an insured in good faith makes truthful answers to questions contained in an application, for workmen's compensation insurance, but his answers owing to fraud, mistake or negligence of agent filling out application, are incorrectly transcribed, insurer is "estopped" to assert their falsity as a defense to an action on the policy, and acts of agent, whether a general agent with power to issue policies, a soliciting agent, or merely a medical examiner, are in such respect acts of the insurer, even though agent is stipulated in application to be insured's agent.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

2. Insurance ⇐379(8)

Where insurer's general insurance agent knew that each of three brothers owned trucks registered in his own name, that each contracted for jobs separately, and that when a job would require more trucks than one brother possessed, he would arrange to hire trucks of the other brothers, and brothers in applying to the agent for workmen's compensation insurance, made no false representations, but relied on agent to give them the coverage needed, and policy was issued to the brothers jointly and not severally, insurer, in compensation proceeding by employee of one of the brothers, was "estopped" to take advantage of the "jointly and not severally" clause on ground that agent was agent of the brothers.

3. Insurance ⇐435

A workmen's compensation insurance policy excluding from coverage specified relatives by marriage of employer, and expressly excluding nephews and nieces, but making no mention of nephews or nieces by marriage, did not exclude employer's "nephew" by marriage.

See Words and Phrases, Permanent Edition, for all other definitions of "Nephew".

In Bank.

Proceeding under the Workmen's Compensation Act by John G. Elston, compensation claimant, against Arthur S. Hubbs, employer, and the National Automobile Insurance Company. The Industrial Accident Commission awarded compensation to the compensation claimant, and the National Automobile Insurance Company brings a proceeding to review the award.

Award affirmed.

Rehearing denied; CURTIS and EDMONDS, JJ., dissenting.

C. W. Bowers, of Los Angeles, for petitioner.

Everett A. Corten and Eldon B. Spofford, of San Francisco, for respondents.

SHENK, Justice.

This is a proceeding to review an award of the Industrial Accident Commission. John G. Elston, a worker, was injured while in the employ of Arthur S. Hubbs. The petitioner had issued a policy of workmen's compensation insurance to "Jesse Hubbs, Arthur S. Hubbs, and Herbert O. Hubbs, jointly and not severally, a co-partnership." The Industrial Accident Commission held the petitioner liable on the policy on the theory that the petitioner had waived or was estopped to invoke the clause, "and not severally" because of its conduct in past dealings and because of the knowledge of its agent, Kincaid, in regard to the method of operations of the assured.

The assured, Jesse Hubbs, Arthur S. Hubbs and Herbert Hubbs are brothers. Each owned trucks that were registered in his own name. Each contracted for jobs separately. Often a job would require more trucks than the particular brother

possessed and he would then arrange to hire the trucks of the other brother or brothers. A stipulated rental would be paid for the hire of the other's trucks. Each however looked after the upkeep of his own trucks. The brothers paid their Social Security Tax from one payroll and also based the premium on the policy here involved on a single payroll.

The facts as to the method of operation were familiar to Mr. S. H. Kincaid, a general insurance agent who was authorized by the petitioner to write policies for the petitioner. The assured did not specify the particular type of policy in their request to the agent but they relied upon Mr. Kincaid to give them the coverage which they needed.

[1] The facts here presented are very similar to those involved in Pacific Employers' Ins. Co. v. Arenbrust, 85 Cal.App. 263, 259 P. 121. In that case it appeared that Arenbrust, Farahan and Loran each owned a truck. By agreement they made it a practice to help each other on jobs where more than one truck was required. They had common headquarters although each was in business for himself. These facts were made clear to an insurance agent who issued the policy for Pacific Employers Insurance Co., and made it a coverage for a co-partnership. The company denied liability when a worker in the individual employ of Loran was injured. The court stated, "When an insured in good faith makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy. The acts of the agent, whether he is a general agent with power to issue policies, a soliciting agent or merely a medical examiner for the company, are in this respect the acts of the company, and he cannot be regarded as the agent of the insured, even though it is so stipulated in the application."

[2] The same rule should apply in the present case. Mr. Kincaid was the agent of the petitioner insurance company which issued the policy here involved. He questioned the assured as to their method of operations. They made no false representations to him. Therefore the petitioner should be estopped in this case to take advantage of the "jointly but not severally," clause.

The facts in this case distinguish it from the case of National Automobile Insurance Co. v. Industrial Accident Comm., 11 Cal.2d 694, 81 P.2d 928. In that case there was a definite co-partnership, which owned certain equipment. One of the partners started a joint venture of the same nature with another party, not one of the partners. One of the employees of the venture was injured. The court held, correctly, that the employee of the separate venture was not covered by the partnership policy.

[3] The injured man, Elston, was the husband of a niece of Arthur S. Hubbs. Specific classes of relatives were excluded from coverage under the policy. The policy expressly excluded some relatives by marriage as, "son-in-law," "daughter-in-law," "mother-in-law," "father-in-law," "sister-in-law," "brother-in-law." The policy expressly mentioned nephews and nieces but no mention was made of nephews or nieces by marriage. Therefore it must be held that they were not excluded. Inasmuch as the policy expressly excluded certain designated relatives by marriage, and inasmuch as nephews or nieces by marriage were not so expressly excluded, it must be concluded that there was no intention to exclude them. It has also been held elsewhere that the word "nephews" should not be construed to include nephews by marriage. Boyd v. Perkins, 130 Ky. 77, 113 S. W. 95, 96; In re Lamberton's Estate, 105 Pa.Super. 348, 161 A. 596; In re Hunt's Estate, 53 Hun. 466, 6 N.Y.S. 186; Fedl v. Ryan, 118 N.J.L. 516, 193 A. 801.

The award is affirmed.

GIBSON, C. J., and CURTIS, CARTER, and TRAYNOR, JJ., concurred.

19 Cal.2d 543

ERMOLIEFF v. R. K. O. RADIO PICTURES, Inc.

L. A. 17857.

Supreme Court of California.

Feb. 17, 1942.

1. Action ⇐6

In view of statutory provision that declaratory relief may be asked for alone or with other relief, court may make a binding declaration of rights whether or not other relief is, or could be claimed at the time, the remedy is cumulative, and the mere fact that contract has already been breached and a cause of action therefor has accrued, does not necessarily deprive the court of the power to grant declaratory relief. Code Civ. Proc. §§ 1060, 1062.

2. Action ⇐6

Where sole question was whether plaintiff, as owner and producer of foreign language motion picture, by entering into contract granting defendant the exclusive rights to produce and distribute English version in certain countries and "The United Kingdom" granted rights with respect to Eire, action for declaratory relief would lie, notwithstanding that defendant had already distributed pictures in Eire. Code Civ.Proc. §§ 1060–1062.

3. Appeal and error ⇐1047(3)
Trial ⇐89

In action for declaratory relief, to determine whether plaintiff, as owner and producer of foreign language motion picture, by entering into contract granting defendant the exclusive rights to produce and distribute English version in certain countries and "The United Kingdom" granted rights with respect to Eire, court committed reversible error in granting plaintiff's motion to strike defendant's evidence that according to custom and usage of moving picture industry, Eire is included in the United Kingdom. Code Civ.Proc. § 1861; Civ.Code, §§ 1644, 1646, 1655.

4. Customs and usages ⇐15(1)

Though words in a contract are ordinarily to be construed according to their plain, ordinary, popular or legal meaning, yet if in reference to the subject matter of the contract, particular expressions have by trade usage acquired a different meaning, and both parties are engaged in that trade, the parties are deemed to have used the words according to their peculiar sense as shown by such trade usage, and parol evidence is admissible to establish the trade usage, though the words in their ordinary or legal meaning are entirely unambiguous. Code Civ.Proc. § 1861; Civ.Code, §§ 1644, 1646, 1655.

5. Customs and usages ⇐15(2)

In action for declaratory relief to determine whether plaintiff as owner and producer of foreign language motion picture, by entering into contract granting defendant the exclusive rights to produce and distribute English version in certain countries and "The United Kingdom" granted rights with respect to Eire, evidence that according to custom and usage of the motion picture industry, Eire is included in The United Kingdom, was not rendered inadmissible because judicial notice may be taken and it was stipulated that Eire is independent of The United Kingdom and not a part thereof.

6. Contracts ⇐170(2)

In action for declaratory relief to determine whether plaintiff as owner and producer of foreign language motion picture by entering into contract granting defendant the exclusive rights to produce and distribute English version in certain countries and "The United Kingdom" granted rights with respect to Eire, wherein defendant introduced evidence that according to custom and usage of the motion picture industry, Eire was included in The United Kingdom, parties by modifying the contract to include Malta and Gibraltar which are political subdivisions of The United Kingdom, did not place a practical construction on the contract negativing presence of custom and usage.

7. Customs and usages ⇐10

Where both parties to a contract are engaged in the same occupation, or belong to the same group of persons, the usages of that occupation or group are operative, unless one of the parties knows or has reason to know that the other party has an inconsistent intention.

8. Appeal and error ⇐994(1), 995

Contentions that witnesses were biased, that evidence on certain issue was a "low quality of proof", and that the evidence was insufficient, were matters which went to the weight of the evidence, rather than to its admissibility, and were not matters with which the Supreme Court was concerned on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action for declaratory relief by Joseph N. Ermolieff against R. K. O. Radio Pictures, Incorporated, to determine whether defendant or plaintiff held certain motion picture rights in Eire. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment reversed.

Mitchell, Silberberg, Roth & Knupp and Guy Knupp, all of Los Angeles, for appellant.

Joseph L. Fainer, L. A. Bloom, and Thomas Connell, all of Los Angeles, for respondent.

CARTER, Justice.

Plaintiff and defendant are producers and distributors in the motion picture industry. Plaintiff was the owner and producer of a foreign language motion picture entitled "Michael Strogoff," based on a novel by Jules Verne, which prior to July 6, 1936, he had produced in the German and French languages. On that date the parties entered into a contract in which plaintiff granted to defendant the exclusive right to produce and distribute an English version of that picture in only those "countries or territories of the world" listed on an exhibit annexed to the contract. On the exhibit is listed among other places "The United Kingdom." Plaintiff reserved the rights in the picture in both foreign and English language in all countries or territories not listed in the exhibit. The contract was modified in December, 1936, and September, 1937, to add other countries or territories to the list. Plaintiff commenced the instant action on May 8, 1940, pleading the contract and its modifications and alleging that defendant had produced an English version of the picture under the title "Soldier and a Lady" in the United States and elsewhere; and that a controversy has arisen between the parties as to the countries and territories granted to defendant and those reserved by plaintiff under the contract and its modifications. Those allegations were admitted by defendant and it alleges that the only controversy between the parties is with respect to the area referred to as "The United Kingdom"; that the only dispute is whether "The United Kingdom," in which the contract grants rights to defendant, includes Eire or the Irish Free State; and that there is a custom and usage in the motion picture industry that that term does include Eire and that such usage is a part of the contract. Both the complaint and the answer pray for declaratory relief, namely, a declaration of their rights with respect to those areas embraced in the contract which are in dispute.

It was stipulated that the sole issue with respect to the territory embraced in the contract was whether defendant or plaintiff held the rights in the picture in Eire, which in turn depended upon whether The United Kingdom included Eire; that defendant did distribute the picture in Eire, and that The United Kingdom, from a political and legal viewpoint, did not include Eire, the latter being independent from it.

At the close of plaintiff's case the trial court denied defendant's motion to dismiss made on the ground that the case was not a proper one for declaratory relief under sections 1060–1062a of the Code of Civil Procedure. It granted a motion to strike all of defendant's evidence that by the custom and usage of the motion picture industry The United Kingdom included Eire on the ground that such evidence was incompetent, irrelevant, and immaterial, and entered judgment in favor of plaintiff determining that he, rather than defendant, possessed the rights with respect to the picture in Eire. From that judgment defendant appeals, claiming error in the above-mentioned rulings of the trial court. Defendant takes the position, with relation to the propriety of declaratory relief under the circumstances, that because it was stipulated that it had distributed the picture in Eire, an action for damages had arisen for that breach of the contract, if such it was, and therefore declaratory relief was not available.

Section 1060 of the Code of Civil Procedure provides in part: "Any person interested under a * * * contract * * * may, in cases of actual controversy relating to the legal rights * * * of the respective parties, bring an action * * * for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He *may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at*

the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought." (Emphasis added.)

Section 1062 of the Code of Civil Procedure provides: "The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts."

[1] It is clear from the above provision stating that declaratory relief may be asked for alone or with other relief, that the court may make a binding declaration of rights whether or not other relief *is or could be* claimed at the time, and that the remedy is cumulative, that the mere fact that the contract has already been breached and a cause of action therefor (one of the traditional remedies) has accrued, does not necessarily deprive the court of the power to grant declaratory relief under the law. Neither the fact that a party has another remedy nor that a breach has occurred prior to the commencement of his action compels the court to deny relief. Ordinarily, the alternative remedy, such as damages, injunctive relief and the like would be more harsh, and if he chooses the milder remedy, declaratory relief, the court is not required for that reason to compel him to seek a more stringent one. It is said in Tolle v. Struve, 124 Cal.App. 263, 267, 12 P.2d 61, 62: "Appellant asserts further that, if her attempt to terminate her obligations under the leases constituted a breach of legal duty, it was one which gave rise to a cause of action for remedial relief against her, and, that being so, there was no longer any room or occasion for the invocation of the statute authorizing declaratory relief. The statute itself seems to afford a complete answer, providing as it does (Code Civ.Proc. § 1060): 'He (the plaintiff) may ask for a declaration of rights or duties, either alone or *with other relief.* * * *' (Italics ours.) We can conceive of no meaning to be attributed to the italicized language unless the statute contemplates the giving of declaratory relief as well after a breach of legal duty as before. This conclusion is strengthened by the additional language of the section that 'the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time.' The concluding sentence of the section further bears this out: 'Such declaration *may* be had before there has been any breach of the obligation in respect to which said declaration is sought.' (Italics ours.) The use of the word 'may' is permissive, not mandatory. It serves to make clear what the Legislature feared might otherwise be obscure, in view of the fact that historically nearly all relief by way of judgment in common-law courts had been limited to redress for completed wrongs, that this statute contemplated declaratory relief, regardless of whether there had been an actual breach of obligation or not. It does not limit the right to such relief to cases where no breach has in fact occurred." See, also, Hamilton Corp. v. Corum, 218 Cal. 92, 21 P.2d 413; Wollenberg v. Tonningsen, 8 Cal.App.2d 722, 48 P.2d 738; Borchard, Declaratory Judgments, 2d Ed., pages 315-390. Defendant relies upon Standard Brands of California v. Bryce, 1 Cal.2d 718, 37 P.2d 446, and Fritz v. Superior Court, 18 Cal.App.2d 232 63 P.2d 872, as stating a contrary rule. In the Bryce case the court was concerned with the true nature of an action which involved the injury to real property, a tort in considering the proper place of trial of the action. When making such determination the true nature of the action is involved rather than what the parties may designate it. The court merely held that the action was not one for declaratory relief and that the law on venue could not be thwarted in that manner. In the instant case the interpretation of the rights and duties under the contract is clearly a case for declaratory relief. The same comment is applicable to the Fritz case, and furthermore in that case the court held that there was no actual controversy, that the facts as pleaded rather than establishing an action within the purview of section 1060, comprehended an action founded upon special statutory authority (Civil Code, sec. 315) and that there was no compliance with the requirements of that statute. It may well be that by reason of the discretion vested in the trial court in the granting of declaratory relief (Code of Civil Procedure, sec. 1061) the court may under proper circumstances deny that relief where other remedies will serve as well or better. See Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 110 P.2d 396; Stenzel v. Kron-

ick, 102 Cal.App. 507, 283 P. 93; Welfare Investment Co. v. Stowell, 132 Cal.App. 275, 22 P.2d 529; A. Hamburger & Sons, Inc., v. Kice, 129 Cal.App. 68, 18 P.2d 115.

In the instant case plaintiff in his complaint claimed a controversy with respect to the respective rights of the parties under the contract. Defendant in its answer set forth with particularity the controversy as being whether The United Kingdom included Eire. It was stipulated that that was the sole controversy and the case was tried on that issue. The court denied defendant's claim that the case was not within the purview of section 1060 and granted declaratory relief. While it is true that defendant has already distributed pictures in Eire, it is also true that if plaintiff is correct in his assertion that Eire is not included in The United Kingdom, he has reserved the right in the contract to distribute pictures there. If defendant is correct it has the right to make a further distribution of pictures in Eire. Defendant's contention must therefore fail.

[3] Defendant asserts, however, that the judgment must be reversed because of the granting of plaintiff's motion to strike defendant's evidence that according to the custom and usage of the moving picture industry Eire is included in The United Kingdom. With that contention we agree. Both plaintiff and defendant are engaged in the business of producing and distributing moving pictures and rights in connection therewith. Defendant's evidence consisted of the testimony of several witnesses familiar with the distribution of motion pictures to the effect that in contracts covering the rights to produce pictures the general custom and usage was that the term "The United Kingdom" included Eire, the Irish Free State. Plaintiff's motion to strike out all of that evidence on the ground that it was incompetent, irrelevant and immaterial was granted. Plaintiff, reserving his objection to defendant's evidence, offered contrary evidence concerning such custom and usage.

[4] The correct rule with reference to the admissibility of evidence as to trade usage under the circumstances here presented is that while words in a contract are ordinarily to be construed according to their plain, ordinary, popular or legal meaning, as the case may be, yet if in reference to the subject matter of the contract, particular expressions have by trade usage acquired a different meaning, and both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage. Parol evidence is admissible to establish the trade usage, and that is true even though the words are in their ordinary or legal meaning entirely unambiguous, inasmuch as by reason of the usage the words are used by the parties in a different sense. See Code of Civil Procedure, sec. 1861; Civil Code, secs. 1644, 1646, 1655; Jenny Lind Co. v. Bower & Co., 11 Cal. 194; Callahan v. Stanley, 57 Cal. 476; Higgins v. California Petroleum, etc., Co., 120 Cal. 629, 52 P. 1080; Caro v. Mattei, 39 Cal.App. 253, 178 P. 537; Wigmore on Evidence, vol. IX, sec. 2463, p. 204; Restatement, Contracts, secs. 246, 248; Hurst v. W. J. Lake & Co., 141 Or. 306, 16 P.2d 627, 89 A.L.R. 1228. The basis of this rule is that to accomplish a purpose of paramount importance in interpretation of documents, namely, to ascertain the true intent of the parties, it may well be said that the usage evidence does not alter the contract of the parties, but on the contrary gives the effect to the words there used as intended by the parties. The usage becomes a part of the contract in aid of its correct interpretation.

Plaintiff relies upon such cases as Brant v. California Dairies, Inc., 4 Cal.2d 128, 48 P.2d 13, and Wells v. Union Oil Co., 25 Cal. App.2d 165, 76 P.2d 696, as announcing a rule contrary to the one above stated. However, in those cases evidence of custom or usage was not offered, and no contention was made therein that the words employed in the contracts there involved had any other than their ordinary, popular or legal meaning in reference to the subject matter of said contracts. That is not the case here. Plaintiff also cites other authorities. In New York Cent. R. R. Co. v. Frank H. Buck Co., 2 Cal.2d 384, 41 P.2d 547, and the cases therein cited, the rule stated is merely that where the terms of the contract are expressly and directly contrary to the precise subject matter embraced in the custom or usage, parol evidence of that custom or usage is not admissible. The provision in the contract was tantamount to a clause that custom or usage shall not be a part of the contract. They did not involve a situation where the evidence was introduced to define a term in the contract. In the case at bar it cannot be said that there was a provision of that character. The contract stated that the defendant's rights existed only in the countries or territories

listed in the annexed exhibit and plaintiff reserved the rights in all other countries or territories. "Territories" is a more comprehensive term than countries, and may well include more than one political entity or nation. The term "The United Kingdom" as a territory or area, does not necessarily limit that area to a political entity known as The United Kingdom. The fact that it is expressly stipulated in the contract that defendant has no rights in any countries not named in the exhibit, does not alter the situation. It falls short of being tantamount to an express and direct agreement that Eire shall not be considered as included in The United Kingdom. The door is still open to evidence of custom and usage with reference to the scope of The United Kingdom. The foregoing comments are equally applicable to the other cases cited by plaintiff, namely, Withers v. Moore, 140 Cal. 591, 74 P. 159; May v. American Trust Co., 135 Cal.App. 385, 27 P.2d 101; Brandenstein v. Jackling, 99 Cal.App. 438, 278 P. 880; Fish v. Correll, 4 Cal.App. 521, 88 P. 489, and California Jewelry Co. v. Provident Loan Ass'n, 6 Cal.App.2d 506, 45 P.2d 271.

[5] Plaintiff urges that since judicial notice may be taken and it was stipulated that Eire is independent of The United Kingdom and not a part thereof, the custom and usage evidence is not admissible to contradict that stipulation or notice. That notice and stipulation add nothing material to the situation. In any case where a word in a contract had an unquestioned common meaning there could be no dispute as to that common meaning, but the custom and usage is evidence of the peculiar sense in which it was used. The stipulation would add nothing that was not already plain on the face of the contract.

[6] It is contended that the parties placed a practical construction on the contract which negatived presence of custom and usage as a part thereof. The contract was modified on December 1, 1936, and September 8, 1937, to include countries not mentioned in the original contract. Eire was not among the added areas and nothing was said therein with reference to the territory embraced by The United Kingdom. Malta and Gibraltar which are political subdivisions of The United Kingdom were added. It does not necessarily follow that these modifications constituted a construction of the contract by the parties to the effect that Eire was not included in the term "The United Kingdom," nor that evidence of custom or usage was removed from the picture. Indeed, it may reasonably follow from those modifications that the criterion to be used in construing the area embraced within The United Kingdom was not the political or legal boundaries thereof. It may well be said to indicate an uncertainty as to the extent of the area embraced by that term because upon plaintiff's present reasoning The United Kingdom is circumscribed by the political and legal boundaries thereof. That being the case, there would be no occasion for the modification because Malta and Gilraltar being political subdivisions of The United Kingdom would be embraced in the contract as originally written. For those reasons, it is also a fair inference to conclude, that the parties because of the modifications, had some meaning in their mind for the term "The United Kingdom," other than that territory which is a political and legal part thereof.

[7] Finally, plaintiff asserts that the custom and usage evidence was inadmissible because a custom and usage to be available must be known by the parties or so generally known that knowledge must be presumed, citing Security Commercial & Savings Bank of San Diego v. Southern Trust & Commerce Bank, 74 Cal.App. 734, 241 P. 945. But in this case defendant's excluded evidence showed that the custom was general in the moving picture industry and both parties were engaged in the production of motion pictures. As plaintiff expresses it in his brief, "Respondent (plaintiff) is a world famous producer." It is stated in Restatement, Contracts, section 248, page 352: "Where both parties to a transaction are engaged in the same occupation, or belong to the same group of persons, the usages of that occupation or group are operative, unless one of the parties knows or has reason to know that the other party has an inconsistent intention."

[8] Plaintiff further urges in support of the exclusion of the evidence of usage; that the witnesses were biased, that it was a "low quality of proof," that it was insufficient and the like. These are matters that go to the weight of the evidence, rather than to its admissibility. With that we are not concerned. There is no necessity for a detailed analysis of the evidence. It is clear that the trial court did not purport to weigh or

evaluate that evidence. It disregarded it in toto as is evinced by its order striking it out. On retrial of the action, if the parties so desire, the trial court may consider and give such weight to such evidence as may be introduced.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, HOUSER, and TRAYNOR, JJ., concurred.



19 Cal.2d 449

BARD v. KENT.

L. A. 17820.

Supreme Court of California

Feb. 10, 1942.

Rehearing Denied March 9, 1942.

1. Contracts ⇐172

An "option" is an "offer" and if it is without consideration, it is revoked by the offeror's death prior to acceptance, but if consideration is given, it is a "contract" binding on the offeror and his successors in interest after his death. Civ.Code, § 1587, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Option", "Offer" and "Contract".

2. Appeal and error ⇐1009(2)

Where trial court in action by offeror's administrator to cancel an option to extend a lease, found that no consideration for the option was given and that the option was therefore revoked by the offeror's death, judgment for administrator was required to be upheld if the finding was supported by sufficient evidence. Civ.Code, § 1587, subd. 4.

3. Landlord and tenant ⇐86(1)

The payment by the holder of an option to extend a lease, of architect's fee for sketches of proposed improvements of leased premises, is "consideration" sufficient to make the option irrevocable only if the offeror agreed to accept the payment as consideration.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

4. Landlord and tenant ⇐86(1)

An act of an offeree does not constitute "consideration" binding on offeror and render option to extend lease irrevocable, unless the offeror agreed to be bound in return therefor.

5. Landlord and tenant ⇐86(1)

"Consideration", sufficient to make an option to extend lease irrevocable, must actually be bargained for as the exchange for the promise, and the existence or nonexistence of a bargain depends on the manifested intention of the parties.

6. Landlord and tenant ⇐86(1)

The fact that a promisee relies on a promise to his injury, or the promissor gains some advantage therefrom, does not establish "consideration" which will render option to extend lease irrevocable, without the element of bargain or agreed exchange.

7. Landlord and tenant ⇐86(1)

In action by deceased offeror's administrator to cancel option to extend lease, trial court was justified under evidence in concluding that offeror did not promise to grant option in return for offeree's engaging of an architect to draw sketches of proposed improvements on leased premises, though offeror suggested engaging the architect.

8. Estoppel ⇐93(1)

In action by offeror's administrator against offeree to cancel option to extend lease, on ground that there was no consideration and that option was not accepted during offeror's lifetime, offeree was not entitled to judgment under doctrine of "promissory estoppel" because he engaged an architect to make sketches of proposed improvements on leased premises in accordance with offeror's suggestion, where there was no showing that offeror promised to keep option open or made any other promise on which offeree could rely.

See Words and Phrases, Permanent Edition, for all other definitions of "Promissory Estoppel".

In Bank.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Ben Bard, as special administrator, etc., against L. E. Kent, individually, and as director, etc., to cancel and set aside an option to extend a lease. From a

judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

For prior opinion, see 116 P.2d 137.

Bautzer & Ryan, Gregson Bautzer, and G. Bentley Ryan, all of Hollywood, and Sampson H. Miller, Perry Bertram, and Bertin Weyl, Jr., all of Los Angeles, for appellants.

Paul Vallée and Jerome H. Kann, both of Los Angeles, for respondent.

TRAYNOR, Justice.

The defendant in this action, L. E. Kent, administered the business affairs of Mrs. Ruth Roland Bard, hereinafter referred to as Miss Roland, under a general power of attorney for many years before her death. In 1933, Kent, acting as agent for Miss Roland, leased for five years a parcel of real property owned by her to Cliff Odums and Albert M. Berkson, who constructed a building on the property and installed equipment for the operation of a restaurant named the Cat and the Fiddle. The restaurant failed, and Odums and Berkson abandoned the venture. Thereupon Kent, acting in his personal capacity together with Howard Hastings and Don Carpenter, organized a corporation, known as the Cat and the Fiddle Company, which assumed the obligations of Odums and Berkson and took over the operation of the restaurant. When this venture likewise proved unprofitable, Kent bought the stock of Hastings and Carpenter in the Cat and the Fiddle Company and continued to pay off the obligations that the company had assumed. Various sublessees who thereafter tried to operate a restaurant on the premises were unsuccessful.

On August 21, 1935, Miss Roland executed a lease of the premises to the Cat and the Fiddle Company for a term of five years. The lessee subsequently obtained an extension of the lease and written authority to sublease the premises to M. A. McDonnell. On August 30, 1935, the premises were subleased to McDonnell for a term of five years ending August 31, 1940, with an option to renew the lease for one year. This lease from the Cat and the Fiddle Company to McDonnell included the right to use the equipment and fixtures on the premises and provided for rental payments of 10% of the gross receipts up to $6,000 and 8% of the gross receipts over that amount, with a minimum payment of $450 per month. The restaurant operated by McDonnell proved highly successful, and he made improvements costing approximately $30,000. Meanwhile Kent dissolved the corporation distributed its assets to himself, and continued his business as an individual under the fictitious name of the Cat and the Fiddle Company. As owner of the improvements upon the property he received half of the rent, but upon termination of the lease the improvements were to revert to Miss Roland.

During 1936 McDonnell told Miss Roland and Kent that he would undertake additional improvements at a cost of about $10,000 if his lease were extended for another four years. Miss Roland in subsequent conversations with Kent expressed a willingness to grant the extension if the proposed improvements would cost approximately $10,000. She suggested that Kent check the figures and have an architect draw sketches for the purpose of making an estimate. On August 17, 1937, Miss Roland executed to the Cat and the Fiddle Company an option to extend its lease for an additional four years in order that it in turn could give McDonnell an extension of his lease. The option was signed for Miss Roland by Kent as her attorney in fact. It recited that "For consideration of Ten Dollars ($10.00) and other valuable consideration" the Cat and the Fiddle Company was granted an option to extend its lease for an additional period of four years. After the option was signed, Kent instructed Kenneth McDonald, an architect, to draw sketches of the proposed improvements. These sketches were billed to Kent and paid for by him subsequent to the deaths of the architect and Miss Roland.

On September 22, 1937, before the option was exercised, Miss Roland died. The special administrator of her estate brought this action against Kent to cancel and set aside the option on the grounds that it was not only given without consideration and therefore revoked by the death of the offeror, but that it was obtained by fraud. It was stipulated that the sum of $10 was not paid to Miss Roland and that none of the proposed improvements were made. The trial court found that defendant made a complete disclosure of all the transactions to Miss Roland and that he was not guilty of any fraud or wrongdoing in his dealings with her. The court also found, however, that there was no consideration given for the option and that it was therefore revoked

by Miss Roland's death. Defendant has appealed from the judgment in favor of plaintiff.

[1, 2] An option is an offer and if it is without consideration, it is revoked by the death of the offeror prior to acceptance. If consideration is given, it is a contract binding upon the offeror and upon his successors in interest after his death. See case cited in 6 Cal.Jur., pp. 48–53, §§ 27, 28, 29; Williston, Contracts (Revised Ed.), §§ 61, 62; Cal.Civ.Code, § 1587(4). Since the trial court found that no consideration was given for the option in question, the judgment must be upheld if the finding is supported by sufficient evidence.

[3-6] Defendant contends that his payment of the architect's fee for sketches of the proposed improvements is a consideration sufficient to make the option irrevocable. There is no doubt that such payment would be consideration for an option if the offeror agreed to accept it as such. Marsh v. Lott, 8 Cal.App. 384, 97 P. 163; Chrisman v. Southern Calif. Edison Co., 83 Cal. App. 249, 256 P. 618; 6 Cal.Jur. 168, 169, § 117; 1 Williston, Contracts (Revised Ed.), §§ 102, 102a; Rest. Contracts, § 75; see Hemenway v. Abbott, 8 Cal.App. 450, 97 P. 190. No act of an offeree, however, can constitute consideration binding upon the offeror unless the latter agrees to be bound in return therefor. Williams v. Hasshagen, 166 Cal. 386, 390, 137 P. 9; Shadburne v. Daly, 76 Cal. 355, 359, 18 P. 403; Commercial Bank of Madera v. Redfield, 122 Cal. 405, 409, 55 P. 160, 772; Tiffany & Co. v. Spreckels, 202 Cal. 778, 790, 262 P. 742. See Williston, Contracts (Revised Ed.), § 61, at pp. 180, 181, note 16; §§ 100, 102, 102a. In the words of the Restatement of Contracts (§ 75): "Consideration must actually be bargained for as the exchange for the promise. * * * The existence or non-existence of a bargain where something has been parted with by the promisee or received by the promisor depends upon the manifested intention of the parties. * * * The fact that the promisee relies on the promise to his injury, or the promisor gains some advantage therefrom, does not establish consideration without the element of bargain or agreed exchange."

[7] In the present case the trial court was justified in concluding from the evidence that Miss Roland did not promise to grant the option in return for Kent's engaging the architect. Under this interpretation of the evidence Miss Roland merely stated the conditions under which she was willing to extend the lease. Although, according to Kent's testimony, she suggested engaging an architect to check the figures on the proposed improvements, this suggestion did not constitute a promise by her to grant the option if that were done. Kent employed the architect to convince her that the necessary conditions existed, but she made no promise to extend the lease in the event they did, and remained free to withdraw her offer at any time before acceptance. Kent could have exercised the option as soon as it was executed, but he chose instead to wait rather than to undertake immediately the obligations incident to leasing the property for another four years. The engagement of the architect was to actuate Miss Roland to keep her offer open, but it did not constitute consideration binding her to do so. At best the evidence created a conflict for the trial court to resolve. Estate of Thomson, 165 Cal. 290, 131 P. 1045.

[8] Defendant contends that in engaging the architect he acted in reliance upon the option given him by Miss Roland to extend the lease, and that under the doctrine of promissory estoppel a promisor who has received no consideration is nevertheless bound by his promise when he has induced another to suffer detriment in reliance thereon. See Rest. Contracts, § 90; 1 Williston, Contracts (Revised Ed.), § 139. There must, however, be a promise on which reliance may be based. See Medberry v. Olcovich, 15 Cal.App.2d 263, 59 P.2d 551, 60 P.2d 281; Lasar v. Johnson, 125 Cal. 549, 58 P. 161; University of Southern Calif. v. Bryson, 103 Cal.App. 39, 283 P. 949; Magee v. Magee, 174 Cal. 276, 162 P. 1023. Defendant did not plead the issue of promissory estoppel at the trial, and there is nothing in the record to show that Miss Roland at any time promised to keep the option open or made any other promise on which defendant could rely. She merely made without consideration an offer, which was never accepted, to renew the lease.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, HOUSER, and CARTER, JJ., concurred.

19 Cal.2d 476

HALSEY et al. v. ROBINSON et al.

L.A. 17954.

Supreme Court of California.

Feb. 13, 1942.

1. Appeal and error ⇐1011(1)

The Supreme Court may not disturb findings based on conflicting evidence.

2. Landlord and tenant ⇐17, 88(3)

Evidence sustained finding that there was a valid acceptance by tenants of landlords' offer to renew the lease, that thereafter tenants improved the realty in consideration of terms of renewal offer, that tenants executed a quitclaim deed by reason of false representations of one of the landlords, and that landlords were "estopped" to deny that terms of offer to renew lease were fully binding on them.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

3. Estoppel ⇐102

Where trial court correctly found that plaintiffs were estopped to deny the validity of offer to renew lease, rule that where it is the intention of parties to reduce their contract to a more formal writing before being bound thereby, and they fail to do so, there is no contract which can be enforced, was not applicable.

4. Frauds, statute of ⇐144

Where trial court in action for restitution of realty properly found that one of the plaintiffs was guilty of actual fraud in obtaining quitclaim deed from defendants, trial court properly found that plaintiffs were "estopped" to set up statute of frauds as defense to defendants' cross-complaint seeking specific performance of a renewal lease, where defendants had made improvements relying on renewal lease.

5. Tenancy in common ⇐49

Where two co-owners of realty had full knowledge of several leases of the realty by third co-owner but the two co-owners made no objection to any of the leases, they were bound by a subsequent lease of the realty by third co-owner.

In Bank.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by George W. Halsey and others against M. R. Robinson, and wife, to compel restitution of property held by defendants under a purported lease and to recover rents, profits, and damages alleged to have accrued during the withholding period, wherein the defendants filed a cross-complaint seeking specific performance of renewal lease. From a judgment for defendants on their cross-complaint, the plaintiffs appeal.

Judgment affirmed.

Brittan & Mack, of Bakersfield, for appellants.

Harvey, Johnston & Baker, of Bakersfield, for respondents.

HOUSER, Justice.

The plaintiffs herein appeal from a judgment rendered on the defendants' cross-complaint by which the court decreed specific performance of a lease.

The plaintiffs, George W. Halsey and Frances L. Halsey (husband and wife) and Joseph Halsey, who are the owners of farm land in Kern County brought this action to compel restitution of the property which was held by M. R. Robinson and his wife under a purported lease. The plaintiffs also sought to recover rents, profits and damages which allegedly had accrued during the withholding period. The defendants answered and cross-complained, asserting they possessed a leasehold interest in the land, also claiming they were holding under an agreement for a renewal lease and asking for a decree of specific performance of such lease. The findings made by the trial court in favor of the defendants and cross-complainants were based on the following factual situation as revealed by the evidence:

The defendants had held the land here involved since 1936 under successive leases from the plaintiffs, who resided in Los Angeles. At the time this litigation arose the defendants were in possession of the farm under a lease for the year 1940, which had been executed by plaintiff George W. Halsey as lessor. In December, 1939, at the time such lease was entered into, some discussion was had between the parties thereto relative to the renewal of the lease at the expiration of the 1940 term. Again in the early part of 1940 defendant Robinson and George W. Halsey carried on correspondence with respect to a proposed re-

newal of the lease, and on May 30, 1940, Halsey wrote to Robinson with regard to certain conditions on which he would execute a five-year renewal lease and asked Robinson to make a bid therefor. On June 4, 1940, Robinson replied to that communication, advising Halsey that he would pay $1,000 a year as rental under the proposed renewal lease and stating that he desired an early reply because he wished to do some leveling of the land during the following month. On June 7, 1940, Halsey again wrote to Robinson, stating that the lessors would give him a lease for five years beginning January 1, 1941, on the condition that Robinson would meet the payment of an expenditure which had been incurred on the farm in connection with the installation of a pump and well, and on the further condition that Robinson would agree to make three separate rental payments each year, aggregating the sum of $1,000 annually during the five-year term. That letter concluded with the statement that if Robinson felt he could handle the new lease under the specified terms he could begin to level the land. The facts just related are not in dispute. However, the evidence includes testimony with respect to other facts, which was sharply conflicting. Robinson testified that on June 10 he wrote to Halsey and accepted the terms as set forth in the letter of June 7, and advised that he would "start leveling" the land; and there was evidence to show that shortly thereafter the defendants made improvements on the farm to the extent of approximately $400 in value. Halsey denied having received the purported acceptance letter, but two witnesses corroborated Robinson's testimony with respect thereto. The evidence also shows that subsequent to the time Robinson received the letter of June 7, and prior to November 14, 1940, George W. Halsey and his wife visited Robinson at the farm, where they had some discussion relative to a proposed change in the terms of the renewal lease, although no such change was ever effected. Thereafter, and on November 14, 1940, the defendants visited the Halseys in Los Angeles, at which time Robinson delivered to George W. Halsey written proof of his payment of the expenditure relating to the pump and well. At such time and place the parties again discussed the matter of the five-year renewal lease; and the defendants testified that George W. Halsey thereupon fraudulently represented to them that before a formal renewal lease could be executed, and in order to clear the record, it would be necessary for the Robinsons to execute a quitclaim deed to the property, and that he advised them the renewal lease would be executed immediately after they turned over to him the said quitclaim deed. The defendants testified further that in reliance on such representations they delivered to Halsey a quitclaim deed, but that immediately thereafter he refused to execute a renewal lease and informed them the land was being sold and they "would have to get off the place." They also testified that during that conversation at the Halsey home George W. Halsey offered Robinson the sum of $200 for "making the trip to Los Angeles," but that Robinson refused to accept it and informed Halsey that he had entered into an agreement for a five-year lease to the land and would not move from the farm. In his testimony, Halsey denied that the conversation had on November 14 was as related by the defendants, but stated that on such occasion he told the defendants he had secured a purchaser for the farm and that they would have to give it up for that reason—whereupon, he asserted, they agreed to execute the quitclaim deed. Halsey admitted having offered Robinson the sum of $200, but testified that such sum was tendered as reimbursement for the improvements made on the land by the defendants.

Shortly after the quitclaim deed was executed, it was recorded by the plaintiffs, who thereupon gave the defendants a thirty-day notice to vacate. In December, prior to expiration of the 1940 lease, and in reliance on the validity of the quitclaim deed, the plaintiffs instituted the present action.

The principal question presented for determination here is whether the findings were sufficiently supported by the evidence. As heretofore indicated, a reading of the transcript reveals a conflict in the evidence on the question whether Halsey received notice of Robinson's acceptance of the terms of the June 7 letter, also as to what was said and done by the parties at the Halsey home on November 14 when the quitclaim deed was executed. The trial court resolved all conflicts in favor of the defendants. It made findings to the effect that there was a valid written acceptance of the June 7 letter: that commencing on that date Robinson began to and did level and improve the land to the value of over

$400, which improvements were not required by the terms of the 1940 lease under which the Robinsons were then in possession of the land but were made solely in consideration of the terms of the letter of June 7; that on or about the 13th day of August, 1940, the plaintiffs inspected the property and were shown the improvements so made; that at that time and place they requested the defendants to change the terms of the purported five-year lease from a "cash rental" to a "crop rental" basis, which request was refused by the defendants; that the latter executed the quitclaim deed solely by reason of the false and fraudulent representations of George W. Halsey as to the purported necessity therefor and on his promise that immediately thereafter a five-year renewal lease would be executed in favor of the defendant; and that by reason of the matters and things as set forth in the findings herein, the plaintiffs were estopped to deny that the conditions and terms of the June 7 letter were fully binding on them.

[1, 2] Aside from the fact that under well-settled principles of law this court may not disturb findings based on conflicting evidence, on an examination of the entire record we are of the view that there was ample evidence to sustain the findings just referred to, including the finding that the quitclaim deed was in fact executed by the defendants solely because of the false and fraudulent representations of plaintiff George W. Halsey. Several inconsistencies appear in his testimony. Thus, although he denied having received Robinson's acceptance of the June 7 letter, his conversation with Robinson at the farm in August, at which time he proposed that the terms of the five-year lease be changed from a cash basis to a crop rental basis, imports a recognition by him of an existing agreement under which the Robinsons were to be given a renewal lease. Moreover, having been present in person at the farm on that occasion, Halsey had constructive, if not actual, notice that among other improvements made to the land, some "leveling" had been done—a project which was contemplated by the terms of the Halsey letter of June 7, conditional on Robinson's acceptance of such terms. The fact that thereafter Robinson had proceeded to level the land gives rise to the inference that he had in fact taken the necessary steps to assure himself that the lease would be renewed, before assuming the hazard of making any such improvements. Nor would it appear reasonable to assume—in accordance with the testimony of plaintiff George W. Halsey—that on the occasion on which the defendants executed the quitclaim deed they voluntarily consented to do so solely on Halsey's statement that he intended to sell the land. Robinson's prior letters to Halsey and his actions thereafter, including payment of the pump and well expenditure, reveal a continuous effort on his part to effect a renewal of the lease and to meet the conditions advanced by George W. Halsey as a prerequisite thereto. Moreover, had the defendants willingly consented to execute the quitclaim deed solely because Halsey told them he intended to sell the land, and for that reason indicated their willingness to vacate the property, no explanation is suggested for Robinson's refusal to accept the $200 which George W. Halsey offered him, if, in accordance with Halsey's testimony, it was tendered as reimbursement for the improvements made on the land. The fact that Robinson refused to accept the money—and Halsey admitted it was refused—affords strong proof that the version given by the defendants of the conversation and actions of the parties hereto at the Halsey home on November 14, was true and correct, and that the testimony given by Halsey in that respect was false.

[3] In view of our conclusion that the trial court was correct in finding that the plaintiffs were estopped to deny the validity of the June 7 writing, no further consideration need be given the plaintiffs' contention that it was the intention of the parties to reduce their contract (the letter of June 7) to a more formal writing before being bound thereby—and having failed to do so there was no contract which could be enforced. As reflected by the findings of the trial court, the facts of this case which give rise to an estoppel afford no basis for the application of the rule of law which is embodied in that contention.

[4] Nor, in the light of the trial court's ruling as to estoppel, is it necessary to give consideration to the plaintiffs' contention that there was no memorandum of the agreement to execute a lease sufficient to satisfy the statute of frauds.

In Hambey v. Wise, 181 Cal. 286, 289, 184 P. 9, 10, the court said: "* * * in general relief is given * * * first, where to allow the statute [of frauds]

to be set up would be to secure to the party relying upon it the fruits of actual fraud * * *." Due to the presence of actual fraud in the present case, there can be no doubt but that the trial court here was warranted in finding that the plaintiffs were estopped to set up the statute of frauds under the rule stated in the cited case. The equitable doctrine of estoppel to raise the statute of frauds has been judicially recognized and frequently applied in this state since 1909 when the decision in Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154, was rendered. See, also, Wilson v. Bailey, 8 Cal.2d 416, 421, 65 P.2d 770; Notten v. Mensing, 3 Cal.2d 469, 474, 45 P.2d 198; Fleming v. Dolfin, 214 Cal. 269, 4 P.2d 776, 78 A.L.R. 585; Kraft v. Rooke, 103 Cal. App. 552, 556, 284 P. 935; 19 Cal.Law Rev. 80. That such doctrine serves a just and salutary purpose in the field of equity jurisprudence is well illustrated by its application to the facts of this case. Here a valuable property right was sought to be wrested from these defendants who, the record shows, were farming people of limited education and who, due to their lack of familiarity with legal procedure and business methods in general, were willing to and did rely on the promises and representations of the plaintiffs in executing the quitclaim deed.

[5] There is no merit in the contention that the June 7 letter, having been written and signed only by George W. Halsey, would not be binding on the other two co-owners of the land. There is evidence in the record to show that both of the latter had full knowledge of the several leases to the Robinsons from 1936 up to and including the 1940 lease, and that prior to the institution of the present action neither of the two co-owners ever made any objection to any of the leases which had been made to the Robinsons. See Swartzbaugh v. Sampson, 11 Cal.App. 2d 451, at pages 462, 463, 54 P.2d 73. The evidence also was sufficient to show a ratification by the co-tenants of the purported agreement of June 7 (Bessho v. General Petroleum Corp., 186 Cal. 133, at page 141, 199 P. 22), which, in part, was evidenced by their reliance on the quitclaim deed in prosecuting the present action. Restatement of Agency, vol. I, § 97, p. 241.

Nor is there merit in the claim that the renewal lease, which by the terms of the judgment the plaintiffs were ordered to execute, was not just, fair and equitable. In essence, it was not essentially different from the former leases which the parties had executed. The court directed that the renewal lease specify a yearly rental of $1,000, and such is the amount which the plaintiffs demanded by the letter of June 7.

From the foregoing it follows that the judgment should be and it is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.



19 Cal.2d 483

CITY OF LOS ANGELES v. OFFNER, Secretary of Board of Public Works.

L. A. 18145.

Supreme Court of California.

Feb. 13, 1942.

1. Municipal corporations ⇐864(1)

Where a lease or other agreement containing an option to purchase is entered into in good faith by a city and creates no immediate indebtedness for the aggregate installments therein provided for, but confines liability to each installment as it falls due, and each year's payment is for the consideration actually furnished that year, the constitutional "debt" limit provision is not violated. Const. art. 11, § 18.

See Words and Phrases, Permanent Edition, for all other definitions of "Debt".

2. Municipal corporations ⇐864(1)

Where an agreement giving a city an option to purchase creates a full and complete liability on its execution, or if its designation as a lease is a subterfuge, and it is actually a conditional sales contract in which rentals are actually installment payments on the purchase price for the aggregate of which an immediate indebtedness or liability exceeding the constitutional limitation arises, the contract is void. Const. art. 11, § 18.

3. Municipal corporations ⇐864(1)

Where installment payments are to be made over a period of years and paid out of a city's ordinary revenue and income, where each installment is not in payment of consideration furnished that year, and total amount of installments when coupled with other expenditures will exceed yearly income, the contract, whether denominated a mortgage, lease, or conditional sale, violates the constitutional "debt" limit provision unless approved by a popular vote. Const. art. 11, § 18.

4. Municipal corporations ⇐864(1)

Proposed agreements for construction and leasing of a rubbish incinerator to city constituted a "lease" and "option to purchase" and did not violate constitutional "debt" limit provision, where it was admitted that amount of rentals which city might be required to pay in any single fiscal year, together with its other liabilities, would not exceed its income for that year, city was in no event to have right to purchase incinerator at less than its fair appraised value when city elected to purchase, and city after learning appraised value could decline to purchase under option and continue with lease. Const. art. 11, § 18.

See Words and Phrases, Permanent Edition, for all other definitions of "Lease" and "Option to Purchase".

In Bank.

Proceeding in mandamus by the City of Los Angeles against Milton Offner, as Secretary of the Board of Public Works, to compel the posting and publishing of notices inviting sealed bids for the construction and leasing to the city of a rubbish incinerator.

Peremptory writ ordered to issue.

Ray L. Chesebro, City Atty., and Bourke Jones, Deputy City Atty., both of Los Angeles, for petitioner.

Richard C. Waltz, of Beverly Hills, for respondent.

GIBSON, Chief Justice.

By this proceeding in mandamus the city of Los Angeles seeks to compel the respondent as secretary of its board of public works, to post and publish notices inviting sealed bids for the construction and leasing to the city of a rubbish incinerator. The respondent demurred to the petition, contending that the proposed lease will create a municipal indebtedness or liability which will exceed in the year of its execution the income and revenue then available to the city in violation of article XI, section 18, of the state Constitution.

The Board of Public Works of the City of Los Angeles by resolution has adopted specifications for the construction and leasing to the city of a rubbish incinerator, and for the receipt of bids therefor. The agreements to be entered into between the city and the successful bidder are to provide for the leasing by the city to such bidder of certain city-owned property for a period of ten years at a rental of $1 a month, it being contemplated that the contractor will construct the incinerator on the property within nine months thereafter. Simultaneously with the execution of this lease and construction contract, the successful bidder is to execute a lease to the city of the demised premises with the incinerator thereon for a period of nine years and nine months, the city to pay a monthly rental to be specified in the bid. The city is to be given an option to purchase the incinerator at various intervals during the term of the lease with a minimum option price for each interval being specified by the bidder. If the city elects to purchase, the option price shall be the then appraised value of the incinerator as determined by three independent appraisers, provided only that it shall not be lower than the minimum price specified in the bid. Title to the incinerator is to remain in the successful bidder unless the city elects to purchase. The land lease from the city is to run for a period of three months after the expiration of the incinerator lease and option agreement from the successful bidder to the city, thus affording the bidder time within which to remove the incinerator, a right expressly reserved to him in the event the city elects not to exercise the option to purchase.

It is alleged in the petition "that the present rubbish incinerator facilities of petitioner City are inadequate and obsolete, and constitute a fire hazard, and that the public health and safety demand the immediate construction of a large, modern rubbish incinerator."

In refusing to post and publish notices inviting sealed bids for the construction and leasing of such incinerator, the respondent secretary challenges the validity of the proposed agreements on the ground that they would violate the constitutional provision which prohibits a city from in-

curring an indebtedness or liability in any year in excess of the income and revenue provided for that year without the assent of two-thirds of the qualified electors of the city. In this connection the petition alleges that while the aggregate of the rentals that might accrue under the lease, together with other municipal debts and liabilities incurred during the fiscal year when the leases and contract will be entered into, will exceed the income and revenue for that year, the amount of rentals that the city may be required to pay in any single fiscal year, together with its other debts and liabilities, will not exceed the income and revenue provided for such year. The question for consideration, therefore, is whether the city in entering into the proposed leases and contract will incur an indebtedness or liability for the rentals for the entire term or whether such action will create an indebtedness or liability in that year for such rentals only as will become payable during that fiscal year. Or, as respondent states, whether "such an arrangement is equivalent in reality to an installment contract for the purchase of said incinerator over a period of nine years and nine months."

[1, 2] It has been held generally in the numerous cases that have come before this court involving leases and agreements containing options to purchase that if the lease or other agreement is entered into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary, confines liability to each installment as it falls due and each year's payment is for the consideration actually furnished that year, no violence is done to the constitutional provision. McBean v. City of Fresno, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191; Smilie v. Fresno County, 112 Cal. 311, 44 P. 556; Higgins v. San Diego Water Co., 118 Cal. 524, 553, 45 P. 824, 50 P. 670; Doland v. Clark, 143 Cal. 176, 180, 181, 76 P. 958; Krenwinkle v. City of Los Angeles, 4 Cal.2d 611, 613, 51 P.2d 1098. If, however, the instrument creates a full and complete liability upon its execution, or if its designation as a "lease" is a subterfuge and it is actually a conditional sales contract in which the "rentals" are installment payments on the purchase price for the aggregate of which an immediate and present indebtedness or liability exceeding the constitutional limitation arises against the public entity, the contract is void. Chester v. Carmichael, 187 Cal. 287, 201 P. 925; City and County of San Francisco v. Boyle, 195 Cal. 426, 233 P. 965; Mahoney v. City and County of San Francisco, 201 Cal. 248, 257 P. 49; Garrett v. Swanton, 216 Cal. 220, 13 P.2d 725.

[3] The rule as applied to each of these situations is well stated in Garrett v. Swanton, supra, 216 Cal. at page 226, 13 P.2d at page 728, as follows: "The law is well settled in this state that installment contracts of any kind, where the installment payments are to be made over a period of years and are to be paid out of the ordinary revenue and income of a city, *where each installment is not in payment of the consideration furnished that year,* and the total amount of said installments, when coupled with the other expenditures, exceeds the yearly income, are violative of the constitutional provision in question unless approved by a popular vote. This is so whether the contract be denominated a mortgage, lease, or conditional sale. * * * It is true that under the doctrine enunciated in McBean v. City of Fresno, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191 * * * contracts for the furnishing of property in the future have been upheld, but only where no liability or indebtedness came into existence until the consideration was actually furnished. In other words, such contracts are valid where each year's installment is within the city's income, and where each year's payment is for the consideration actually furnished that year." (Italics added.)

[4] We are satisfied that the proposed agreements involved in the proceeding now before us are within the rule as applied in the McBean and Krenwinkle cases and are therefore valid and do not violate the debt limitation provision of the constitution. The transaction here challenged constitutes in reality a lease with reasonable terms and option to purchase. We find no evident present intention on the part of the city to purchase the incinerator. The rentals are for a definite amount, to be specified in the bid. The amount of the rentals and the minimum option prices are to be determined by competitive bidding, but in no event is the city to have the right to purchase the incinerator at less than its fair appraised value at the time it elects to purchase. Under such circumstances, the city is not required to exercise the option in order to protect its prior investment in the form of rental payments. The rental

payments are intended to represent the fair rental value of the incinerator and the option purchase price is intended to represent the then fair value of the incinerator itself. The city after learning the appraised value may decline to purchase under the option and continue with the lease. If the city has not exercised the option to purchase during the term of the lease, provision has been made for the removal of the incinerator by the lessor. In view of the admitted fact that the amount of rentals that the city may be required to pay in any single fiscal year, together with its other debts and liabilities will not exceed its income and revenue for such year, it cannot be said that the proposed agreements violate the debt limitation provision of the Constitution.

Let a peremptory writ of mandate issue as prayed for.

SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.



19 Cal.2d 420

BUTLER et al. v. WOODBURN.

Sac. 5413.

Supreme Court of California.

Feb. 5, 1942.

Rehearing Denied March 6, 1942.

1. Vendor and purchaser ⇐189

Where the purchaser of land under an executory contract has entered into possession thereof according to the terms of the agreement, during the life of such agreement, the purchaser in possession is "estopped" from denying the validity of his vendor's title for the purpose of defeating the agreement.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

2. Vendor and purchaser ⇐296, 308(8)

The purchaser of land under an executory contract, who has entered into possession of the land according to the terms of the contract, so long as he remains in possession of the land under such contract, cannot successfully resist either the vendor's action for the purchase price or an action to recover possession of the land upon the ground that vendor's title is defective.

3. Vendor and purchaser ⇐190

Where purchaser of land under an executory contract, having entered into possession thereof according to terms of the contract, acquires an outstanding interest in the land, such outstanding title thus acquired cannot be used for the purpose of defeating purchaser's obligation under the contract so long as the possession originally obtained in accordance with the contract continues.

4. Vendor and purchaser ⇐190

Where the holder of an exclusive option to purchase land, in which optionor actually owned only an undivided seven-eighths interest, with knowledge of optionor, entered into executory contract to sell the land to defendant and himself, permitting defendant to go into possession thereunder in order to commence mining operations, general rule that any outstanding title acquired by a purchaser in possession of realty under an executory contract of purchase inures to benefit of the contract vendor for purposes of the contract was not applicable to "estop" the defendant, who after going into possession had acquired the outstanding one-eighth interest, from asserting title thereunder as against optionor.

5. Deeds ⇐208(3)

Possession of a deed by the grantee is "prima facie evidence" that deed was properly delivered to grantee.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Evidence".

6. Estoppel ⇐72

Where the true owner of realty permits another to appear as the owner or as having full power of disposition over the realty, an innocent third party who is thus led into dealing with the apparent owner will be protected by equity against the claims of the true owner under statutory principle that, where one of two innocent persons must suffer by the act of a third, the one whose negligence made the act possible must be the sufferer. Civ.Code, § 3543.

7. Vendor and purchaser ⇐190

Where owner of undivided seven-eighths interest in land, by permitting holder of an option to purchase the land to retain a deed purporting to convey all the land from owner to optionee, made it possible for optionee to induce defendant to enter into executory contract whereby optionee agreed to

convey the land to himself and defendant and permitted defendant to remain in possession of land under contract expending money thereon, owner of seven-eighths interest could not in equity assert that title to outstanding one-eighth interest acquired by defendant after going into possession was held in trust by him for owner and must be conveyed to owner upon repayment to defendant of the amount expended in the acquisition thereof. Civ.Code, § 3543.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by E. F. Butler and others against Walter M. Woodburn to establish a trust in favor of the named plaintiff as to an undivided one-eighth interest in certain realty, the legal title to which was held by defendant, and to require the execution by defendant of a conveyance to the named plaintiff upon repayment to defendant of the amount expended by him in acquiring the interest. From a judgment denying the relief sought and quieting defendant's title to the one-eighth interest, plaintiffs appeal.

Judgment affirmed.

Rehearing denied; CARTER, J., dissenting.

Harding J. McGuire, of San Francisco, and Orr M. Chenoweth and Chenoweth & Leininger, all of Redding, for appellants.

W. E. Davies and J. E. Ebert, both of Marysville, and Charles C. Boynton, of San Francisco, for respondent.

GIBSON, Chief Justice.

The plaintiffs brought this action in the Superior Court of Yuba County to have it adjudged that the defendant, Walter M. Woodburn, holds title to an undivided one-eighth interest in certain real property as a trustee for the plaintiff, E. F. Butler. The complaint also prayed that defendant Woodburn be compelled to execute and deliver a deed conveying title in the one-eighth interest to plaintiff Butler upon the repayment to defendant of the amount expended by him in acquiring the property. The trial court rendered a judgment which denied the relief sought and quieted defendant's title to the one-eighth interest in the property. Plaintiffs bring this appeal from the judgment for defendant.

The plaintiff Butler was the owner of a seven-eighths interest in two parcels of real property in Yuba County which consisted of the "Lost Channel Mine" and 160 acres of additional land. The remaining one-eighth interest in the property was owned by one Frank Butler, a half-brother of plaintiff Butler. In 1931, plaintiff Butler entered into an agreement with the plaintiff Maynard in which Maynard was given an exclusive option to purchase the property for a period of five years, which was extended until 1946 by a later agreement. Under this agreement Maynard was entitled to possession of the property for the purpose of engaging in mining operations thereon. On July 10, 1934, Maynard and his wife, as parties of the first part, agreed to sell the "Lost Channel Mine" together with certain water rights to the defendant Woodburn and to Maynard, as parties of the second part. Maynard and his wife represented that they were the owners of the property and agreed to place a good and sufficient deed in escrow for the duration of the agreement. Woodburn and Maynard, as parties of the second part, agreed to purchase the land for the sum of $60,000, all but $500 of which was to be paid in specified percentages of the gross proceeds derived from mining operations. For the purpose of completing the contract of purchase, the defendant was permitted to go into possession of the property in order to commence mining operations. A separate operating agreement was entered into at the same time between Woodburn and Maynard relating to the operation of the mine. This agreement was modified by later agreements entered into on January 15, 1935, and March 5, 1936.

Pursuant to the contract of purchase a deed purporting to convey title to the property was placed in escrow on January 21, 1935. On or about June 26, 1936, after the defendant Woodburn had expended over $20,000 on the "Lost Channel Mine," he discovered for the first time that Frank Butler was the owner of record of an undivided one-eighth interest in the property. The trial court found that during this entire period plaintiffs knew that the plaintiff Butler was the owner of seven-eighths in the property and that Frank Butler was the owner of the other one-eighth interest. It was also found that at the time the contract of purchase was entered into, the plaintiff Maynard falsely represented to defendant that he was the owner of all the

properties described. In support of these false statements he exhibited to defendant a deed executed by plaintiff Butler and purporting to convey all of the property from Butler to Maynard. The court found that after Woodburn discovered the false representations made by Maynard and after he learned the condition of the title, he sought to protect his investment in the property by purchasing the undivided one-eighth interest in the property which was owned by Frank Butler. This purchase from Frank Butler was made on August 11, 1936, and the court found that it was made by defendant in good faith to protect his interests and only after he had expended a large sum of money on the property and had been lulled by Maynard, acting with the approval of the plaintiff Butler, into thinking that the title to the entire property was vested in Maynard. The trial court resolved all conflicts in favor of defendant, ordered that the plaintiffs take nothing by reason of their complaint, and gave judgment quieting defendant's title to the undivided one-eighth interest which he purchased from Frank Butler.

The contentions advanced upon this appeal by the plaintiffs are the arguments which the trial court rejected. Plaintiffs rely on the established rule that any outstanding title acquired by a purchaser in possession of real property under an executory contract of purchase inures to the benefit of the contract vendor for the purposes of the agreement and that all the contract purchaser can ask is to be reimbursed for his expenditures in acquiring the outstanding interest. In arguing that this doctrine should be applied in favor of the plaintiff Butler in the present case, plaintiffs cite only the general statement of the rule which is found in Garvey v. Lashells, 151 Cal. 526, 533, 91 P. 498. Also, 25 Cal.Jur. 689. The main portion of the brief upon appeal, therefore, is devoted to the contention, which is contrary to the conclusion of the trial court, that the plaintiff Butler was not connected with the fraud practiced by Maynard in such a way that he is barred by unclean hands from coming into a court of equity to seek relief. Under the facts of the present case, however, it is unnecessary for us to consider this contention because, assuming that the plaintiff Butler was not barred by his conduct from coming into a court of equity, it is clear that the general doctrine cited furnishes no basis for the recovery sought in the present case.

[1, 2] The general rule relied upon is one of universal application where the purchaser of land under an executory contract has entered into possession of the land according to the terms of the agreement. During the life of such a contract, a purchaser in possession of the land is estopped to deny the validity of his vendor's title for the purpose of defeating the agreement. 25 Cal.Jur. 688; 27 R.C.L. 543 et seq.; Sheehan v. McKinstry, 105 Or. 473, 210 P. 167, 34 A.L.R. 1321, 1324; Page v. Bradford-Kennedy Co., 19 Idaho 685, 115 P. 694, Ann.Cas.1912C, 402. The purchaser, for example, cannot remain in possession of the land under the contract and successfully resist either the vendor's action for the purchase price or an action to recover possession of the land upon the ground that the vendor's title is defective. Coates v. Cleaves, 92 Cal. 427, 28 P. 580; Garvey v. Lashells, supra; Gervaise v. Brookins, 156 Cal. 103, 103 P. 329; Keele v. Clouser, 92 Cal.App. 526, 268 P. 682; Burnett v. Caldwell, 9 Wall. 290, 293, 19 L.Ed. 712; Ann.Cas.1912C, 404–406. The reason which supports the rule was stated in Garvey v. Lashells, supra, 151 Cal. page 531, 91 P. page 500: "A purchaser cannot retain possession of property delivered to him under a contract of sale without complying with the terms of the contract as to payment, for the reason that the title of his vendor is not satisfactory. If a perfect title was to be conveyed, and the vendor is unable to give such a title, the vendee has appropriate remedies, but he cannot keep both the property and the purchase money."

[3] A specific application of this general doctrine is found where the purchaser in possession of land under an executory contract, after discovering that the title of his vendor is defective because of an outstanding claim in the hands of a third party, attempts to deny the vendor's title following an acquisition of the outstanding interest. Under such circumstances the courts have refused to permit the outstanding title thus acquired by the contract purchaser to be used for the purpose of defeating his obligations under the contract, so long as the possession originally obtained in accordance with the contract continues. Garvey v. Lashells, supra, 151 Cal. page 533, 91 P. 498; Galloway v. Finley, 12

Pet. 264, 295, 9 L.Ed. 1079; Mizamore v. Berglin, 197 Ala. 111, 72 So. 347, L.R.A. 1916F, 1024; Latin-American Bank v. Rogers, 87 Fla. 147, 99 So. 546; Frink v. Thomas, 20 Or. 265, 25 P. 717, 12 L.R.A. 239; First Nat. Bank v. Mapson, 181 Wash. 196, 42 P.2d 782; 40 A.L.R. 1078 et seq.; 25 Cal.Jur. 689; 27 R.C.L. 547; 1 Warvelle, Vendors, 2d Ed., p. 232, sec. 186; Maupin, Marketable Title, 3d Ed., p. 549, et seq.

The court in Slocum v. Peterson, 131 Wash. 61, 70, 229 P. 20, 23, 40 A.L.R. 1071, accurately summarized this application of the doctrine: "A critical examination * * * will show, we think conclusively, that *this view of the law has no application, except where the purchaser has gone into possession of the land under the sale contract.* A purchaser so in possession cannot assert a title acquired by him, adverse to his vendor, while he remains in possession under the sale contract, because his remaining in possession under the sale contract is wholly at variance with the rescission of or the nonexistence of such contract, and the purchaser will, while in such possession, no more be permitted to so challenge or impair the title of his vendor with a view of defeating the vendor's title than a tenant in possession will be permitted to challenge or impair the title of his landlord." (Italics ours.) The whole purpose behind the rule is the protection of the contract obligation existing between the vendor and vendee, as is further illustrated by the fact that once the contract is executed the rule no longer applies. Cassin v. Nicholson, 154 Cal. 497, 507, 98 P. 190; City and County of San Francisco v. Lawton, 18 Cal. 465, 476, 79 Am.Dec. 187.

[4, 5] This doctrine of equitable estoppel cannot be applied against the defendant under the facts of the present case in favor of plaintiff Butler. No contractual obligation for the purchase of the property exists, or ever has existed, between the plaintiff Butler and the defendant. Obviously, therefore, the defendant did not go into possession of the land under the provisions of any contract with plaintiff Butler and his continued possession of the land is not dependent upon the performance of any contractual obligations due from defendant to plaintiff Butler. Defendant, therefore, cannot use the outstanding title acquired by him for the purpose of defeating any contract obligations between himself and Butler. That being so, the whole basis for the application of the doctrine which is set forth in the cases cited is absent in this case. Indeed, rather than compelling the defendant to recognize the title of plaintiff Butler, the doctrine relied upon would not, in fact, permit defendant to do so. The contract under which defendant actually acquired possession of the land names the plaintiff Maynard and his wife as vendors. Under his contract, therefore, defendant was required to recognize the title of Maynard, according to the doctrine discussed above. In view of the deed from Butler to Maynard which defendant had seen in Maynard's possession Butler might have been merely a third party making a claim adverse to that of his vendor. This is particularly so since possession of a deed by the grantee is prima facie evidence that the deed was properly delivered to him. Stewart v. Silva, 192 Cal. 405, 409, 221 P. 191; Ward v. Dougherty, 75 Cal. 240, 242, 17 P. 193, 7 Am.St.Rep. 151.

[6, 7] In addition to the considerations already mentioned, the inequitable nature of the relief sought by the plaintiff Butler is demonstrated further by the following fundamental principle of equity. Civil Code, section 3543 provides: "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Where, as here, the true owner permits another to appear as the owner of the property or as having full power of disposition over it, it is established that an innocent third party who is thus led into dealing with the apparent owner will be protected by a court of equity against the claims of the true owner whose conduct made the fraud possible. Conklin v. Benson, 159 Cal. 785, 793, 116 P. 34, 36 L.R.A.,N.S., 537; Jeannerette v. Taylor, 2 Cal.App.2d 568, 38 P.2d 831; cf. Trout v. Taylor, 220 Cal. 652, 32 P.2d 968; 10 Cal.Jur. 506, et seq. In the present case not only did Butler permit Maynard to remain in possession of a deed apparently conveying title to the latter, but for a considerable time, so far as appears, he made no objection to the continued possession of the property by defendant under his contract with Maynard.

The judgment is affirmed.

CURTIS, EDMONDS, HOUSER, and TRAYNOR, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. Briefly stated, there is presented in this case the following situation, plaintiff Butler granted an option to plaintiff Maynard to purchase certain mining property, in which the latter was given the right of possession. Plaintiff Maynard then agreed to sell the property to defendant, and in a transaction with which plaintiff Butler has no connection, falsely represents that he (Maynard) was the owner of the property; defendant is given the right to possession and does go into possession under the agreement with Maynard. Thereafter, and before defendant has paid the purchase price of the property, the condition precedent to his right to a conveyance thereof from Maynard, he discovers that plaintiff Butler, not Maynard, is the true owner of the property and that Frank Butler owns an outstanding one-eighth interest therein. In spite of that knowledge he makes no attempt to rescind the contract or give up possession of the property. On the contrary, he maintains that his contract with Maynard is still in full force and effect, and that he is entitled to remain in possession of the property and extract the minerals therefrom. He continues to hold under plaintiff Butler's title because obviously he has no other basis for a claim to any right or interest in the property. Under these circumstances, that is, knowing that plaintiff Butler is the owner of the property, and that any right he asserts therein must be by virtue of and pursuant to Butler's title, he acquires the outstanding one-eighth interest owned by Frank Butler. These facts certainly justify the application of the rule that defendant is estopped to deny plaintiff Butler's title and that any outstanding interest he acquires while holding possession under that title inures to the benefit of plaintiff Butler. Garvey v. Lashells, 151 Cal. 526, 91 P. 498. The reason for that rule is that a vendee of real property shall not be permitted to have the benefits arising from the possession of the real property which are enjoyed by reason of the rights acquired under another's title, and at the same time refuse to pay the purchase price and take a position adverse to the holder of the title by acquiring an outstanding interest in the property adverse to him. The vendee is not entitled to a clear title to the property until he has paid the full purchase price thereof and in the interim may not object to a defect in the vendor's title. The situation is not altered by the fact that his contract of purchase was with Maynard rather than Butler. He continued to enjoy and insist on his right to possession after he knew Butler, not Maynard, was the owner of the property. That enjoyment or advantage was therefore necessarily predicated upon Butler's title; it could not be derived from any other source. His conduct constituted a recognition in effect of Butler as the true owner and vendor of the property. The situation is no different in reality than if Maynard had assigned his option from plaintiff Butler to defendant, rather than having made a separate contract with him.

The majority opinion states that the equities are in favor of the defendant; that when one of two innocent persons must suffer (Butler and defendant) by reason of another's conduct, the one who put the third person in a position to cause the injury must bear the burden. But here, as far as appears, defendant has not been and will not be injured nor will he suffer in any manner. It does not appear that any royalties have been paid, thus defendant has paid nothing on the purchase price except the original down payment. In return for that he has had possession of the property for several years. It may be true that he and his associates have expended a considerable sum in mining activities on the property, but whether those expenditures improved or made the property more valuable is not shown. He is in no worse or different position than he would have been if Maynard rather than Butler held title to the property. He still has his rights under his contract with Maynard and may proceed to cause those rights to mature into the right to receive a conveyance of the property. If he can prove that he has suffered any damages by reason of Maynard's false representation as to ownership, he may recover the same from Maynard or have the amount of such damage credited against the purchase price payable to Maynard. He is not injured by being estopped to question Butler's title, inasmuch as he is entitled to receive from Butler as a condition upon which Butler's recovery of the one-eighth interest is predicated, the $100 he paid for that one-eighth plus interest thereon.

In my opinion, the majority opinion is based upon a very tenuous and highly technical ground, and overlooks the basic

equitable principle involved in the case. To my mind, it is obvious that plaintiff Butler is the only one who can be injured in this case. As he has not been guilty of any fraud or come into court with unclean hands, he should be entitled to invoke the rule contended for by him, and the judgment should be reversed.



19 Cal.2d 488

Ex parte BELL et al.

Cr. 4298.

Supreme Court of California.

Feb. 13, 1942.

Rehearing Denied March 12, 1942.

1. Habeas corpus ⇐32

In California, only a writ of habeas corpus enables a higher court to decide the question of the constitutionality of an ordinance in cases which arise in a justice's or municipal court and can be appealed only to the superior court. Const. art. 6, § 5.

2. Habeas corpus ⇐4

In California, the requirement that all available remedies by appeal be exhausted before habeas corpus can be invoked to test the constitutionality of an enactment is not "mandatory".

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

3. Habeas corpus ⇐4

A court may in its discretion refuse to grant a writ of habeas corpus to test constitutionality if the remedy by appeal is not exhausted, since granting of writ results in release of the petitioner, whereas reversal on appeal might result merely in a new trial with the exclusion of those charges found based on unconstitutional enactments or the inclusion of that procedure found constitutionally guaranteed.

4. Habeas corpus ⇐32

Where petitioners seeking by habeas corpus to assert the invalidity of a county ordinance as a whole had exhausted their remedy by appeal from justice court judgment, habeas corpus was not merely the proper remedy, but the only one that would enable the Supreme Court to decide on the constitutionality of the ordinance. Const. art. 6, § 5.

5. Habeas corpus ⇐92(1)

On petition for a writ of habeas corpus to test the validity of a county ordinance prohibiting picketing of an employer's premises for purpose of inducing an employee or person seeking employment to quit employment or refrain from seeking employment by means of compulsion, coercion, etc., the ordinance was required to be judged on its face to determine whether it unconstitutionally prohibited acts falling within the category of peaceful picketing.

6. Counties ⇐55

In determining whether a county ordinance unconstitutionally prohibited acts falling within the category of peaceful picketing, it was not the function of the Supreme Court to determine whether the restrictions imposed could be validly applied to the facts of a particular case.

7. Criminal law ⇐13

Language in a statute prohibiting conduct that may be prohibited and conduct that may not be prohibited affords no reasonably ascertainable standard of guilt and is therefore too uncertain and vague to be enforced, and a conviction based on such a statute cannot stand, even though the acts of misconduct in the particular case could be validly prohibited by properly drafted legislation.

8. Constitutional law ⇐274
Counties ⇐55

The section of a county ordinance making it unlawful for any person to loiter, stand or sit on any public highway, alley, sidewalk or crosswalk so as to hinder or obstruct free passage of persons or vehicles encompasses conduct well within bounds of "peaceful picketing" sanctioned by the guaranties of "due process of law" and entire section of ordinance so providing is invalid, even though county might validly prohibit excessive and unnecessary obstruction of streets and highways. Const.Cal. art. 1, §§ 9, 10; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law" and "Peaceful Picketing".

9. Constitutional law ⇐274

"Peaceful picketing" sanctioned by the guaranties of "due process of law" involves besetting the premises of another in the

course of a labor dispute for the purpose of inducing employees to quit their employment or dissuading others from seeking employment, and fact that to some extent compulsion, coercion, intimidation, or threats are employed does not detract from its peaceful nature so long as those means constitute only economic, moral, or social pressure and not the pressure of violence. Const. Cal. art. 1, §§ 9, 10; U.S.C.A.Const. Amend. 14.

10. Constitutional law ⇐274

Whether picketing in the course of a labor dispute is peaceful picketing sanctioned by the guaranties of due process of law is determined not by the existence of a threat, but by what is actually threatened. Const. Cal. art. 1, §§ 9, 10; U.S.C.A.Const. Amend. 14.

11. Constitutional law ⇐274

The provisions of a county ordinance prohibiting picketing of an employer's premises for the purpose of inducing an employee or person seeking employment to quit employment or refrain from seeking employment by means of compulsion, coercion, intimidation, or threats are invalid as making conduct generally recognized as "peaceful picketing" unlawful. Const.Cal. art. 1, §§ 9, 10; U.S.C.A.Const. Amend. 14.

12. Counties ⇐55

The provisions in a particular section of a county ordinance prohibiting picketing by acts of violence are valid, notwithstanding invalidity of other separate provisions of that section making conduct generally recognized as peaceful picketing unlawful, particularly in view of provision of ordinance that if any provision is held unconstitutional the decision should not affect the validity of the remaining portions of the ordinance. Const.Cal. art. 1, §§ 9, 10; U.S.C.A.Const. Amend. 14.

13. Statutes ⇐64(1)

Where part of a statute is declared unconstitutional, the remainder will stand if it is complete in itself and would have been adopted had the legislative body foreseen the partial invalidation of the statute.

14. Counties ⇐21½

The provisions of a county ordinance prohibiting use of violence for purpose of preventing employees or patrons from entering premises being picketed in connection with a labor dispute do not conflict with general state laws relating to assault, battery, riot, disturbing the peace, and unlawful assemblage, within rule that an ordinance making illegal the same acts made illegal by general state laws is invalid, since picketing by acts of violence is an offense distinct from those offenses even though it may sometimes involve them. Const. art. 11, § 11.

15. Habeas corpus ⇐32

Where a petitioner has been convicted of violating a statute which is entirely unconstitutional, the court will ordinarily issue a writ of habeas corpus releasing him from custody.

16. Habeas corpus ⇐32

A complaint charging petitioners with picketing by acts of violence in violation of valid provision of county ordinance charged a "public offense", and where punishment imposed on them was not excessive for violation of that provision of ordinance, which also contained invalid provisions, petitioners could be released by habeas corpus only if it was clear that they were not convicted of violating the valid provision.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Offense".

17. Habeas corpus ⇐1
Judgment ⇐495(1)

A habeas corpus proceeding is in the nature of a "collateral attack", and a judgment which is collaterally attacked carries with it a presumption of regularity.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

18. Judgment ⇐496

The presumption of regularity attaching to a judgment collaterally attacked applies to proceedings of a justice's court only if the judgment affirmatively shows that the court had jurisdiction over the person and subject matter.

19. Habeas corpus ⇐85(1)

In habeas corpus proceeding collaterally attacking a justice court judgment finding petitioners guilty of violating any one "and/or" any other provision of two sections of county ordinance on ground of unconstitutionality of ordinance, presumption of regularity of judgment was not conclusive, but placed on petitioners burden of proving that their convictions were based

not on the constitutional but on the unconstitutional provisions of the ordinance.

20. Habeas corpus ⇐92(1)

A petitioner seeking habeas corpus is not confined to the face of the record in attempting to sustain his burden of proving that his conviction was in violation of his constitutional rights, but the remedy permits an examination of the actual evidence introduced at petitioner's trial and also of any necessary additional evidence bearing on the infringement of petitioner's constitutional rights. Pen.Code, § 1484.

21. Habeas corpus ⇐92(1)

On petition for writ of habeas corpus on ground that conviction was in violation of petitioner's constitutional rights, evidence introduced at the trial and any necessary additional evidence bearing on infringement of those rights will be examined, not to pass on sufficiency of evidence to support the verdict, but to determine what the verdict actually was, so that the court may decide whether it violates constitutional guaranties, and such an examination will be made whenever a petitioner has been deprived of due process of law, whatever form that deprivation has taken. Pen.Code, § 1484.

22. Habeas corpus ⇐92(1)

In a habeas corpus proceeding, the court must look beyond the face of the record at the actual evidence when necessary to determine whether a petitioner has been deprived of constitutional rights, but if the statute under which he was convicted is entirely unconstitutional, the court will discharge him on habeas corpus without examining the evidence, and if the statute is entirely constitutional, the conviction will be upheld without examination of the evidence. Pen. Code, § 1484.

23. Habeas corpus ⇐92(1)

Where the statute under which a petitioner seeking a writ of habeas corpus was convicted is in part unconstitutional, and it cannot be determined from charge and conviction whether petitioner was tried and convicted for violating the valid part, the court must examine the evidence, not to test whether it is sufficient to support a verdict, but to determine whether petitioner was tried and convicted for violating the invalid part alone, in which event the conviction must fall, or whether he was tried and convicted for violating the valid part as well, in which event the conviction must stand. Pen. Code, § 1484.

24. Counties ⇐21½

The forcible stopping of automobiles and intimidating occupants by gathering in large numbers exceeds the bounds of "peaceful picketing" and constitutes forcible "intimidation" and "violence" within county ordinance prohibiting picketing by acts of violence.

See Words and Phrases, Permanent Edition, for all other definitions of "Intimidation" and "Violence".

25. Habeas corpus ⇐32

In habeas corpus proceeding challenging validity of county ordinance containing invalid provisions making conduct generally recognized as peaceful picketing unlawful and valid provisions prohibiting picketing by acts of violence, petitioners who were found guilty of violating any one "and/or" any other provision of ordinance failed to introduce evidence sufficient to sustain their burden of proving that they were not convicted of the valid provisions of ordinance prohibiting acts of violence, and hence writ issued would be discharged and petitioners would be remanded to custody. Pen.Code, § 1484.

CARTER, J., dissenting.

In Bank.

Proceeding in the matter of the petition of Rufus Bell and others for a writ of habeas corpus to secure release from custody.

Writ discharged and petitioners remanded to custody.

For prior opinion, see 37 Cal.App.2d 582, 100 P.2d 339.

Rehearing denied; CARTER, J., dissenting.

Andersen & Resner, George R. Andersen, and Herbert Resner, all of San Francisco, for petitioners.

Joseph L. Heenan, Dist. Atty., and Erling S. Norby, both of Marysville, for respondent.

TRAYNOR, Justice.

Petitioners, members of a labor union, while engaged in picketing certain ranches and orchards, were arrested and charged with violating sections 2 and 3 of an anti-picketing ordinance adopted by the Board of Supervisors of Yuba County in 1937. These sections read as follows: "Section 2. It is unlawful for any person to loiter, stand, or sit upon any public highway, alley, sidewalk or crosswalk so as to in any manner hinder or obstruct the free passage

therein or thereon of persons or vehicles passing or attempting to pass along the same, or so as to in any manner annoy or molest persons passing along the same."

"Section 3. It is unlawful for any persons to beset or picket the premises of another, or any approach thereto, where any person is employed or seeks employment, or any place or approach thereto where such employee or person seeking employment lodges or resides, for the purpose of inducing such employee or person seeking employment, by means of compulsion, coercion, intimidation, threats, acts of violence, or fear to quit his or her employment or to refrain from seeking or freely entering into employment."

The complaint did not specify the acts of misconduct on the part of petitioners but followed the language of the ordinance. It charged petitioners in count 1 with violating any one "and/or" any other provision of section 2, and in count 2, with violating any one "and/or" any other provision of section 3. They were tried in the Justice's Court of Marysville Township, County of Yuba, found guilty "as charged in the complaint," and sentenced "on said conviction" to a fine of $500 or 6 months in jail. On appeal the superior court, the court of last resort in cases arising in a municipal or justice's court, Cal.Const., art. VI, § 5, upheld the constitutionality of the ordinance and affirmed the conviction, but reduced the jail sentence to 3 months. Petitioners thereafter applied to the superior court for a writ of habeas corpus on the ground that the ordinance was unconstitutional. When that court denied the writ, petitioners renewed their application in the District Court of Appeal, but the latter court also denied the writ and upheld the ordinance as constitutional. 37 Cal. App.2d 582, 100 P.2d 339. Petitioners now ask this court for a writ of habeas corpus, contending that the ordinance prohibits peaceful picketing and therefore abridges freedom of speech, press and assemblage in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and article I, sections 9 and 10 of the Constitution of California.

A preliminary question is whether the constitutionality of an ordinance may be tested by application for a writ of habeas corpus. Most jurisdictions permit such a use of habeas corpus. See cases collected in 25 Am.Jur. 164, § 29; 13 Cal.Jur. 225, § 8; 39 L.R.A. 450; 32 A.L.R. 1054. They adhere to the theory, however, that habeas corpus can lie, not to substitute for a writ of error, but only to test the jurisdiction of the trial court or to secure the release of persons detained without judicial authorization or under a void proceeding. See 25 Am.Jur. 151, § 13; 13 Cal.Jur. 217, § 4; Ex parte Nielsen, 131 U.S. 176, 9 S. Ct. 672, 33 L.Ed. 118; Harlan v. McGourin, 218 U.S. 442, 31 S.Ct. 44, 54 L.Ed. 1101, 21 Ann.Cas. 849; Ex parte Moran, 8 Cir., 144 F. 594, 75 C.C.A. 396; 1 Bailey, Habeas Corpus [1913], § 2, 30 et seq.; 12 N.Y.L.Q.R. 525. The theory and the practice are somewhat inconsistent. In order to reconcile them the courts have resorted to the artificial reasoning of Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717, that an unconstitutional statute is actually not a statute, and that a trial court therefore has no jurisdiction over the subject-matter of proceedings based upon such a statute. The unconstitutionality of a statute, however, is not a foregone conclusion but the very question at issue and it has traditionally been one that trial courts have jurisdiction to decide. See 39 L.R.A. 454. State courts constantly make decisions regarding the validity of statutes under the Constitution of the United States, and the United States Supreme Court, which reviews their determinations by writ of error, has expressly stated that they have jurisdiction in such cases. See Robb v. Connolly, 111 U.S. 624, 4 S.Ct. 544, 28 L. Ed. 542. If they lacked it the United States Supreme Court would be compelled to reverse the decision of a state court because of lack of jurisdiction without further inquiry into the merits of the case. See Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462. It has never been held that a decision holding a statute invalid is void because the statute itself was void. "Therefore, unless we adopt the peculiar theory that the court has jurisdiction to decide right, but none to decide wrong, we are driven to the conclusion that a decision is not void for lack of jurisdiction merely because it decides that an unconstitutional statute is valid." 39 L.R.A. 454; see McGovney, Cases on Constitutional Law, 1st Ed., pp. 198–200.

[1] A minority of courts, realizing the inconsistency between the practice of using habeas corpus to test constitutionality and the theory that it lies only to test juris-

diction, will not permit the question of constitutionality to be raised by habeas corpus. See cases cited in 25 Am.Jur.; 39 L.R.A.; 32 A.L.R., all supra. There is, however, a less drastic solution. The courts can permit an independent review by habeas corpus of matters over which the trial court had jurisdiction, apart from any remedy by appeal, because it is warranted by the importance of securing a correct determination on the question of constitutionality. "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired. * * * the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." Chief Justice Hughes in Bowen v. Johnston, 306 U.S. 19, 26, 27, 59 S.Ct. 442, 446, 83 L.Ed. 455. There are instances where habeas corpus affords the only method of testing constitutionality as when a statute upheld as valid at the time of conviction is subsequently declared invalid in another case and in the interim the petitioner either exhausts his remedy by appeal or the time for taking an appeal expires. Ex parte Lockhart, 25 Okl.Cr. 429, 221 P. 119; In re Jarvis, 66 Kan. 329, 71 P. 576. In California only a writ of habeas corpus enables a higher court to decide the question of constitutionality in cases which, like the present one, arise in a justice's or municipal court and can be appealed only to the superior court. See Ex parte Siebold, supra, involving a similar situation.

Habeas corpus is also widely used to test the constitutionality not only of a statute but of the procedure in petitioner's trial, even though the trial court has jurisdiction to try the petitioner (see Ex parte Nielsen, supra; 35 Columb. L. Rev. 404 at 412), and any infringement of constitutional right during the trial may be raised on appeal. The federal courts have repeatedly held that habeas corpus lies if the accused has been deprived of such fundamental constitutional guarantees as the right to counsel (Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; see Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527), the right to a fair trial free from mob violence (Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543) or free from the use of testimony known to the prosecution to be perjured. Mooney v. Holohan, 294 U.S. 103, 105, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406. See, also, Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, 50 A.L.R. 1243, insuring the right to an impartial judge. The federal courts regard these rights as so fundamental as to admit an additional special procedure to insure their protection once the remedy in the state courts is exhausted (Mooney v. Holohan, supra), or is no longer available. Johnson v. Zerbt, 304 U.S. 458, 58 S.Ct. 1019, 82 L. Ed. 1461.

There are other situations in which habeas corpus is used, not as a test of jurisdiction, but to review a question of law that cannot otherwise be raised or is so important as to render the ordinary procedure inadequate. Thus, it lies to test whether there is probable cause to justify the committing magistrate in holding petitioner for trial. Pen.Code § 1487; Ex parte Williams, 52 Cal.App. 566, 199 P. 347; Application of Hartwell, 28 Cal.App. 627, 153 P. 730; see, also, cases cited in 13 Cal.Jur. 230, § 12; 25 Am.Jur. 170, § 37. There is no other method of securing a review of the magistrate's determination in this regard. People v. Creeks, 170 Cal. 368, 149 P. 821; Ex parte Williams, supra. It also lies to test whether the complaint charges a public offense (Ex parte Williams, 121 Cal. 328, 53 P. 706; Ex parte McNulty, 77 Cal. 164, 19 P. 237, 11 Am.St.Rep. 257; People ex rel. Perkins v. Moss, 187 N.Y. 410, 80 N.E. 383, 11 L.R.A.,N.S., 528, 10 Ann.Cas. 309; see, also, 13 Cal.Jur. 232, § 14; 25 Am.Jur. 174, § 42; and 35 Columb. L. Rev. 850 at 862) even though this question falls within the jurisdiction of the trial court and may be raised on appeal. Certain courts go so far as to permit the use of habeas corpus before trial when the statute of limitations has run upon the offense charged. United States v. Mathues, D.C., 27 F.2d 137; see Ex parte Vice, 5 Cal. App. 153, 89 P. 983; People v. McGee, 1 Cal.2d 611, 36 P.2d 378; People v. Hoffman, 132 Cal.App. 60, 22 P.2d 229; see 35 Columb.L.Rev. 407.

[2, 3] While a few courts require that all available remedies by appeal be exhausted before habeas corpus can be invoked to test constitutionality (see Goto v. Lane, 265 U.S. 393, 44 S.Ct. 525, 68 L. Ed. 1070), most jurisdictions, including California, do not make the requirement mandatory (see cases collected in 13 Cal.

Jur. 225, § 8; 25 Am.Jur. 164, § 29), and even permit the issue of constitutionality to be raised by habeas corpus before trial. Ibid, Matter of Zany, 20 Cal.App. 360, 129 P. 295; Ex parte Royall, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868; contra, Glasgow v. Moyer, 225 U.S. 420, 32 S.Ct. 753, 56 L.Ed. 1147; Johnson v. Hoy, 227 U.S. 245, 33 S.Ct. 240, 57 L.Ed. 497. Since the granting of a writ of habeas corpus, however, results in the release of the petitioner, while reversal on appeal may result merely in a new trial with the exclusion of those charges found based on unconstitutional enactments or the inclusion of that procedure found constitutionally guaranteed, the court may in its discretion refuse to grant the writ if the remedy by appeal is not exhausted. This rule, adopted by the federal courts (In re Lancaster, 137 U.S. 393, 11 S.Ct. 117, 34 L.Ed. 713; In re Chapman, 156 U.S. 211, 15 S.Ct. 331, 39 L.Ed. 401; Riggins v. United States, 199 U.S. 547, 26 S.Ct. 147, 50 L.Ed. 303; United States v. Sing Tuck, 194 U.S. 161, 24 S.Ct. 621, 48 L.Ed. 917; Henry v. Henkel, 235 U.S. 219, 35 S.Ct. 54, 59 L.Ed. 203; see 35 Columb.L.Rev. 404 at 412, 414), should also be followed by the courts of this state.

[4] In the present case petitioners, having exhausted their remedy by appeal, seek by habeas corpus to assert the invalidity of the ordinance as a whole. Habeas corpus is not merely the proper remedy under such circumstances but the only one that will enable this court to decide upon the constitutionality of the ordinance.

[5-7] The ordinance must be judged on its face to determine whether it unconstitutionally prohibits acts that fall within the category of peaceful picketing. Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Carlson v. California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; Hague v. C. I. O., 307 U.S. 496, 518, 59 S.Ct. 954, 83 L.Ed. 1423; Schneider v. State of New Jersey, 308 U.S. 147, 162-165, 60 S.Ct. 146, 84 L.Ed. 155; Lovell v. Griffin, 303 U.S. 444, 451, 58 S.Ct. 666, 82 L. Ed. 949; Stromberg v. California, 283 U.S. 359, 369, 370, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484. See Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. If certain of its provisions operate to prohibit peaceful picketing, they are invalid even though they also prohibit acts that may properly be made illegal. A penal statute that "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press * * * lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure" and "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." Thornhill v. Alabama, supra, 310 U.S. at page 97, 60 S.Ct. at page 742, 84 L.Ed. 1093. It is not the function of the court to determine whether the restrictions imposed by the legislation can be validly applied to the facts of a particular case. "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas." Thornhill v. Alabama, supra, 310 U.S. at page 97, 60 S.Ct. at page 741, 84 L.Ed. 1093; Hague v. C. I. O., supra; Lovell v. Griffin, supra; Schneider v. State of New Jersey, supra. Language prohibiting conduct that may be prohibited and conduct that may not affords no reasonably ascertainable standard of guilt and is therefore too uncertain and vague to be enforced. Stromberg v. California, supra, 283 U.S. 369, 370, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484; Herndon v. Lowry, 301 U.S. 242, 261-263, 57 S. Ct. 732, 81 L.Ed. 1066; Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888; De Jonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278; Hague v. C. I. O., supra; Schneider v. State, supra; In re Harder, 9 Cal.App.2d 153, 155, 49 P.2d 304; Territory of Hawaii v. Anduha, 9 Cir., 48 F.2d 171. A conviction based upon such a statute cannot stand even though the acts of misconduct in the particular case could be validly prohibited by properly drafted legislation. Thornhill v. Alabama, supra; Carlson v. California, supra.

[8] Section 2 of the present ordinance makes it a crime "for any person to loiter, stand, or sit upon any public highway, alley, sidewalk or crosswalk so as to in any manner hinder or obstruct the free passage * * * of persons or vehicles * * *". This language encompasses conduct that is well within the bounds of peaceful picketing sanctioned by the guarantees of due process of law. Thus a picket may be peaceful even though he

loiters, stands, or sits upon a public highway, alley, sidewalk, or crosswalk, and thereby constitutes to some extent an obstruction to the free passage of persons and vehicles or an annoyance to persons who do not approve of his presence. See Thornhill v. Alabama, supra; Carlson v. California, supra; In re Harder, supra; Territory of Hawaii v. Anduha, supra; In re Williams, 158 Cal. 550, 111 P. 1035. The sweeping prohibition of section 2 would apply equally against peaceful pickets, shoppers engrossed in a window display, invalids in wheelchairs, acquaintances who stand engaged in conversation. The entire section is therefore invalid even though Yuba County might validly prohibit excessive and unnecessary obstruction of the streets and highways.

[9-11] Section 3 of the ordinance likewise makes conduct generally recognized as peaceful picketing unlawful. Peaceful picketing in the course of a labor dispute involves besetting the premises of another for the purpose of inducing employees to quit their employment or dissuading others from seeking employment. The fact that to some extent compulsion, coercion, intimidation, or threats are employed does not detract from its peaceful nature so long as they constitute only economic, moral, or social pressure and not the pressure of violence. See McKay v. Retail Automobile Salesmen's Local Union No. 1067, 16 Cal.2d 311, 106 P.2d 373; Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165; Lisse v. Local Union No. 31, 2 Cal.2d 312, 41 P.2d 314; Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324. The character of the picketing is determined not by the existence of a threat but by what is actually threatened. See dissenting opinion of Justice Holmes in Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L.R.A. 722, 57 Am.St.Rep. 443. A picket may point to the possibility of ousting from the union any employee crossing the picket line and thereby compel or coerce him to quit his employment. The provisions of section 3 prohibiting such conduct are invalid.

[12, 13] That part of section 3, however, prohibiting picketing by acts of violence is valid, for there is no constitutional sanction for violence in labor disputes. When part of a statute is declared unconstitutional, the remainder will stand if it is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute. Ex parte Frazer, 54 Cal. 94; 5 Cal.Jur. 644; Cooley, Constitutional Limitations, 8th Ed., vol. 1, p. 360. Not only is the valid part of the present ordinance complete in itself, but the ordinance provides: "If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity or constitutionality of the remaining portions of this ordinance." See Bacon Service Corp. v. Huss, 199 Cal. 21, 248 P. 235.

[14] The provisions of section 3 prohibiting picketing by acts of violence do not conflict with the general laws of the state relating to assault, battery, riot, disturbing the peace, and unlawful assemblage. An ordinance is invalid if it makes illegal the same acts that are made illegal by the general laws of the state. Cal. Const., art. XI, § 11; In re Sic, 73 Cal. 142, 14 P. 405; In re Mingo, 190 Cal. 769, 214 P. 850; In re Murphy, 190 Cal. 286, 212 P. 30; Ex parte Stephen, 114 Cal. 278, 46 P. 86; Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172. Picketing by acts of violence, however, is an offense distinct from assault, battery, riot, disturbing the peace, or unlawful assemblage, even though it may sometimes involve these acts. The nature of a crime involving violence varies with the purpose for which the violence is employed. This ordinance prohibits the use of violence for the purpose of preventing employees or patrons from entering premises being picketed in connection with a labor dispute. It therefore defines an offense different from general acts of violence unconnected with a labor controversy.

[15, 16] When a petitioner has been convicted of violating a statute that is entirely unconstitutional, the court will ordinarily issue a writ of habeas corpus releasing him from custody. The present ordinance, however, contains a valid provision prohibiting acts of violence. The complaint charges petitioners with picketing by acts of violence and therefore charges a public offense for such acts are not consistent with lawful action. See cases cited in 13 Cal.Jur., pp. 235, 236, note 7; cf. Ex parte Peterson, 119 Cal. 578, 51 P. 859; Ex parte McLaughlin, 16 Cal. App. 270, 116 P. 684; In re Hernandez, 64 Cal.App. 71, 220 P. 423; Ex parte Green-

all, 153 Cal. 767, 96 P. 804; In re Ah Sing, 156 Cal. 349, 104 P. 448. Since the punishment imposed on petitioners is not excessive for violation of the valid provision of the ordinance, they can be released by habeas corpus only if it is clear that they were not convicted of violating that provision. Ex parte Morrison, 88 Cal. 112, 25 P. 1064.

The uncertainty surrounding their conviction arises from the ambiguity of the complaint, which charged them with violating any one "and/or" any other provision of the ordinance, count 1 referring to section 2 and count 2 referring to section 3. Petitioners were in effect charged with violating all the provisions of each section of the ordinance or any one provision of each section. They were found guilty "as charged" and sentenced "on said conviction." It cannot therefore be determined from the face of the record whether or not they were found guilty of violating the one valid provision of section 3.

The expression "and/or", which made possible a conviction couched in such general terms, has met with widespread condemnation. Cochrane v. Florida East Coast R. Co., 107 Fla. 431, 145 So. 217; Preble v. Architectural Iron Workers' Union, 260 Ill.App. 435; Tarjan v. National Surety Co., 268 Ill.App. 232; State v. Dudley, 159 La. 872, 106 So. 364; Russell v. Empire Storage & Ice Co., 332 Mo. 707, 59 S.W.2d 1061; State v. Douglas, 339 Mo. 187, 95 S.W.2d 1179; Drummond v. City of Columbus, 136 Neb. 87, 285 N.W. 109, 286 N.W. 779; Kornbrodt v. Equitable Trust Co., 137 Or. 386, 2 P.2d 236, 3 P.2d 127; Allen v. State, 138 Tex.Cr. 303, 136 S.W. 2d 232; Cobb v. State, 139 Tex.Cr. 337, 139 S.W.2d 272; Putnam v. Industrial Commission, 80 Utah 187, 14 P.2d 973; Employers' Mutual Liability Ins. Co. v. Tollefson, 219 Wis. 434, 263 N.W. 376; An And/Or Symposium, 18 A. B. A. Journal 574; 18 A. B. A. Journal 456, 524 (editorials); 42 West Va.L.Q. 235; H. H. Parsons, And/Or, 10 Cal.S.B.J. 89, cf. H. Mumper, Unfair Tirade Against the Symbol "And/Or", 10 Cal.S.B.J. 187. It is true that the expression has proved convenient in contracts and other instruments where, by its intentional equivocation, it can anticipate alternative possibilities without the cumbersome itemization of each one. 118 A.L.R. 1367; 43 Yale L. J. 918, 20 Marquette L.Rev. 101. It lends itself, however, as much to ambiguity as to brevity. Thus it cannot intelligibly be used to fix the occurrence of past events. A purported conclusion that either one or both of two events occurred is a mere restatement of the problem, not a decision as to which event actually occurred. If a person is accused of violating an unconstitutional as well as a constitutional provision of a statute and the verdict by the use of "and/or" declares him guilty of violating either one or both provisions, it is an open question whether he is guilty of any punishable offense. The verdict in effect states that the accused is guilty or innocent of violating the constitutional provision. A comparable lack of precision was censured by the United State Supreme Court in Stromberg v. California, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484: "The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. * * * It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld."

[17-19] The ambiguity of the judgment in the present case would thus clearly warrant a reversal of the conviction on appeal or other direct attack. People v. Moss, 33 Cal.App.2d, Supp., 763, 767, 87 P.2d 932; People v. Tomlinson, 35 Cal. 503, 508. A habeas corpus proceeding, however, is in the nature of a collateral attack, and a judgment that is collaterally attacked carries with it a presumption of regularity. Johnson v. Zerbst, 304 U.S. 458, 468, 58 S.Ct. 1019, 82 L.Ed. 1461; see 1 Freeman, Judgments, 5th Ed., 780 et seq.; 15 Cal. Jur. 64, et seq. This presumption of regularity applies to the proceedings of a justice's court only if the judgment af-

firmatively shows, as in the present case, that the court has jurisdiction over person and subject matter. Brush v. Smith, 141 Cal. 466, 75 P. 55; Hayward v. Pimental, 107 Cal. 386, 40 P. 545; Rowley v. Howard, 23 Cal. 401, 404. See 15 Cal.Jur. 503; 6 Cal.Jur.Supp. 511. The presumption, however, is not conclusive in a habeas corpus proceeding but places upon petitioners the burden of proving that their convictions were based not upon the constitutional but upon the unconstitutional provisions of the ordinance. Johnson v. Zerbst, supra. Unless they can sustain this burden they must be considered as having been convicted of violating the valid provision relating to acts of violence, and the judgment must be upheld.

[20, 21] A petitioner seeking habeas corpus, however, is not confined to the face of the record in attempting to sustain the burden of proving that his conviction was in violation of his constitutional rights. The courts of both the United States and California have declared that the remedy of habeas corpus permits an examination not only of the actual evidence introduced at petitioner's trial but of any necessary additional evidence bearing upon the infringement of petitioner's constitutional rights. Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543; Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406; Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066; Johnson v. Zerbst, supra; In re Connor, 15 Cal.2d 161, 99 P.2d 248; In re Connolly, 16 Cal.App.2d 709, 61 P.2d 490; In re Lake, 65 Cal.App. 420, 224 P. 126; In re Chaus, 92 Cal.App. 384, 268 P. 422; see, also, Fiske v. Kansas, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108; De Jonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278; Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074; Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527. This examination is made, not to pass upon the sufficiency of the evidence to support the verdict, but to determine what the verdict actually was, so that the court may decide whether it violates constitutional guaranties. Such an examination will be made in a habeas corpus proceeding whenever a petitioner has been deprived of due process of law, whatever form that deprivation has taken. If a court has no "jurisdiction" to enter a judgment against a defendant after depriving him of such constitutional guarantees as the right to counsel or to a fair trial free from mob domination, it has no "jurisdiction" to enter a judgment against him based upon an unconstitutional statute. An examination of the facts is permissible to determine whether a petitioner was denied due process of law with respect to the procedure at his trial; it is no less permissible to determine whether he was denied due process of law by being convicted of violating unconstitutional legislation.

In Herndon v. Lowry, supra, a defendant was convicted of the crime of attempting to incite an insurrection. On appeal from a denial of his petition for a writ of habeas corpus, the United States Supreme Court examined the evidence introduced at his trial, concluded that it revealed only conduct that was protected by the constitutional guarantee of freedom of speech, and held that his conviction under the statute was therefore a denial of due process of law requiring the issuance of a writ of habeas corpus.

In Johnson v. Zerbst, supra, a defendant petitioned for a writ of habeas corpus on the ground that he had been deprived of his constitutional right to be represented by counsel at his trial. The court held that petitioner was entitled to a release on habeas corpus if an examination of the facts supported his allegation, stating, "a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction. * * *" 304 U.S. at page 466, 58 S.Ct. at page 1024, 82 L.Ed. 1461.

In Moore v. Dempsey, supra, petitioners asked for release by habeas corpus on the grounds that they had been deprived of due process of law because of mob domination of their trial. The court held that the actual facts should be examined to determine the truth of the allegations. In Mooney v. Holohan, supra, the court stated that an examination must be made of facts outside the record to determine whether petitioner was deprived of due process of law at his trial.

The cases of Fiske v. Kansas, supra; De Jonge v. Oregon, supra; Norris v. Alabama, supra; and Powell v. Alabama, supra, all hold that an examination should be made of the evidence introduced in the

trial court whenever it is essential to a proper determination of constitutional questions. While not involving writs of habeas corpus, these cases mark the extent of the protection afforded by constitutional guaranties and are therefore applicable to habeas corpus proceedings concerned with infringement of constitutional rights. In Norris v. Alabama, supra [294 U.S. 587, 55 S.Ct. 580, 79 L.Ed. 1074], the court stated: "That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights."

The California cases are equally clear that on habeas corpus a court may examine the evidence introduced at the trial if necessary to determine properly the constitutional question at issue. In the case of In re Connor, supra, this court, following an application for a writ of habeas corpus, examined a transcript of statements made by petitioner at his arraignment to determine whether he had been deprived of his constitutional right to be represented by counsel at his trial. The court, treating the constitutional question as a jurisdictional one, stated: "Furthermore, the function of habeas corpus is to test the jurisdiction of the court to render judgment. It is not limited to the face of the proceeding, but extends to the record of the court below when necessary to determine jurisdiction." [15 Cal.2d 161, 99 P. 2d 250.] The District Court of Appeal in the case of In re Connolly, supra [16 Cal. App.2d 709, 61 P.2d 492], declared: "But the respondent argues that the rule cannot be applied unless the fact of immunity appears on the face of the indictment. The argument is based upon the all too broad statement that the function of habeas corpus is limited to the question of jurisdiction as it appears on the face of the proceedings. The accepted rule in this state (and the only one applicable under the Code sections above cited) is clearly stated in Re Lake, 65 Cal.App. 420, 423, 224 P. 126, 127, where the court says: '* * * While neither writ [habeas corpus or certiorari] is one of error, both extend to the entire record of the court below and to the evidence itself when necessary to determine jurisdiction.'" Penal Code section 1484, moreover, provides that on habeas corpus proceedings the petitioner may "allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge. The court or judge must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such party as the justice of the case may require, and have full power and authority to require and compel the attendance of witnesses, by process or subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case."

[22, 23] It is clear from the foregoing authorities that in a habeas corpus proceeding a court must look beyond the face of the record at the actual evidence when necessary to determine whether a petitioner has been deprived of constitutional rights. If the statute under which the petitioner was convicted is entirely unconstitutional, the court will discharge him on habeas corpus without examining the evidence. Conversely, if the statute is entirely constitutional, the conviction will be upheld without examination of the evidence. If, however, as in the present case, the statute is in part constitutional and in part unconstitutional and it cannot be determined from the charge and conviction whether or not petitioner was tried and convicted for violating the valid part, the court must examine the evidence, not to test whether it is sufficient to support a verdict, but to determine whether petitioner was tried and convicted for violating the invalid part alone, in which case the conviction must fall, or whether he was tried and convicted for violating the valid part as well, in which case the conviction must stand. The petitioner has the burden of proving that he was not tried and convicted for violating the valid part of the statute.

[24, 25] Petitioners in the present case have failed to sustain the burden of proving that they were not tried and convicted for acts of violence since the transcripts of testimony at their trials reveal evidence of such acts. Some of the petitioners, along with 75 to 100 other men and women, were engaged in picketing the entrance to the Reed Ranch while others were in a large group picketing the entrance to the

Datoni Orchard. Witnesses testified that at the Reed Ranch a large group of pickets stood in the middle of the road and refused to move when automobiles approached, thus forcing the automobiles to stop. An officer testified that he could have driven on only if he "had wanted to kill somebody." Petitioners Bell, Davis and Walker participated in the stopping of cars. Bell was quoted as saying: "We are going to stop every damned automobile that comes in here." Davis, according to a witness, walked up and down the middle of the road giving orders "to stop every car that comes through here." Walker stated that "he was going to stop every damn automobile and to hell with the law. He would take care of them personally." Some of the automobiles were permitted to go through after having been stopped but no automobile, other than one used by officers, passed through the blockade at the Reed Ranch before the arrival of two deputy sheriffs.

The witness Newcomb testified that he was forced to stop at the Datoni Orchard about 3:10 a. m. by a large group of men standing across the road waving flashlights. They gathered about his car and ordered him to go back. A flashlight picture taken by a photographer at the scene shows seventeen men grouped about the car, eight of them directly in front of it. The photographer testified that there were about 65 men on the road and that Newcomb immediately turned around and left. Petitioners Knapp, Hamilton, Hinman, Wiseman, Day, and McKay were in this group and participated in the stopping of cars. Witnesses present at the Reed Ranch and the Datoni Orchard testified that the pickets' action caused them to fear bodily harm.

This evidence reveals conduct exceeding the bounds of peaceful picketing. Pickets may bring themselves to the notice of persons entering the picketed premises, but may not forcibly stop automobiles and intimidate the occupants by gathering in large numbers. Such action is more than peaceful persuasion. It is forceful intimidation and constitutes violence.

Because petitioners have failed to sustain the burden of proving that they were not convicted of the one valid provision of the ordinance prohibiting acts of violence, the writ heretofore issued is discharged and the petitioners are remanded to the custody of the sheriff of Yuba County.

GIBSON, C. J., SHENK and HOUSER, JJ., concurred.

EDMONDS, Justice (concurring).

Although I agree that the petitioners are not entitled to be released upon the writ of habeas corpus, the scope of the review, in my opinion, has been extended beyond that which the law allows. As I read the record in this proceeding, it shows judgments of conviction which the court pronouncing them had jurisdiction to render.

The petitioners were convicted under a complaint which charged them both in the conjunctive and disjunctive with the violation of each section of the ordinance. They now contend that, since a conviction upon charges of peaceful picketing would be an infringement of their constitutional rights, this court is not confined to the complaint and the judgment in considering the issues presented in this proceeding but may look behind the record of conviction and examine the evidence adduced at the trial to determine whether the conviction was for acts which are included within the unconstitutional portions of the ordinance. This argument requires some consideration of the nature and function of the writ of habeas corpus.

Generally speaking, the scope of review on habeas corpus is limited to an examination of the jurisdiction of the court whose judgment of conviction is challenged. Ex parte Parks, 93 U.S. 18, 23 L.Ed. 787; Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717; Knewel v. Egan, 268 U.S. 442, 45 S.Ct. 522, 69 L.Ed. 1036; Bowen v. Johnston, 306 U.S. 19, 59 S.Ct. 442, 83 L.Ed. 455; Ex parte Sternes, 77 Cal. 156, 19 P. 275, 11 Am.St.Rep. 251; Ex parte Long, 114 Cal. 159, 45 P. 1057; In re Carpenter, 36 Cal.App.2d 274, 97 P.2d 476. The writ may not be employed as a vehicle for the correction of errors or irregularities committed within the exercise of an admitted jurisdiction. Ex parte Clarke, 100 U.S. 399, 25 L.Ed. 715; Ex parte Siebold, supra; Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; 13 Cal.Jur. 218. Nor may it be used as a device to test the sufficiency of the evidence to warrant the conviction of the petitioner, a question properly addressed to a reviewing court upon appeal. Harlan v. McGourin, 218 U.S. 442, 31 S.Ct. 44, 54 L.Ed. 1101, 21 Ann.Cas. 849; In re Jacobs, 175 Cal. 661, 166 P. 801; In re Williams, 183 Cal. 11, 190 P.

163; In re Stevenson, 187 Cal. 773, 204 P. 216; Ex parte Drew, 188 Cal. 717, 207 P. 249; 13 Cal.Jur. 219. These are traditional and fundamental principles from which there has been no departure, and although in recent times the concept of jurisdiction has been broadened upon habeas corpus, the question of the guilt or innocence of the petitioner is never a proper subject of inquiry.

Furthermore, a judgment challenged by a writ of habeas corpus carries with it a presumption of validity, and every reasonable intendment must be made in its favor. Johnson v. Zerbst, supra, 304 U.S. at page 468, 58 S.Ct. 1019, 82 L.Ed. 1461; In re Pillsbury, 69 Cal.App. 784, 232 P. 725; 15 Cal.Jur. 64. The proceeding is subject to the rules applicable to collateral assault upon judgments generally. In re Stevenson, supra; Ex parte Stephen, 114 Cal. 278, 46 P. 86. The presumption of validity, however, is rebuttable when the jurisdiction of the convicting court is called into question, and in pursuing its inquiry into the challenged jurisdiction, the petitioned court is not confined to the face of the judgment of conviction but may review the entire proceeding below, including an examination not only of the facts disclosed by the record but of any additional facts, outside of, but not inconsistent with, the record. Ex parte Nielsen, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118; Ex parte Cuddy, 131 U.S. 280, 9 S.Ct. 703, 33 L.Ed. 154; In re Mayfield, 141 U.S. 107, 11 S.Ct. 939, 35 L.Ed. 635. However, as to all matters not affecting the jurisdiction of the court, the presumption of regularity attaching to the judgment of conviction is conclusive and unrebuttable, and any inquiry beyond the face of the judgment is foreclosed. To hold otherwise, would permit the writ of habeas corpus to be used as a means of correcting error or of testing the sufficiency of the evidence. Accordingly, the presumption that petitioners were convicted under the constitutional portions of the picketing ordinance must be deemed conclusive and an examination of the evidence upon which that conviction was had is improper unless the jurisdiction of the justice's court has been adequately challenged by the allegations of the petition.

As the courts have defined jurisdiction in recent years, it includes, the right to hear and determine concerning the offense charged and the authority of the court to act in a given manner over the person of the accused. Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411. Moreover, if during the course of a criminal prosecution the accused is deprived of certain fundamental procedural rights guaranteed by the Fourteenth Amendment to the Constitution of the United States, a judgment of conviction subsequently entered is invalid for lack of jurisdiction. Johnson v. Zerbst, supra; Smith v. O'Grady, 312 U.S. 369, 61 S.Ct. 572, 85 L.Ed. 859; In re Connor, 15 Cal.2d 161, 99 P.2d 248 [denial of the right to counsel]; Frank v. Mangum 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969; Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543 [trial dominated by mob violence]; Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, 50 A.L.R. 1243 [denial of the right to an impartial judge]. The remedy of habeas corpus is available to a petitioner asserting a lack of jurisdiction in any of the respects above set forth, and the petitioned court may look behind the record of conviction to test the questioned jurisdiction. As stated in one of these cases: "A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake." Johnson v. Zerbst, supra.

But when one is being prosecuted for the commission of acts which are charged to have been committed with force and violence and also within the limits of peaceful persuasion, the court does not lose jurisdiction when it determines from the evidence that they fall within the first category and not the second. That is the situation of the petitioners in the present case. The justice's court had jurisdiction over the persons of those charged with violating the ordinance. The offense of committing acts of violence in connection with picketing is one which the court had the power to try, and a conviction for that offense was within the authority of the court to enter. The petitioners do not claim that they were not accorded a fair trial or that they were denied any rights guaranteed to them by the federal Constitution. And although the petitioner for a writ of habeas corpus is entitled to his release if the complaint upon which he was convicted does not charge a public offense

(Ex parte McNulty, 77 Cal. 164, 19 P. 237, 11 Am.St.Rep. 257; Ex parte Williams, 121 Cal. 328, 53 P. 706), if it attempts, as here, to state an offense of which the court has jurisdiction, the question whether the facts alleged show the commission of that offense will not be inquired into. In re Leach, 215 Cal. 536, 12 P.2d 3; In re Wood, 194 Cal. 49, 227 P. 908. When one has been convicted under a statute or ordinance constitutional in its entirety, the question whether the evidence at the trial is sufficient to bring the case within the ordinance and establish a breach of its provisions, is a question, the improper determination of which, constitutes error only and is not subject to review on habeas corpus. Ex parte Long, 114 Cal. 159, 45 P. 1057; In re Kelso, 147 Cal. 609, 82 P. 241, 2 L.R.A.,N.S., 796, 109 Am.St.Rep. 178; In re Horr, 177 Cal. 721, 171 P. 801. This principle is applicable even though it be contended there is a total lack of evidence to support the conviction. In re Cutler, 1 Cal.App.2d 273, 36 P.2d 441. No different result should obtain when one has been convicted under a severable ordinance, constitutional in part.

In Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066, the facts were quite different from those now before this court. There, the defendant was convicted of the crime of insurrection as defined in a statute of Georgia. He appealed from a judgment of the state Supreme Court refusing him a discharge upon habeas corpus, contending that the statute was too vague and indefinite to provide a sufficiently ascertainable standard of guilt. The Supreme Court of the United States upheld this contention and characterized the entire statute as uncertain in that it was susceptible of a construction penalizing innocent as well as criminal conduct. In order to determine whether the state court had made an unconstitutional construction and application of the statute, the Supreme Court was compelled to examine the record and to ascertain the specific conduct which was claimed to be unlawful under the statute. This record, the court concluded, showed the commission of lawful acts only, and it held that the statute had been unconstitutionally construed and applied.

If, upon examining the face of a criminal statute, the nature of the conduct which is made unlawful appears to be wholly uncertain, the court must of necessity review the acts attributed to the defendant to determine whether the statute is being given an unconstitutional application. That rule is not applicable, however, where, as here, the statute includes acts of violence in connection with picketing which unquestionably may be made unlawful. The sufficiency of the complaint to charge such acts was a question which the petitioners might properly present upon appeal, together with the point that the evidence showed no acts of violence. But their appeal has been determined adversely to them. That determination constitutes a final adjudication upon the issues of fact which must be conclusively presumed to be a conviction for acts of violence.

This conclusion is in accordance with long established principles. For example in the case of Ex parte Morrison, 88 Cal. 112, 25 P. 1064, petitioner challenged the validity of a judgment convicting him of the crime of vagrancy as defined in section 647 of the Penal Code. He attacked the first clause of this section as unconstitutional. Although the judgment was regular on its face, it did not appear therefrom under which clause of section 647 the conviction was had. In discharging the writ, the court declared, "we cannot assume, for the purpose of passing on this question, or of discharging the prisoner, that this is the particular clause under which the conviction was had." And in In re Dal Porte, 198 Cal. 216, 244 P. 355, 357, petitioner was charged and convicted under two counts, one of which stated an offense beyond the jurisdiction of the court to try. As the finding of guilt was general, it was impossible to ascertain whether the conviction was based upon either or both counts. Admitting that the judgment was erroneous and subject to correction on appeal, the court nevertheless declared: "We are not prepared to say, however, that petitioner is entitled in this proceeding to any relief from said judgment on account of its being based upon a defective count of the complaint. As we have already seen, the charge set forth in the second count of said complaint was one within the jurisdiction of said police court, and the fact that the offense charged in the first count of said complaint was one over which said police court did not have jurisdiction would not be sufficient to oust the court of jurisdiction of the offense over which it had full and complete jurisdiction."

But I agree that if the records of the trials which resulted in the petitioners' conviction may be examined for the purpose of deter-

mining whether the petitioners committed acts of violence and physical intimidation, there is substantial evidence to support the judgments which are attacked in this proceeding. For although labor may present its grievances to the public, the obstruction of access to an employer's place of business by such number of persons as to require his employees who desire to work to run the gauntlet under threats of physical harm is not protected by the constitutional guarantees.

Many years ago, this court held that an intentional interference with the relations of an employer and his employees is not tortious if the object sought to be attained has reasonable relevance to labor conditions and peaceful means are used to accomplish it. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165. That principle was recently restated and applied in holding "that workmen may associate together and exert various forms of economic pressure upon employers, provided they act peaceably and honestly." However, the court laid particular emphasis upon the requirement that labor's acts must be peaceful if they are to come within the protection of the law. Fully recognizing "that the right to picket peacefully and truthfully is one of organized labor's lawful means of advertising its grievances to the public, and as such is guaranteed by the Constitution as an incident of freedom of speech," it also added: "But the law clearly requires that concerted action by union workers must be peaceful. Acts of violence or 'acts * * * amounting to physical intimidation' will be enjoined." McKay v. Retail Auto S. L. Union No. 1067, 16 Cal.2d 311, 106 P.2d 373, 378.

The testimony which is referred to in the opinion of my associates, and other evidence which is shown by the record, fully justifies a conclusion that the picketing, carried on, in part, under cover of darkness and with a show of force toward employees of the Earl Fruit Co. who desired to continue their employment entirely out of proportion to any peaceful purpose, was accompanied by such violence, or threats of violence, as to constitute unlawful means. To say that it comes within the bounds of peaceful picketing is to ignore the realities of the situation.

When pickets patrol the public street which is the approach to their employer's premises and either their number or their conduct is such as to constitute intimidation and put employees or others in fear of bodily harm, they are guilty of unlawful acts. Such picketing goes far beyond that which has been recognized by the courts as a reasonable exercise of the right to tell the facts of a labor dispute and to persuade employees, by peaceful means, to leave their work. The courts have generally recognized that persuasion in the presence of a large number of persons is not peaceful persuasion, and in one of its decisions, the Supreme Court of the United States said that it is the proper function of a court of equity "to prevent the inevitable intimidation of * * * groups of pickets, but to allow missionaries. * * * In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege." American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 42 S.Ct. 72, 76, 78, 66 L.Ed. 189, 27 A.L.R. 360.

In the very recent case of Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 61 S. Ct. 552, 555, 85 L.Ed. 836, 132 A.L.R. 1200, rehearing denied 312 U.S. 715, 61 S.Ct. 803, 85 L.Ed. 1145, the same court laid down the requirement that, to be lawful, picketing must be peaceful and may not have a background of violence. "Peaceful picketing," said the court, "is the workingman's means of communication. It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution."

The petitioners in that case, as in the one now before this court, relied upon the decision of Thornhill v. Alabama, 310 U.S. 88, 105, 60 S.Ct. 736, 84 L.Ed. 1093. But as Mr. Justice Frankfurter pointed out, there was no "entanglement with violence" in either the Thornhill case or in Carlson v. California, 310 U.S. 106, 60 S.Ct. 746, 749, 84 L.Ed. 1104, where the court declared: "The power and duty of the State to take adequate steps to preserve the peace and

protect the privacy, the lives, and the property of its residents cannot be doubted." Concerning the former case, he said that the court expressly excluded a labor dispute involving violence from the scope of its decision in these words [310 U.S. 88, 60 S.Ct. 746, 84 L.Ed. 1093]: "We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger * * * as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger." The Yuba County ordinance, in so far as its valid severable provisions are concerned, is exactly such a statute.

CURTIS, J., concurred.

CARTER, Justice (dissenting).

I dissent.

In my opinion petitioners are entitled to their release on habeas corpus upon the ground that the provisions of the ordinance under which they were charged and convicted are unconstitutional and void.

Since the majority of the court seem to agree that section 2 of the ordinance is invalid, but sustain the validity of the judgment of conviction against the petitioners under section 3 of said ordinance, I will confine my discussion to section 3 only.

Said section provides: "Section 3. It is unlawful for any person to beset or picket the premises of another, or any approach thereto, where any person is employed or seeks employment, or any place or approach thereto where such employee or person seeking employment lodges or resides, for the purpose of inducing such employee or person seeking employment, by means of compulsion, coercion, intimidation, threats, acts of violence, or fear, to quit his or her employment or to refrain from seeking or freely entering into employment."

In my opinion the above-quoted section is so vague, indefinite and uncertain that it cannot be said to denounce as a crime any act which may be proscribed under the police power of the state, and fails to provide a sufficiently ascertainable standard of guilt.

Before making an analysis of the above-quoted section, I shall call attention to certain rules applicable to the interpretation of statutes and ordinances. They are as follows:

"When the language of an act appears on its face to have a meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate, it is simply void; for if no judicial certainty can be settled upon as to its meaning, courts are not at liberty to supply the deficiency or make the statute certain. But legislation cannot be nullified on the ground of uncertainty, if susceptible of any reasonable construction that will support it." 26 Am. and Eng. Ency. Law, 2d Ed., 656.

"Where the statutory terms are of such uncertain meaning, or so confused, that the courts cannot discern with reasonable certainty what is intended, they will pronounce the enactment void." Statutory Crimes, 3d Ed., in the third subdivision of section 41.

"Statutes and ordinances which fix crimes, or quasi crimes, should so fix them that there could be no uncertainty. They should be so worded that one could read them, and know whether or not he was violating law. They should not be so worded as to leave their substantive elements to the caprices of either judge or jury. In other words the law should be complete and definite. What would be 'reasonable effort' under this law is left a question for the court or jury. What in the minds of one court or jury might be 'reasonable effort' might not be so considered by another court or jury. Each trial tribunal would be making its own ordinance. This will not do for a law or ordinance criminal in character." Taft v. Shaw, 284 Mo. 531, 225 S.W. 457, 461.

"It is equally true that a mere collection of words cannot constitute a law; otherwise the dictionary can be transformed into a statute by the proper legislative formula. An act of the legislature, to be enforceable as a law, must prescribe a rule of action, and such rule must be intelligibly expressed." State ex inf. Crow v. West Side Street Ry. Co., 146 Mo. 155, 47 S.W. 959, 961.

"An ordinance of a regulatory nature must be clear, certain and definite, so that the average man may with due care after reading the same understand whether he will incur a penalty for his actions or not." 19 R.C.L., p. 810.

"* * * in creating an offence the legislature may define it by a particular description of the act or acts constituting it, or may define it as any act which produces, or is reasonably calculated to produce certain defined or described results." 8 R.C.L., p. 57.

Applying the foregoing rules to the ordinance under consideration, it is clear to my mind that the language contained therein is insufficient to charge an offense within the purview of the police power of the state in view of the recent decisions of the Supreme Court of the United States holding that "The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state. * * *" Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 740, 84 L.Ed. 1093; Carlson v. California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Gitlow v. New York, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138, 1145; Stromberg v. California, 283 U.S. 359, 368, 51 S.Ct. 532, 75 L.Ed. 1117, 1121, 73 A.L.R. 1484; Near v. Minnesota, 283 U.S. 697, 707, 51 S.Ct. 625, 75 L.Ed. 1357, 1362; Grosjean v. American Press Co., 297 U.S. 233, 244, 56 S.Ct. 444, 80 L.Ed. 660, 665; De Jonge v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278, 283. See, also, Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288, decided December 6, 1937. It is also well settled that municipal ordinances adopted under state authority constitute state action and are within the prohibition of the amendment. Raymond v. Chicago Union Traction Co., 207 U.S. 20, 28 S.Ct. 7, 52 L.Ed. 78, 12 Ann.Cas. 757; Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510; Cuyahoga River Power Co. v. Akron, 240 U.S. 462, 36 S.Ct. 402, 60 L.Ed. 743.

The terms, "beset or picket" are not defined in the ordinance here under consideration nor in any statute or court decision of this state. Carlson v. California, supra. Text-writers have defined picketing as "the marching to and fro before the premises of an establishment involved in a dispute, generally accompanied by the carrying and display of a sign, placard or banner bearing statements in connection with the dispute." Section 109 Labor Disputes and Collective Bargaining by Ludwig Teller. Picketing has also been defined by legislative enactment elsewhere as "the act of walking up and down before any place of business * * * and the solicitation of the public or employees through word of mouth or by printed signs or banners, that such place of business is unfair to organized labor or to any voluntary association, group or members of labor organizations; and by requesting through word of mouth or signs that such place of business or employer be boycotted and not patronized by the public; and by personal solicitation through word of mouth or signs that employees * * * cease working in such places of business so picketed." Diemer v. Weiss, 343 Mo. 626, 122 S.W.2d 922, 924. In brief terms, picketing may be said to constitute the dissemination of information concerning the facts of a labor dispute by representatives of organized labor in the vicinity of the place where the dispute exists. Thornhill v. Alabama, supra.

It now appears to be well settled by both the decisions of this court and those of the Supreme Court of the United States that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." Thornhill v. Alabama, supra; Carlson v. California, supra; Hague v. C. I. O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; Schneider v. State, supra; Senn v. Tile Layers Protective Union, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229.

Applying the foregoing definition to section 3 of the ordinance under consideration here, we find that the ordinance makes it "unlawful for any person to * * * picket the premises of another * * * for the purpose of inducing any employee or person seeking employment * * * to quit his or her employment or to refrain from seeking or freely entering into employment."

It appears to be conceded that a statutory enactment couched in the above-quoted language would constitute a clear violation of the constitutional provisions both of this state and of the United States guaranteeing such civil liberties as freedom of speech, freedom of press and freedom of assembly. Thornhill v. Alabama, supra; Carlson v. California, supra; Lovell v. Griffin, supra; Schneider v. State, supra.

But it is insisted that the insertion of the words "by means of compulsion, coercion, intimidation, threats, acts of violence, or fear," after the clause "for the purpose of inducing such employee or person seeking employment," and before the clause "to

quit his or her employment or to refrain from seeking or freely entering into employment" removes section 3 of said ordinance from the category of unconstitutional legislation and renders it a valid enactment prohibiting all picketing where some of the pickets in some manner or other resort to what might be construed to mean "compulsion, coercion, intimidation, threats, acts of violence, or fear." In view of this argument, let us analyze the last quoted terms and see if they have any significance whatever when used in an ordinance designed to proscribe and prohibit acts and conduct which may be performed in the exercise of one's civil liberties guaranteed by both our state and federal Constitutions.

If picketing constitutes the publicizing of the facts concerning a labor dispute in the vicinity of the premises where said dispute exists, then it must follow that it was the intention of the legislative body which enacted said ordinance to prohibit the dissemination of information concerning such labor dispute by means of "compulsion," etc.

In my opinion this is the only interpretation or construction which can be placed upon the above-quoted language of section 3 of said ordinance and said language is thereby rendered meaningless. To illustrate, how can it be said that a picket disseminated information concerning the facts of a labor dispute by means of "compulsion," or "coercion," or "intimidation," or "threats," or "acts of violence," or "fear"? Certainly the dissemination of information by means of either the spoken or printed word regardless of how loud the voice or how large the printing would not have the effect of creating or bringing about the conditions described as "compulsion, coercion, intimidation, threats, acts of violence, or fear." At least, it is not possible for me to imagine a situation in which one engaged in picketing in the sense that that term has been defined, doing anything as a picket which would bring about a condition approaching "compulsion, coercion, intimidation, threats, acts of violence, or fear." Picketing does not mean throwing stones, but a person engaged in picketing may throw stones; picketing does not mean wielding clubs, but a person engaged in picketing may wield a club; picketing does not mean firing guns, but a person engaged in picketing may fire a gun; in brief, picketing does not mean or comprehend the commission of any act or acts of violence, but such acts may be committed by those engaged in picketing. It must be conceded that every act of violence designed to injure the person or property of another now constitutes a violation of some penal provision of the law of this state and subjects the perpetrator thereof to prosecution and punishment, whether committed by a person engaged in picketing or in any other activity. There is no more reason for saying that publicizing the facts of a labor dispute, or the dissemination of information concerning the facts of a labor dispute through pickets, may be accomplished by means of acts of violence, than to say that preaching the gospel, lecturing on social reforms, teaching political economy or publishing a newspaper may be likewise accomplished. The fact that acts of violence may be committed by one engaged in any of the above pursuits does not change the character of the pursuit nor subject it to restrictions created by legislative enactments under an asserted exercise of the police power. In other words, it is the acts of violence which come within the purview of the police power and not the picketing, preaching, lecturing, teaching or publishing, because acts of violence have no relation to the purpose and object to be accomplished by any of the above-mentioned activities, including picketing, according to the accepted definition of that word. It may be true that a person while engaged in picketing might commit any and every crime known to our law, but certainly the commission of such crimes should not be charged up against the entire picket line or the labor organization under whose auspices the premises are being picketed. As I read our penal statutes, I cannot think of anything in the nature of violence, threats of violence, or acts of violence which are not now denounced as public offenses and punishable as such. Therefore, to enact an ordinance denouncing the dissemination of information concerning the facts of a labor dispute by means of acts of violence, places such ordinance in the category of those denounced by the above-quoted rules as being so vague, indefinite and uncertain that they are absolutely meaningless. Such, in my opinion, is the situation with reference to section 3 of the ordinance here under consideration. To carry the discussion a little further in order to disclose the absurdity of the contention that since section 3 of said ordinance prohibits "picketing

by means of acts of violence" it is a valid exercise of the police power of the state, let us assume that the ordinance denounced as a crime any of the following: "preaching by means of acts of violence"; or "lecturing by means of acts of violence"; or "teaching by means of acts of violence"; or "publishing a newspaper by means of acts of violence"; or "distributing a newspaper by means of acts of violence"; or "parading by means of acts of violence." Obviously, any such ordinance would be declared void on its face as being too vague, uncertain and indefinite to constitute a public offense. The Supreme Court of Missouri by unanimous opinion in the case of Deimer v. Weiss, supra, declared a similar ordinance void for uncertainty, and I have not been able to find respectable authority to the contrary.

The ordinance here under consideration falls squarely within the rule announced by the Supreme Court of the United States in the case of Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 733, 81 L.Ed. 1066, where a statute of the state of Georgia purporting to prohibit acts and conduct tending to incite insurrection was under attack. It appears from the opinion in that case that "The petition alleged the judgment and sentence were void and appellant's detention illegal because the statute under which he was convicted denies and illegally restrains his freedom of speech and of assembly and is too vague and indefinite to provide a *sufficiently ascertainable standard of guilt*, and further alleged that there had been no adjudication by any court of the constitutional validity of the statute as applied to appellant's conduct." (Emphasis added.) The court at page 255 of its opinion in 301 U.S., at page 738 of 57 S.Ct., 81 L.Ed. 1066, said:

"The affirmance of conviction upon the trial record necessarily gives section 56 the construction that one who seeks members for or attempts to organize a local unit of a party which has the purposes and objects disclosed by the documents in evidence may be found guilty of an attempt to incite insurrection.

"The questions are whether this construction and application of the statute deprives the accused of the right of freedom of speech and of assembly guaranteed by the Fourteenth Amendment, and whether the statute so construed and applied furnishes *a reasonably definite and ascertainable standard of guilt.*" (Emphasis added.)

On page 263 of its opinion in 301 U.S., on page 741 of 57 S.Ct., 81 L.Ed. 1066, in the Herndon case the court quotes with approval from its decision in United States v. L. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, 14 A.L.R. 1045, the following pertinent declaration:

"'Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. * * *' [255 U.S. at page 89, 41 S.Ct. at page 300, 65 L.Ed. 516, 14 A.L.R. 1045.]"

"The decisions relied on by the state held the Sherman Law (15 U.S.C.A. §§ 1–7, 15 note) furnished a reasonable standard of guilt because it made a standard long recognized by the common law the statutory test.

"The statute, as construed and applied, amounts merely to a dragnet which may enmesh any one who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. *No reasonably ascertainable standard of guilt is prescribed.* So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment." (Italics added.)

What is the ascertainable standard of guilt prescribed in the ordinance here under consideration? The obvious answer to this question must be that it contains no such standard. The statement therein that "it shall be unlawful" to commit an "act of violence" amounts to nothing more than to say that "it is unlawful to do an unlawful act" without defining what constitutes the unlawful act. Nowhere in the ordinance is there any indication of what is meant by the expression "It is unlawful for any

person to beset or picket the premises of another * * * for the purpose of inducing such employee or person seeking employment, *by means of compulsion, coercion, intimidation, threats, acts of violence,* or *fear,* to quit his or her employment or to refrain from seeking or freely entering into employment." It is obvious that if we apply the accepted definition of the word "picket" (to disseminate information concerning or to publicize the facts of a labor dispute) the italicized words become meaningless and no crime is defined.

The Supreme Court of the United States in the case of Thornhill v. Alabama, supra, in commenting upon similar broad and sweeping provisions of an Alabama statute, made the following comment:

"The numerous forms of conduct proscribed by section 3448 are subsumed under two offenses: the first embraces the activities of all who 'without a just cause or legal excuse' 'go near to or loiter about the premises' of any person engaged in a lawful business for the purpose of influencing or inducing others to adopt any of certain enumerated courses of action; the second, all who 'picket' the place of business of any such person 'for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another.' It is apparent that one or the other of the offenses comprehends every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of an employer. The phrase 'without a just cause or legal excuse' does not in any effective manner restrict the breadth of the regulation; the words themselves have no ascertainable meaning either inherent or historical. Compare Lanzetta v. New Jersey, 306 U.S. 451, 453, 455, 59 S.Ct. 618, 619, 83 L. Ed. 888. The courses of action, listed under the first offense, which an accused—including an employee—may not urge others to take, comprehends those which in many instances would normally result from merely publicizing, without annoyance or threat of any kind, the facts of a labor dispute. An intention to hinder, delay or interfere with a lawful business, which is an element of the second offense, likewise can be proved merely by showing that others reacted in a way normally expectable of some upon learning the facts of a dispute. *The vague contours of the term 'picket' are nowhere delineated.* Employees or others, accordingly, may be found to be within the purview of the term and convicted for engaging in activities identical with those proscribed by the first offense. In sum, whatever the means used to publicize the facts of a labor dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise, all such activity without exception is within the inclusive prohibition of the statute so long as it occurs in the vicinity of the scene of the dispute." (Italics added.)

Likewise, in the case of Carlson v. California, supra, the Supreme Court of the United States in striking down as unconstitutional and void an ordinance of Shasta County, California, similar to the ordinance here under consideration because of its *"sweeping and inexact terms,"* made this very pertinent declaration:

"The sweeping and inexact terms of the ordinance disclose the threat to freedom of speech inherent in its existence. It cannot be thought to differ in any material respect from the statute held void in Thornhill's case. The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern. Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484. For the reasons set forth in our opinion in Thornhill v. Alabama, supra, publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a state."

In reviewing the decisions of the Supreme Court of the United States in connection with my study of the case at bar and the preparation of this opinion, I have been strongly impressed with the decided liberal trend of the decisions of that great court, which in its pronouncements in the field of those fundamental and basic personal rights and liberties referred to as civil liberties, have exemplified profound vision and foresight and eminent fairness in extending the constitutional guarantees of freedom of speech and of the press not only the strong, the wealthy and the powerful, but likewise the weak, the humble and the oppressed. It is these pronouncements which will protect a defenseless minority from being legislated against and their freedom of expression curtailed by those who happen to be in the majority or who

control the legislative processes for the time being. Such a situation was depicted by Mr. Justice Murphy in speaking for the Supreme Court of the United States in the case of Thornhill v. Alabama, supra, when he said:

"A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. *The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.* It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship. An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. Schneider v. State, 308 U.S. 147, 155, 162, 163, 60 S.Ct. 146, 148, 151, 84 L.Ed. 155. Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. Stromberg v. California, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484; Schneider v. State, 308 U.S. 147, 155, 162, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155. Compare Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888." (Emphasis added.)

So zealously has the Supreme Court of the United States guarded and protected these fundamental personal rights and liberties that in the case of Schneider v. State, supra, that court struck down as unconstitutional and void four ordinances enacted respectively by the cities of Los Angeles, California, Milwaukee, Wisconsin, Worcester, Massachusetts, and Irvington, New Jersey, designed to prohibit the distribution of handbills, leaflets, circulars, etc., in said cities. Mr. Justice Roberts speaking for the court in said case, declared [308 U.S. 147, 60 S.Ct. 151, 84 L.Ed. 155]:

"It is argued that the circumstance that in the actual enforcement of the Milwaukee ordinance the distributor is arrested only if those who receive the literature throw it in the streets, renders it valid. But, even as thus construed, the ordinance cannot be enforced without unconstitutionally abridging the liberty of free speech. As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.

"It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited to streets and alleys and leaves persons free to distribute printed matter in other public places. But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place. * * *

"The freedom of speech and of the press secured by the First Amendment * * * against abridgment by the United States is similarly secured to all persons by the Fourteenth [Amendment] against abridgment by a state.

"Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion. * * *

"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well sup-

port regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

The chief contention of the prosecuting officers in the case at bar is that the ordinance here in question may be upheld as a valid exercise of police power. While the realm within which the police power operates may be somewhat indefinite, it may not be invoked to abridge the fundamental right of freedom of expression guaranteed by constitutional mandate. The Constitution is the bulwark of our civil liberty and it should be so construed as to protect that liberty against encroachment even under the guise of the police power. While some of its provisions have at times been emasculated by enthusiastic advocates of the police power doctrine, the Constitution still remains the fundamental law of the land and will continue to be such so long as the ideal of civil liberty is predominate in the hearts and minds of the American people.

In my opinion, the ordinance here in question trenches upon the right of free expression guaranteed by both our state and federal Constitutions, and should therefore be stricken down. If "picketing" means "the dissemination of information concerning the facts of a labor dispute," then the right to picket, as well as the right to preach, lecture, teach, or publish a newspaper, all fall in the same category. If the Constitution protects one of these rights, it protects the others. If a crime is committed by a person while exercising one or more of these rights, he may be prosecuted, convicted and punished for the crime, not for the exercise of the right to picket, preach, lecture, teach, or publish a newspaper. In my opinion, any legislative enactment designed to abridge or limit any of the above-mentioned rights flies squarely in the face of the constitutional guarantee of freedom of speech and press, and should be declared null and void by the courts under their constitutional power.

From what I have said in the foregoing opinion, it is obvious that section 3 as well as section 2 of the ordinance here under consideration is void, and there can be no doubt but that habeas corpus is the only remedy available to petitioners to test the validity of said ordinance. See cases collected and commented on in 13 Cal.Jur. p. 225, sec. 8.

In view of my determination that the ordinance is invalid and void because the language employed therein is too vague, uncertain and indefinite to provide a sufficiently ascertainable standard of guilt and that the acts denounced by it cannot be proscribed because they are not within the purview of the police power of the state, the complaint therefore fails to charge a public offense, and it is unnecessary to review the evidence presented during the trial in the justice's court.

The majority opinions in this case are predicated upon the theory that since section 3 of the ordinance in question purports to prohibit "picketing by means of acts of violence" (whatever this phrase means), it defines a crime within the purview of the police power of the county of Yuba, and notwithstanding the defendants were found guilty of violating all of the provisions of both sections 2 and 3 of the ordinance (a portion of the charge being based on obviously invalid provisions of the ordinance), the judgment against them is nevertheless immune from attack on habeas corpus.

I am of the opinion, that even if it can be said that section 3 of the ordinance sufficiently defines a crime as held by a majority of the court, the conviction of the defendants should not be allowed to stand for the reason that the complaint which forms the basis of the prosecution is wholly insufficient to charge a public offense, and the judgment against petitioners is void for the reason that they were found guilty of the commission of lawful as well as unlawful acts.

Section 3 of the ordinance in question makes unlawful, "picketing by means of compulsion, coercion, intimidation, threats, acts of violence, or fear." All of these means, except "acts of violence" may be resorted to by those who are peacefully and therefore lawfully engaged in publicizing a labor dispute by means of picketing or boycotting.

That there is such a thing as moral compulsion, coercion, intimidation, threats, and fear is a proposition recognized in experience and by many court decisions, and in my opinion, these words do not necessarily imply conduct of an unlawful character when applied to a labor dispute.

Such words may be used to define the usual, ordinary and customary moral, social and economic pressure which inheres in every labor dispute and particularly where picketing is resorted to.

It must be conceded that it is within the constitutional right of a person engaged in a labor dispute to advise those who contemplate crossing a picket line, that if they do so, future social or business relations with them will be withheld. It must also be conceded that such advice constitutes a threat, and it also amounts to compulsion, intimidation and coercion. Such compulsion, intimidation and coercion is the result of fear of the withholding of such social or business relations which may have been both pleasant and profitable to the person who is threatened with the loss thereof. Obviously, conduct constituting such threats, compulsion, intimidation, coercion or fear cannot be proscribed by penal statute or ordinance for the reason that the same would constitute a violation of the constitutional guarantee of free speech.

Webster's New International Dictionary, Second Edition, defines "compulsion" as follows:

"1. Act of compelling, or state of being compelled; act of driving or urging by force or by physical or moral constraint; subjection to force. Cf. Coercion.

"I would give no man a reason upon compulsion."

"2. Anything that compels; as, to live under compulsion." The same work defines "coercion" as follows:

"1. The act, process, or power of coercing; specif., the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done; compulsion. Coercion may cause the act produced to be a nullity so far as concerns legal ability. Cf. Duress.

"2. The application of legal or governmental measures to a group or nation, so as to bring its outward conformity."

And "intimidation" is defined by the same work as follows:

"To make timid or fearful; to inspire or affect with fear; to make fearful; to frighten; specif., to deter, as by threats; to overawe; cow.

"Now guilt, once harbored in a conscious breast,

"Intimidates the brave, degrades the great. Johnson.

"Syn.—Terrify, daunt, deter, abash. See Frighten.

"Ant.—Embolden, hearten, inspirit. See Encourage.

"Act of making timid or fearful or of deterring by threats; state of being intimidated, as the voters were kept from the polls by intimidation."

It will be observed from the foregoing definitions that the mere assertion that compulsion, coercion or intimidation has been used or resorted to for the accomplishment of an object or purpose or in the performance of an act, it does not necessarily follow therefrom that the means employed was unlawful, immoral or unjust. In fact, it is inconceivable that a labor dispute could result in a strike, and that striking employees and their sympathizers could picket and boycott places of business, without the owners, employees or patrons of such places of business being subjected to some degree of moral, social or economic compulsion, coercion or intimidation. It appears to be settled beyond any question by the authorities which I have cited above, and by many other authorities both in this and other jurisdictions, that the moral, social and economic compulsion, coercion and intimidation which may be occasioned as the result of peaceful picketing, boycotting and publicizing of labor disputes, cannot be proscribed by statute or prohibited by injunction because such conduct is permissible as a lawful exercise of the constitutional right of free speech, free press and free assemblage.

What is said with reference to the meaning of the words "compulsion," "coercion" and "intimidation" when applied to peaceful picketing and boycotting, is equally true with reference to the word "threat." It cannot be denied that a person has the right to threaten that which he has a lawful right to do, and that such threat cannot be proscribed by statute or ordinance, or prohibited by injunction. The late Mr. Justice Holmes, while a member of the Supreme Judicial Court of Massachusetts, in the case of Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077, 1081, 57 Am.St. Rep. 443, 35 L.R.A. 722, made this observation in one of his history-making dissenting opinions. He said:

"I pause here to remark that the word 'threats' often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, give warning of your intention to do—in that event, and thus allow the other person the chance of avoiding the consequence. So, as to 'compulsion,' it depends on how you 'compel.' * * * So as to 'annoyance' or 'intimidation.'"

In the case of Lisse v. Local Union No. 31, 2 Cal.2d 312, at page 318, 41 P.2d 314, at page 316, this court quoted with approval from its decision in the case of Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324, as follows:

"The right of united labor to strike, in furtherance of trade interests (no contractual obligation standing in the way) is fully recognized. The reason for the strike may be based upon the refusal to comply with the employees' demand for the betterment of wages, conditions, hours of labor, the discharge of one employee, or the engagement of another—any one or more of the multifarious considerations which in good faith may be believed to tend toward the advancement of the employees. After striking, the employee may engage in a 'boycott,' as that word is here employed. As here employed, it means not only the right to the concerted withdrawal of social and business intercourse, but the right by all legitimate means—of fair publication, and fair oral or written persuasion—to induce others interested in, or sympathetic with, their cause, to withdraw their social intercourse and business patronage from the employer. *They may go even further than this, and request of another that he withdraw his patronage from the employer, and may use the moral intimidation and coercion of threatening a like boycott against him if he refuse so to do.* This last proposition necessarily involves the bringing into a labor dispute between A and B, C, who has no difference with either. It contemplates that C, upon the request of B, and under the moral intimidation lest B boycott him, may thus be constrained to withdraw his patronage from A, with whom he has no controversy." (Emphasis added.)

In the case of Parkinson Co. v. Building Trades Council, 154 Cal. 581, 610, 98 P. 1027, 1039, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165, Mr. Justice Sloss in his concurring opinion quoted with approval from the dissenting opinion of the late Mr. Justice Holmes, in the case of Vegelahn v. Guntner, supra, as follows:

"'If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control.'

"The terms 'intimidation' and 'coercion,' so frequently used in the discussion of this question, seem to me to have no application to such acts as were here committed. One cannot be said to be 'intimidated' or 'coerced,' in the sense of unlawful compulsion by being induced to forego business relations with A, rather than lose the benefit of more profitable relations with B. It is equally beside the question to speak of 'threats' where that which is threatened is only what the party has a legal right to do."

The Supreme Court of Indiana, in the case of Local Union No. 26, etc., v. City of Kokomo, 211 Ind. 72, 5 N.E.2d 624, at page 628, 108 A.L.R. 1111, discusses the meaning of the words "compulsion" and "coercion" in relation to a labor dispute in the following language:

"The city ordinance now before the court makes all picketing of the employer's premises, or the approach thereto, unlawful. No force or violence is necessary to make the act of picketing unlawful and punishable. Peaceable acts upon the part of the employees are authorized expressly by chapter 12 of the Acts of 1933. The allegations of the complaint show no acts involving fraud or violence. The 1933 act authorizes the doing of all acts alleged in the complaint, which alleges that such acts were performed by lawful means and without fraud or violence, or any intention or purpose to injure the employer. The act of striking or picketing necessarily involves compulsion and coercion, and unless the same is performed by acts of fraud or violence, is lawful and permissible under the statute.

"The act of picketing is a means of 'compulsion and coercion,' but if it is ex-

ercised in a legal manner and without fraud or violence, it is lawful under the statute, yet it is the clear intention of the ordinance to prevent such acts. The overt act of assembling and congregating for concerted action in a peaceable, lawful manner is made punishable by the ordinance. The ordinance is repugnant to the declared purpose and object of the statute."

I think the foregoing authorities clearly hold that to some extent moral, social and economic compulsion, coercion and intimidation inheres in every labor dispute where picketing and boycotting is resorted to by striking employees and their sympathizers, and that such compulsion, coercion and intimidation, so long as it is exercised without fraud, force or violence, does not transcend the realm of peaceful picketing, and cannot be proscribed by statute or ordinance. This conclusion is sustained by the trend of recent decisions, particularly those of the Supreme Court of the United States, which I have cited herein. The clear purport of these decisions is to the effect that any statute or ordinance which proscribes or prohibits peaceful picketing is in clear violation of the Fourteenth Amendment to the Constitution of the United States.

Of course, it is elementary that a person engaged in picketing is amenable to all of our penal statutes denouncing as crimes all acts of force, violence, menacing threats, riots, routs, disturbing of the peace, unlawful assembly, assault and battery, etc., and my attention has not been called to any acts which one engaged in picketing might perpetrate in violation of the civil rights of another, or inimical to public peace and safety, which are not now denounced as crimes by the penal statutes of this state and punishable as such.

The complaint against petitioners follows the language of the ordinance and the petitioners were charged as follows:

"That on or about the 9th day of July, 1939, and within the limits of the County of Yuba, in the State of California, said defendants did then and there wilfully and unlawfully beset and/or picket the premises and/or the approach thereto of another, to-wit, the Earl Fruit Company located approximately seven miles southwest of the City of Marysville, in the County of Yuba, State of California, and commonly known as the New England Ranch where persons were employed and/or sought employment, for the purpose of inducing such employees and/or persons seeking employment by means of compulsion, and/or coercion and/or intimidation and/or threats and/or acts of violence and/or to quit his or her employment and/or to refrain from seeking or freely entering into said employment."

It appears to be well settled that where a statute is so framed that lawful as well as unlawful acts may be punished under it, a complaint charging a violation of the law must specifically set out the alleged unlawful conduct of the accused, and negative lawful conduct on his part. Otherwise, a complaint under such a law fails to charge a public offense, which is the situation we have in the case at bar. Ex parte Peterson, 119 Cal. 578, 51 P. 859; Ex parte McLaughlin, 16 Cal.App. 270, 116 P. 684; In re Hernandez, 64 Cal.App. 71, 220 P. 423.

Tested by the rule announced in the foregoing authorities, the complaint in the case at bar was clearly insufficient to charge the petitioners with the commission of a public offense. As I have heretofore pointed out, the ordinance is clearly invalid in so far as it purports to denounce as a public offense picketing by means of compulsion, coercion, or intimidation as such words are defined in the authorities relating to picketing cases. Such being the case, the complaint against petitioners charges them with the doing of lawful as well as unlawful acts, and is therefore insufficient to charge a public offense and is insufficient to support a judgment of conviction against petitioners for a violation of section 3 of said ordinance.

Furthermore, the complaint in the case at bar charges both in the conjunctive and disjunctive the violation of every act denounced by section 3 of the ordinance. This method of pleading is clearly improper. It is impossible to determine from such a complaint what specific acts or conduct of the defendants the prosecution intends to prove for the purpose of establishing their guilt. Under the complaint in this case, the defendants could have been found guilty of a violation of section 3 of said ordinance if they did nothing more than stand on the side of the road peacefully holding a piece of cardboard in their hands containing a statement that a labor dispute was in progress on the adjacent premises. Such a complaint is clearly insufficient to charge a public offense, and may be tested

on habeas corpus. Ex parte Greenall, 153 Cal. 767, 96 P. 804; In re Ah Sing, 156 Cal. 349, 104 P. 448.

The trial court made no attempt to segregate the charges in the complaint charging an alleged unlawful offense from those charging the commission of purely lawful acts. This is demonstrated not only by the allegations of the petition, but also by those of the return. Both allege that the jury found the defendants guilty "as charged in the complaint," and that the sentence imposed was imposed "on said conviction." I think it is clear that such a complaint could not authorize the trial court to try the accused for acts which are lawful, nor could it confer jurisdiction on the trial court to convict the accused for the doing of lawful acts, and to sentence them for the doing of such lawful acts. That is exactly what was done in the instant case. The defendants were found guilty "as charged in the complaint" and sentence was imposed "on said conviction." That means that the jury found that the defendants were guilty of all the "offenses" charged in the complaint, including those predicated upon those portions of the statute which are admittedly unconstitutional. It also means that the sentence was partially predicated on the unconstitutional portions of the statute. It certainly needs no citation of authority to establish the proposition that a trial court has no jurisdiction to enter a judgment convicting an accused of acts which are lawful. Petitioners have exhausted the only other remedy available to them, namely, an appeal. On that appeal the constitutionality of the statute was in issue, and the court to which the appeal was taken had jurisdiction to reverse the judgment of conviction and retry the case upon issues raised by a plea of not guilty of the unlawful act charged. Since this is so, habeas corpus is now the only remedy available to petitioners.

On a habeas corpus proceeding the only question involved is one of jurisdiction, namely, did the court below have the lawful authority to make or issue the particular order, judgment or process under attack. See the many cases from the United States Supreme Court, California Supreme Court and other state courts collected and commented on in 22 Am.Jur. 159, § 26; 13 Cal. Jur. 222, § 7. All courts are agreed on this point. While there is some confusion in the cases as to the meaning of the term "jurisdiction," as used in habeas corpus proceedings, the overwhelming weight of authority is to the effect that the term includes more than the question as to whether the trial court had jurisdiction over the person and subject matter. It is now settled that jurisdiction over the person and subject matter is not alone conclusive, but that the jurisdiction of the court to make or render the order or judgment that serves as the basis of the imprisonment is a proper subject of inquiry. Stated another way, jurisdiction to render the particular order or judgment in question is deemed as essential as is jurisdiction of the person or subject matter. See cases collected and commented on in 22 Am.Jur. 161, § 27; 76 A.L.R. 469.

Moreover, it must be remembered that petitioners were convicted in an inferior court and not by a superior court. As to such courts, no presumption will be indulged as to the regularity of the proceedings therein. It has been consistently held that, as to justice's courts, nothing will be presumed in favor of their jurisdiction. Antilla v. Justice's Court, 209 Cal. 621, 290 P. 43, and numerous other authorities cited in the foot note to 6 Cal.Jur. 10 Yr. Supp. 611, § 85.

Even if it be conceded, as erroneously held in the majority opinions, that there is a presumption of regularity of the proceedings in a justice's court, there is no basis for the application of such a rule here, for the reason that it affirmatively and conclusively appears on the face of the record itself that petitioners were charged, convicted and sentenced for the commission of acts which both this court and the Supreme Court of the United States have held to be beyond the power of the state or its political subdivisions to proscribe.

Tested by these standards, and keeping in mind the fact that the convictions were here had in an inferior court, the judgment of conviction is subject to collateral attack on habeas corpus. The trial court, although it may have had jurisdiction of the person and subject matter, had no jurisdiction to convict and sentence the petitioners for offenses based wholly or in part on an unconstitutional statute. While it is true that habeas corpus will not always issue where other remedies are available, it is settled that habeas corpus properly may be used to test the constitutionality of a statute (see cases collected and commented on in 13 Cal.Jur. 225, § 8), and that the fact that a remedy by appeal may exist is not a com-

plete bar to the proceeding. Certainly, where, as in this case, the petitioners appeal and raise the question of the constitutionality of the statute on such appeal, and, where the court to which the appeal is taken has complete jurisdiction to pass on the question, but, nevertheless affirms the invalid judgment, habeas corpus is available.

A writ of habeas corpus should therefore be granted and the petitioners discharged from custody.



19 Cal.2d 428

WHITECHAT et al. v. GUYETTE.

L. A. 17813.

Supreme Court of California.

Feb. 6, 1942.

Rehearing Denied March 6, 1942.

1. Automobiles ⇐181(2)

Where a motorist picks up a hitchhiker, the pleasure derived by the motorist is not a benefit sufficient to be considered "compensation" within meaning of statute providing that no person who as a guest accepts a ride in any vehicle on a highway without giving compensation for such ride has right of action against the motorist for injuries, unless motorist was intoxicated or guilty of willful misconduct. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensation".

2. Automobiles ⇐181(2)

The benefits of hospitality, companionship or good fellowship accruing to the owner or operator of an automobile as result of a simple pleasure trip are not "compensation" within meaning of statute providing that no person who as a guest accepts a ride in any vehicle without giving compensation for such ride, has right of action for injuries unless motorist was intoxicated or guilty of willful misconduct. Vehicle Code, § 403, St.1935, p. 154.

3. Automobiles ⇐181(2)

Even if there is something tangible in the way of contribution of money from occupant of automobile to motorist, a sharing of expenses or even full payment of gas and oil by occupant, on trip of purely social nature, there is not a benefit sufficient to be termed "compensation" within meaning of statute providing that no person who as a guest accepts a ride in a vehicle without giving compensation for such ride, has any right of action for injuries, unless resulting from intoxication or willful misconduct of the motorist. Vehicle Code, § 403, St.1935, p. 154.

4. Automobiles ⇐181(2)

If occupant of automobile and motorist are engaged in a business venture for their mutual advantage, and ride is an integral part of that business venture, then motorist is in receipt of benefits sufficient to be classified as "compensation" within meaning of statute providing that no person who as a guest accepts a ride in a vehicle without giving compensation for such ride has right of recovery for injuries unless they resulted from intoxication or willful misconduct of motorist, and the occupant becomes a "passenger" who may recover for injuries suffered as a result of the motorist's negligence. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Passenger".

5. Automobiles ⇐181(2)

Where the owner or operator of an automobile invites another to ride with him in the automobile with the hope of making some future profit as a result of such ride, there is "compensation" within meaning of statute providing that no person who as a guest accepts a ride in a vehicle without giving compensation for such ride has right of action for injuries unless they resulted from intoxication or willful misconduct of the motorist. Vehicle Code, § 403, St.1935, p. 154.

6. Automobiles ⇐181(2)

Where motorist is promised a money payment for transportation to a certain point, as where the occupant is a passenger in a taxicab, there is "compensation" within meaning of statute providing that no person who as a guest accepts a ride in a vehicle without giving compensation for such ride has right of action for injuries unless they resulted from intoxication or willful misconduct of the motorist. Vehicle Code, § 403, St.1935, p. 154.

7. Automobiles ⇐244(20)

In action against motorist for death of occupant of automobile which overturned,

evidence that purpose of trip was to take occupant of automobile to a meeting of an organization of which all occupants were members, did not warrant finding that deceased occupant was a "passenger" or that motorist received "compensation" within meaning of automobile guest statute. Vehicle Code, § 403, St.1935, p. 154.

8. Trial ⇐140(1)
Witnesses ⇐316, 317(2)

The jury is the sole judge of the credibility of witnesses and may believe all of the testimony of a witness or believe a part and reject parts as it may be convinced of the truth or falsity of such testimony, whether it arises from willfulness or mistake.

9. Automobiles ⇐244(20)

In action against motorist for death of occupant of automobile which overturned, evidence that purpose of trip was to take occupants of automobile to a meeting of an organization of which occupants were members, and that motorist received money from organization for making the trip, sustained jury's finding that deceased occupant was a "passenger" and that there was "compensation" within meaning of automobile guest statute, warranting recovery without proof of willful misconduct or intoxication of motorist. Vehicle Code, § 403, St.1935, p. 154.

10. Appeal and error ⇐930(1)

An appellate court must accept as true all evidence tending to establish correctness of finding or verdict on which judgment appealed from is based, consider evidence in aspect most favorable to prevailing party, and give such party benefit of every reasonable inference supporting his claim.

11. Automobiles ⇐244(20)

In action against motorist for death of occupant of automobile, which overturned, evidence supported jury's finding that motorist was negligent in operating automobile in unsafe mechanical condition because of rotten inner tube, driving at excessive speed, and failing to keep automobile under control and use proper care in bringing it to stop after sensing fact that tube was leaking. Vehicle Code, § 679, St.1935, p. 225.

In Bank.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by David Mitchael Whitechat, a minor, etc., and another against Ervine O. Guyette to recover for the wrongful death of David Whitechat, deceased. From a judgment in favor of the plaintiffs, the defendant appeals.

Judgment affirmed.

Prior opinions, 107 P.2d 300 and 115 P. 2d 814.

Chester O. Hansen and John Said, both of Fresno, for appellant.

Gray, Cary, Ames & Driscoll, of San Diego, amicus curiæ, on behalf of appellant.

Rae B. Carter and John D. Chinello, both of Fresno, for respondents.

PER CURIAM.

Defendant appeals from a judgment rendered by the trial court after a jury verdict awarding plaintiffs, as surviving widow and minor child, $8,000 damages for the alleged wrongful death of one David Whitechat. The death occurred when the automobile in which the deceased was riding overturned while being driven from Fresno to Stockton. The defendant owned and was driving the car at the time of the accident. The occupants of the car, other than defendant, were officers of the Fresno Chapter of the Young Men's Institute and, as such, were going to Stockton to attend a business meeting of that organization. The defendant was a member of the Young Men's Institute but was not an officer required to attend the meeting. One of the occupants of the car was a grand officer of the organization and was allowed mileage, which would amount to approximately $5. This money was to be turned over to the defendant.

A few miles north of Fresno, while driving at a speed of fifty miles per hour, defendant lost control of the car as the result of the flattening of the left rear tire, and the accident and death above referred to followed. The complaint alleged that Whitechat was riding as a passenger for compensation and that his death was the direct and proximate result of defendant's negligence. There were no allegations, nor was there any proof offered, of intoxication or wilful misconduct on the part of defendant.

Appellant argues that the evidence most favorable to the respondent shows, as a matter of law, that Whitechat was technically a "guest" and was not a "passenger for compensation," as alleged in the complaint, and that therefore the judgment cannot stand, as neither wilful misconduct nor intoxication was pleaded. Respondents argue

that whether or not compensation was given was a question of fact for the jury, and that by returning a verdict in their favor, the jury impliedly found that there was compensation either because the relationship between the parties was of a business rather than a social nature and the transportation was supplied in pursuance thereof for their mutual benefit, or because of the special tangible benefit to the appellant for furnishing the ride, viz., the promise of the $5 to defray expenses. The determinative question, therefore, on this appeal is whether Whitechat was a passenger or a guest without having given compensation for the ride, within the meaning of section 403 of the Vehicle Code, St. 1935, p. 154.

In approaching this problem it is well to keep in mind the observation made in the case of McCann v. Hoffman, 9 Cal. 2d 279, 282, 70 P.2d 909, to the effect that although the terms "passenger" and "guest" have for convenience been adopted for the purpose of distinguishing a person carried for hire or reward from one carried gratuitously, the chief concern of the courts should be the meaning of the phrase "without giving compensation" as used in section 403 of the Vehicle Code, and not a definition of the term "guest."

Since the enactment of the "guest law" in 1929 there have been numerous decisions both by this court and the District Courts of Appeal wherein it was determined that certain benefits passing from the occupant to the owner or operator of an automobile were or were not sufficient to be termed "compensation" within the meaning of what is now section 403 of the Vehicle Code. These cases have laid down certain general rules which may be used as a guide, but as noted in McCann v. Hoffman, supra, the nature of compensation as contemplated by the statute is as variable as the particular facts involved. Instead of attempting to formulate some new or further rule in the instant case, the better method would seem to be to place this case within one of the classifications of the previously decided cases, if we are justified in so doing by its facts.

[1-6] As a starting point reference might be made to a situation in which a person driving along a highway picks up a hitch hiker. It is clear that the pleasure derived from the doing of such an act of kindness is not a benefit sufficient to be considered compensation, and, in fact, the only tangible benefit is enjoyed by the hitchhiker. Nor is there any question of compensation involved if a driver of a car takes another to some social event which both desire to attend or to some other point of common destination solely for the pleasure derived from the taking. It is equally clear that the benefits of hospitality, companionship or goodfellowship accruing to the owner or operator of an automobile as the result of a simple pleasure trip are not benefits that may be considered compensation. Even if there is something tangible in the way of a contribution of money from the occupant to the driver, a sharing of expenses, or even in some cases full payment of gas and oil by the occupant, there is no benefit sufficient to be termed compensation if the trip is of a purely social nature. In the McCann case, supra, two couples were on a pleasure trip from San Mateo to Rio Del Mar, and there was a mutual understanding that the expenses of the trip would be shared equally. It was there held that such sharing of expenses was not compensation. See, also, Stephen v. Spaulding, 32 Cal.App.2d 326, 89 P.2d 683; Starkweather v. Hession, 23 Cal.App.2d 336, 73 P.2d 247; Rogers v. Vreeland, 16 Cal.App. 2d 364, 60 P.2d 585; Chaplowe v. Powsner, 119 Conn. 188, 175 A. 470, 95 A.L.R. 1177; Morgan v. Tourangeau, 259 Mich. 598, 244 N.W. 173; Clendenning v. Simerman, 220 Iowa 739, 263 N.W. 248. On the other hand, if the parties are engaged in a business venture for their mutual advantage and the ride is an integral part of that business venture, then the driver may be said to be in receipt of benefits sufficient to be classified as compensation, and the occupant becomes a "passenger," who may recover for injuries suffered as a result of the negligence of the driver. In the case of Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914, the driver and occupant were business associates, and the trip was for the purpose of taking some material to carpenters engaged in construction work on property jointly owned by them, and for the purpose of supervising said construction and the renting of the property. Under such circumstances compensation was said to have been given. See, also, Jensen v. Hansen, 12 Cal.App.2d 678, 55 P.2d 1201; Parrett v. Carothers, 11 Cal.App.2d 222, 53 P.2d 1023; Woodman v. Hemet Union High School District, 136 Cal.App. 544, 29 P.2d 257. Another situation where the benefit received has always been held to be compensation is that in which the owner or

operator invites another to ride with him with the hope of making some future profit as a result of such ride. One of the first and a typical example of this type of situation is the case of Crawford v. Foster, 110 Cal.App. 81, 293 P. 841, wherein a prospective purchaser of an automobile injured in an accident during a demonstration was held not to be a "guest" without having given compensation, because of the hope of a future sale on the part of the driver. See, also, Piercy v. Zeiss, 8 Cal.App.2d 595, 47 P.2d 818; Riley v. Berkeley Motors, Inc., 1 Cal.App.2d 217, 36 P.2d 398. The final and most obvious situation in which it may be said that compensation has been given is that wherein an owner or operator is promised a money payment for transportation to a certain point. The clearest example of this is a passenger in a taxicab. Chaput v. Lussier, 132 Me. 48, 165 A. 573. If the person injured is one of a class which the owner or operator was paid to transport, then it is immaterial whether or not that particular person made the payment. Smith v. Fall River Joint Union High School District, 118 Cal.App. 673, 5 P.2d 930.

Having outlined the classifications made by the appellate courts of this and other states, there remains the question whether the facts in the instant case place it in one of the above-mentioned categories.

Respondents contend that the jury could have found the deceased to be a "passenger" or that the defendant received compensation, under the authorities, for two different reasons: First, because the relationship between the parties was that of business and the transportation was supplied in the pursuit thereof for their mutual benefit; and second, because of the promise of payment of the $5 for furnishing the ride.

[7] In order to uphold the respondents' first contention, it must be shown that the appellant and the deceased were engaged in a business venture for their mutual advantage and that the ride was an integral part of that business venture. No such showing has been made. It is true that all of the occupants of the car were members of the Young Men's Institute, and it might be said generally that the trip was being made for the purpose of attending a meeting of that organization, but, specifically, the four occupants of the car other than appellant were attending a business meeting which, as officers, they were required, or at least expected, to attend. The appellant, although a member, was not an officer and was not required to attend. Therefore, as between appellant and deceased, it cannot be said that the trip was an integral part of a business venture for their mutual advantage, as in the case of Walker v. Adamson, supra, where the trip was being made for the purpose of taking material to carpenters who were working on property jointly owned by the driver and the injured occupant. Disregarding for the moment the promised money payment, the relationship between the appellant and the deceased may be said to be merely one of a social nature analogous to that existing in the case of McCann v. Hoffman, supra, wherein the parties were on a pleasure trip. From this standpoint then the benefit received by appellant was not sufficient to be termed compensation, within the meaning of section 403 of the Vehicle Code.

Respondents' second contention is that whether the promise of payment of $5 was compensation as in the case of Smith v. Fall River Joint Union High School District, supra, or merely a sharing of expenses as in the McCann case, supra, was a question of fact for the jury, and that body, by rendering a verdict for respondents, impliedly found that the payment was compensation, which finding is conclusive on this court. In answer to this contention appellant argues that in view of the evidence presented, the question is one of law, and as a matter of law under McCann v. Hoffman, supra, deceased was a "guest" and not a "passenger," or in other words, that the promise of payment of $5 was merely a promise to share expenses and not compensation.

The record discloses that the only evidence in regard to the conditions under which appellant agreed to take his car and drive to Stockton was given by the appellant himself. Prior to the trial and on June 29, 1939, his deposition was taken under section 2055 of the Code of Civil Procedure. His testimony on that occasion was, in part, as follows:

"Q. (By Mr. Carter): Now, you say, you were driving these boys up there to that meeting? A. That is right.

"Q. And the Y. M. I. was paying you for your gas and oil a certain amount of money *for driving up there?* (Emphasis added.) A. That is right.

"Q. Some $9. A. I think it was $5.

"Q. $5? A. Yes, sir."

[8, 9] Some four months later at the trial, upon being called as a witness in his own behalf, appellant testified that he agreed to take the officers to Stockton before the $5 offer was made; that subsequent to that agreement, the grand officer told appellant that he would give him the $5, which he could collect from the Young Men's Institute as mileage, to defray appellant's expenses on the trip; and that he (appellant) accepted the offer but still insisted that he was going to take the men to Stockton because of his friendship for them and in the interest of the organization, and not because of the promised money payment. If this latter testimony were accepted as true, then it would follow that the promise of the $5 payment was merely a promise to share expenses, and not a promise of compensation. However, "The jury is the sole judge of the credibility of the witnesses, and may believe all of the testimony of a witness or believe a part and reject parts as it may be convinced of the truth or falsity of such testimony, whether it arises from willfulness or mistake." Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 503, 55 P.2d 870, 882. The jury could therefore have believed that portion of appellant's testimony given at the trial in which he stated that he agreed to make the trip before any mention of payment was made, and the further portion thereof wherein he stated that he was making the trip only out of friendship for the men and in the interest of the organization. On the other hand, the jury could have accepted as true only that portion of the deposition in which the appellant stated that he was being paid $5 by the Y. M. I. for his gas and oil "for driving up there." Because of the verdict in favor of the respondents, it must be assumed that the jury accepted as true the statement made in the deposition, and that it rejected the statements made at the trial in regard to the promised $5 payment. At the time of giving his deposition, appellant made no claim that he was driving the deceased and the other occupants of his car to Stockton in the interest of the organization and on account of his friendship for them. Nor did he then state that he was not making the trip for the $5. From the statement in the deposition the jury reasonably could have concluded, and apparently did conclude, that the $5 payment was promised and the promise was accepted as compensation for making the trip to Stockton. In view of the evidence presented, it cannot be said, as a matter of law, that the promise of payment of the $5 was merely a promise to share expenses. The jury impliedly found that the payment was compensation and such finding, on a question of fact, is conclusive on this court.

[10, 11] Appellant further contends that the evidence is insufficient, as a matter of law, to support the implied finding of the jury that he was negligent in the operation of the automobile. This point was ably discussed by the District Court of Appeal, Fourth Appellate District, in an opinion written by Justice Griffin prior to the granting of a hearing by this court. In his petition for a hearing before this court, appellant did not question the disposition of this contention as made by the District Court of Appeal. Nothing further said by this court could improve the disposition there made. Therefore, that portion of the opinion of the District Court of Appeal dealing with the negligence of appellant is hereby adopted as expressing the views of this court. Said portion of the opinion, [107 P.2d 300, 304] is as follows:

"Appellant insists that the record does not establish that he failed to exercise ordinary care, and endeavors to defend on the doctrine of unavoidable accident. We are again confronted with the rule, as admitted by appellant, that in passing upon the merits of an appeal an appellate court will and must accept as true all evidence tending to establish the correctness of the finding or verdict and must consider the evidence in the most favorable aspect towards the prevailing party and give that party the benefit of every inference that can reasonably be drawn in support of his claim. Cope v. Goble [39 Cal.App.2d 448, 453], 103 P.2d 598.

"Appellant argues that 'the Gods of fortune do not smile on all persons equally. As a result, some people do not have the financial wherewithal to buy new automobiles, or in the event they buy used automobiles, to buy new tires and tubes "all around," ' and contends that appellant acted as a reasonable and prudent person would act under the same or similar circumstances after buying a second-hand car, and that his failure to dismount the rear tires on the automobile on the chance that he might find that the inner tubes were 'lifeless', was not negligence. It is further argued that the owner of an automobile does not owe an absolute duty to others that his automobile

shall be in a safe condition, but he is only bound to use reasonable care to see that his vehicle is in proper condition to use on the highways, citing Bolin v. Corliss Co., supra [1928, 262 Mass. 115, 159 N.E. 612]; Coppedge v. Blackburn, supra, [15 Tenn.App. 587]; and Kemp v. Stephenson, supra [139 Misc. 38, 247 N.Y.S. 650].

"Respondents claim that the record supports the finding that appellant was negligent in several respects: (1) That he violated section 679 of the Vehicle Code forbidding the operation of automobiles that are not in safe mechanical condition and which would endanger the driver or other occupant or any person upon the highway; (2) that he violated the speed laws of the state; and (3) that he failed to keep his automobile under control.

"As to the first claim, the rule set forth in 2 California Jurisprudence Ten Year Supplement, section 157, page 234, is quoted to the effect that: 'The statute declares that it shall be unlawful for any person to drive a vehicle unless it is in "such safe mechanical condition" that its operation on the highway shall not endanger the driver or an occupant of the vehicle or any person upon the highway. "It is the duty of one operating a motor vehicle to see that it is so equipped in order that it may at all times be under control and not become a menace to other traffic on the highway." Proof having been made that the collision was occasioned by the defective condition of the party's vehicle, the issue as to his responsibility for the happening of the calamity depends upon the showing as to whether he knew or ought to have known of the existence of the defect.'

"An instruction to this effect was given in Brandes v. Rucker-Fuller Desk Co., 102 Cal.App. 221, 282 P. 1009, where an automobile left the highway and ran upon a sidewalk and injured a pedestrian due to the breaking of a portion of a steering gear, the evidence tended to show that the vehicle had been used to such an extent that its safety was a matter of doubt. See, also, Coppock v. Pacific Gas & Electric Co., 137 Cal.App. 80, 30 P.2d 549; Smith v. Brown, 102 Cal.App. 477, 283 P. 132; Maus v. Scavenger Protective Ass'n, 2 Cal.App.2d 624, 39 P.2d 209; Rath v. Bankston, 101 Cal.App. 274, 281 P. 1081; Silvey v. Harm, 120 Cal.App. 561, 8 P.2d 570; Dunn v. Shamoon, 37 Cal.App.2d 486, 99 P.2d 1113.

"The question then presented is this: Do the facts in the instant case come within the rule which would impose negligence on the part of appellant? The force of the evidence on the mechanical condition of the car was that the left rear tire did not blow out but went flat because the inner tube was 'rotten' and in a dangerous condition. A portion of the tube bore evidence of five or six patches. It was incapable of retaining air. The jury saw that portion of the inner tube and saw a demonstration of its condition. That the inner tube was not in a safe condition is not open to doubt.

"From the evidence it appears that appellant was told by the salesman of the used car, at the time of the sale, that all of the tires and tubes were in good condition. Observation subsequently informed appellant, however, that the spare tire was in a bad condition, notwithstanding the salesman's statement. A few months after the sale, again notwithstanding the salesman's statement, and after a puncture appellant found that the left rear tire and tube were in such bad condition that they also had to be thrown away. This should have placed appellant upon notice of the fact at least, that the salesman's representation as to those particular tires and tubes was somewhat erroneous and of the added fact that if those tires and tubes were in such bad condition the same might be true of the others.

"The added and admitted fact that appellant was operating his automobile, of somewhat ancient vintage, with tires and tubes of the kind described, on a warm day, at 50 miles per hour, may have been prima facie unlawful, and the jury had the right to determine that the operation of the vehicle under the surrounding circumstances, at the excessive speed, constituted negligence. Secs. 511 and 513, Vehicle Code.

"The record further discloses testimony given by a witness for the respondents who had been in the automobile tire and garage business for 32 years, and who more or less qualified as an expert on the subject. His evidence substantiates respondents' claim that appellant did not use the proper care in bringing the car to a stop after he sensed the fact that the tube was leaking or that he was having tire trouble. It reads in part as follows:

"'Q. (By Mr. Hansen): But I am asking you based upon what you saw, that the marks got wider as they went along, that it appears to you as a tire expert which you say you are, that the air did not leave that tire in just one explosion but went out

gradually? A. Gradually, yes, sir. * * Q. He (Guyette) said in his deposition that he couldn't control it, he was permitting it to stop without applying the brakes? A. Yes, sir. Q. As a tire man you would say that was the proper way to stop a car when you have a flat tire? A. No, sir. Q. What do you do, put on your brakes? A. No, sir. Q. What do you do? A. The minute you feel that tire flat, if you are going very fast, the best thing to do is slow it down a little and then when you come to your crawling speed you will have to release it, and when you get below that again, you put your brakes on again. * * * Q. But you wouldn't say that he did the wrong thing by not using his brakes hard when he felt the tire go down on him? A. Yes, sir, I do. I think that could have been avoided if he had been a little careful in putting them on quickly and using them at the proper time.'

"In Brandes v. Rucker-Fuller Desk Co., supra, it is held that if the question of whether or not the automobile was being operated in a careless manner was one from which reasonable minds might draw different conclusions, the determination of the jury that it was being carelessly operated was controlling on appeal."

For the foregoing reasons the judgment is affirmed.



19 Cal.2d 439

DRUZANICH v. CRILEY et al.

L. A. 17817.

Supreme Court of California.

Feb. 6, 1942.

1. Automobiles ⇐181(2)

Where occupant and driver of automobile were delegates from their local union to district conference, but the attendance of one was not necessary for the enjoyment of the benefits of attendance by the other, regardless of whether the conference was of a business or social nature, the driver and occupant were not engaged in a business venture for their mutual advantage so as to constitute occupant a "passenger", who had given "compensation" for the ride within meaning of Vehicle Code, and entitled as such to recover damages if driver negligently injured him. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensation" and "Passenger".

2. Automobiles ⇐181(2)

An occupant of automobile, who was tendered and accepted transportation on condition that he assist in driving, was a "passenger", whose promise to assist in driving was a special tangible benefit and constituted "compensation" for the transportation within Vehicle Code, so as to entitle him to recover damages if driver negligently injured him. Vehicle Code, § 403, St.1935, p. 154.

3. Appeal and error ⇐1071(1)

In action against driver and owner of automobile for injuries sustained by an occupant thereof when automobile left highway, trial court's error in finding that occupant was not a passenger but was riding in the automobile as a guest without giving compensation for the ride within meaning of Vehicle Code did not require a reversal of judgment denying recovery, unless trial court also erred in finding that the accident was not proximately due to driver's negligence. Vehicle Code, § 403, St.1935, p. 154.

4. Automobiles ⇐242(2)

In action against owner and driver of automobile for injuries sustained by occupant, who was riding in rear seat, when automobile, which was under exclusive control of driver and without any voluntary action of occupant, left the highway while rounding a left curve and plunged down an embankment, the doctrine of "res ipsa loquitur" was applicable to raise an inference of negligence of driver.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

5. Negligence ⇐136(6)

The application of the doctrine of "res ipsa loquitur" does not give a plaintiff an absolute right to a judgment, but where the defendant produces evidence to rebut the inference of negligence arising under the doctrine, it is ordinarily a question of fact whether such inference has been dispelled.

6. Negligence ⇐121(2)

The inference of negligence, arising under the doctrine of "res ipsa loquitur", is in

itself "evidence", which may not be disregarded by the trier of facts, and in the absence of any other evidence as to negligence necessitates a verdict in favor of the plaintiff, since it is incumbent on the defendant to rebut the prima facie case thus created by showing that defendant used the care required of him under the circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

7. Automobiles ⇐244(20)

In action against owner and driver of automobile for injuries sustained by passenger, who was riding in rear seat when automobile, while rounding left-hand curve at a speed of 50 to 55 miles per hour, left the highway and plunged down an embankment, finding of negligence on part of driver was required under the evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by George Druzanich against Dorothy Criley and others for injuries sustained by plaintiff, while riding in an automobile driven by named defendant. From a judgment in favor of defendants, plaintiff appeals.

Judgment reversed.

Prior opinions, 107 P.2d 445 and 115 P. 2d 810.

Edward M. Raskin and Belmore D. Goulden, both of Los Angeles, for appellant.

Joe Crider, Jr., and John J. Ford, both of Los Angeles, for respondents.

PER CURIAM.

Plaintiff appeals from a judgment in favor of defendants after trial by the court without a jury. The action was brought against the operator and the owners of an automobile by an occupant thereof to recover damages for personal injuries. The third amended complaint contained three causes of action, the first two of which were abandoned at the trial. It was alleged in the third cause of action that plaintiff was a "passenger" in the automobile and that defendant Dorothy Criley was negligent in its operation. The trial court found that plaintiff was not a "passenger" but was riding in the automobile as a "guest without giving compensation for such ride." It further found that the defendant driver was free from negligence in the operation of the car in which plaintiff was riding at the time he sustained his injury.

From the above statements it may be seen that this case involves a problem already considered in the case of Whitechat v. Guyette, Cal.Sup., 122 P.2d 47, filed today, viz., the meaning of the phrase "without giving compensation" as used in section 403 of the Vehicle Code, St.1935, p. 154.

Appellant and respondent Dorothy Criley were delegates to a conference in Los Angeles of the United Cannery and Agricultural Workers of America, a labor union affiliated with the C. I. O. The conference was called by District No. 2 of this union for the purpose of forming a set of rules and the policy for this district, which comprises California, Nevada and Arizona. The parties were delegates from separate branches of the same local. The means of transportation to the conference were discussed in the union office in Sunnyvale. Those present were appellant, respondents Dorothy and Richard Criley, Lloyd Lehman, another delegate, and Luke Hinman, who apparently was not a delegate but who desired to go to Los Angeles. Dorothy Criley asked her husband Richard if he would let her use their car so that they could all go together. Criley said that he didn't feel that she should use the car and drive all the way to Los Angeles, but if the others would assist her in driving, she could have the car. The parties all agreed to this, and they started that evening. Dorothy Criley drove from Sunnyvale to King City; appellant drove from there to Santa Maria; Hinman from Santa Maria to Santa Barbara, where respondent Dorothy Criley again took the wheel and drove until the time of the accident. There was no definite schedule or plan as to distances each was to drive, and the shifts were made as each driver felt in need of a rest. Lehman, who was to attend an early conference, did not drive at all.

The accident occurred at about 7:30 o'clock in the morning. Appellant was in the back seat and because he was dozing at the time, his testimony is of little aid as to the events leading up to or the cause of the accident. Respondent Dorothy Criley didn't testify at the trial, but according to her deposition she was driving at a speed of fifty or fifty-five miles an hour

and came to a left curve. She was sleepy because of the all-night ride and blinked her eyes on the curve. The car was traveling on the outer lane and the wheels hit a soft shoulder. Respondent lost control and the car went over an embankment, turning over several times. Appellant was thrown out of the car and suffered the personal injuries for which he now seeks to recover damages.

[1] Appellant first argues that he had given "compensation" for the ride within the meaning of section 403 of the Vehicle Code and was thus a "passenger," who could recover if the driver was negligent, because the parties were engaged in a business venture for their mutual advantage and traveling in contemplation of their mutual business. This same contention was made by the respondents in the Whitechat case, supra, and we there held that the relationship between the driver and the deceased was not such as to bring the case within that group of cases headed by Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914, which stands for the above-mentioned proposition. The relationship in the Whitechat case differs from that presented here in that in the former case the driver, although a member of the Young Men's Institute, was not required to attend the meeting in Stockton, whereas in the instant case both parties were delegates to the conference. However, the instant case still does not come within the Walker v. Adamson classification. It is true that both parties desired or, as delegates, were required to attend the conference. It is also true that each would be benefited by individual attendance. However, the attendance of one was not necessary for the enjoyment of the benefits of attendance by the other. This being so, it becomes immaterial whether the conference was of a business or social nature. The case of Doherty v. Edwards, 227 Iowa 1264, 290 N.W. 672, 674, is illustrative of that type of situation in which it may be said that compensation was given because the trip was an integral part of a business venture for the mutual advantage of the parties. There the driver was a supervisor of federal loans and the occupant was interested in borrowing some money. The court stated that "Presumably the presence of both was necessary." In the instant case either the appellant or respondent Dorothy Criley could have enjoyed the benefits of the conference without the presence of the other. The fact that the parties were both interested in the general objective of the trip, viz., the attending of the conference, is not the controlling factor. If an attorney were transporting a client to a place where the client's case was to be heard, then it might be said that the client would be a "passenger" and not a "guest" who had not given compensation, but if two attorneys were riding to a certain point in a car owned by one for the purpose of appearing on different matters in the same court, no such relationship would exist unless some tangible benefit had passed from one to the other.

[2, 3] The qualification of the last statement brings us to the second contention of appellant. That contention is that the promise to aid in the driving was sufficient to take him out of the category of a "guest" who had not given compensation. In opposition to this respondents argue that this sharing in the driving was merely incidental and analogous to the sharing of expenses as in McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909. Cases may arise in which a sharing of the driving might be a "courtesy of the road" and thus not of sufficient benefit to be considered compensation, but this is not true in the instant case. Reference to the testimony of both parties in regard to the conversation prior to the trip shows that the offer to transport appellant was conditional upon his sharing in the driving. This appellant agreed to do, and it was just as much payment for transportation as a railroad fare. Respondent Dorothy Criley desired to take her husband's car to Los Angeles, but she could not do so unless appellant and the others promised to share in the driving. Appellant's promise then was the "special tangible benefit" which was the "motivating influence for furnishing the transportation" referred to in the McCann case, supra, 9 Cal. 2d at page 286, 70 P.2d at page 913, and must be termed compensation. The instant case cannot be distinguished from the case of Lerma v. Flores, 16 Cal.App.2d 128, 60 P.2d 546, wherein the plaintiff was invited by the defendant to ride with him so that he [plaintiff] might show the defendant which route they should follow. Nor does it differ materially from the case of Haney v. Takakura, 2 Cal.App.2d 1, 37 P.2d 170, in which the plaintiff, who had experience in selling oranges, was asked to accompany the defendant driver into town to aid the

defendant in selling his crop of oranges. In each case there was a special tangible benefit passing from the occupant to the driver which was sufficient to be termed compensation within the meaning of section 403 of the Vehicle Code. The case of Mayer v. Puryear, 4 Cir., 1940, 115 F.2d 675, cited by respondents, is clearly distinguishable in that there the furnishing of transportation was not made conditional upon the sharing in the driving. We are, therefore, of the opinion that the trial court erred in finding that appellant was not a "passenger" but was riding in the automobile as a "guest without giving compensation for such ride." However, this conclusion is not sufficient to compel a reversal of the judgment unless it can be said that the trial court also erred in finding that the accident was not proximately due to negligence on the part of respondent Dorothy Criley.

[4] In support of his contention that the trial court erred in finding respondent Dorothy Criley free from negligence, appellant urges that the doctrine of res ipsa loquitur should have been applied to the instant situation and that the purported "explanation" of the cause of the accident offered by said respondent was, as a matter of law, insufficient to rebut the inference of negligence created by the application of that doctrine. Under the circumstances here presented, viz., the instrumentality being in the exclusive control of said respondent; the accident being such that in the ordinary course of things it would not have happened if the respondent driver had used proper care; and the injury having occurred without voluntary action on the part of appellant, the res ipsa loquitur doctrine must be held to have been applicable. See Godfrey v. Brown, 220 Cal. 57, 29 P.2d 165, 93 A.L.R. 1092; Ellis v. Jewett, 18 Cal.App. 2d 629, 64 P.2d 432; Cookson v. Fitch, 116 Cal.App. 544, 3 P.2d 27; Queirolo v. Pacific Gas & Elec. Co., 114 Cal.App. 610, 300 P. 487; Ireland v. Marsden, 108 Cal.App. 632, 291 P. 912; Crooks v. White, 107 Cal. App. 304, 290 P. 497; Brown v. Davis, 84 Cal.App. 180, 257 P. 877.

[5, 6] The application of the doctrine does not give a plaintiff an absolute right to a judgment in every case. Raymer v. Vandenbergh, 10 Cal.App.2d 193, 51 P.2d 104; Nicol v. Geitler, 188 Minn. 69, 247 N.W. 8; Sweeney v. Erving, 228 U.S. 233, 33 S.Ct. 416, 57 L.Ed. 815. It does not shift the burden of proof, and when the defendant produces evidence to rebut the inference of negligence, it is ordinarily a question of fact whether the inference has been dispelled. Anderson v. I. M. Jameson Corp., 7 Cal.2d 60, 59 P.2d 962; Scarborough v. Urgo, 191 Cal. 341, 216 P. 584; Ireland v. Marsden, supra; Crooks v. White, supra. However, the trier of fact cannot arbitrarily disregard the inference. As stated in Ales v. Ryan, 8 Cal.2d 82, 99, 64 P.2d 409, 417: "The rule is well settled by a multitude of decisions of the appellate courts of this state to the effect that the inference of negligence which is created by the rule res ipsa loquitur is in itself evidence which may not be disregarded by the jury and which in the absence of any other evidence as to negligence, necessitates a verdict in favor of the plaintiff. It is incumbent on the defendant to rebut the prima facie case so created by showing that he used the care required of him under the circumstances. The burden is cast upon the defendant to meet or overcome the prima facie case made against him."

[7] In the instant case respondent Dorothy Criley's explanation in no way indicates that she was exercising due care while driving the car. On the contrary, it indicates a lack of due care. She testified that she was driving at a speed of 50 to 55 miles per hour; that she was sleepy because they had not slept all night; that she started around a left-hand curve on the outer lane; that she blinked her eyes on the curve; and that the car hit a soft shoulder and went over the embankment. Other evidence shows that the sun was shining and, in so far as appears from the record, the pavement was dry. The windshield on the car was clean and visibility ahead was clear. There is no evidence or even suggestion that there was any gravel or other substance on the pavement which would have caused the car to skid; that any tire on the car became flat or was in a condition other than normal; that the steering apparatus was not operating properly; or that the sun or anything else blinded the respondent driver. Nevertheless the car left the road with the result above mentioned. Automobiles when driven with due care and caution do not leave the highway under these circumstances. Respondent Dorothy Criley has failed completely to rebut the inference of negligence raised by the attending circumstances. Such failure necessitates a finding of negligence in ac-

cordance with the inference. Ales v. Ryan, supra; Seney v. Pickwick Stages, Northern Div., 206 Cal. 389, 274 P. 536; Ireland v. Marsden, supra. Therefore the trial court erred in finding said respondent free from negligence.

The judgment is reversed.

GIBSON, C. J., did not participate herein.



49 Cal.App.2d 714

De ARYAN v. AKERS.

Civ. 11895.

District Court of Appeal, First District, Division 1, California.

Feb. 17, 1942.

Hearing Denied April 16, 1942.

Contracts ⇐329

Action on verbal contract, providing that if Board of Equalization was legally authorized to collect sales tax from defendant who printed newspaper owned and published by plaintiff plaintiff's protest should be void, but if court ruled that collection of tax from defendant by the Board was illegal, the sales tax was to be returned to plaintiff, was properly dismissed as "premature" where undisputed evidence showed that the controversy was still pending before the Board of Equalization.

See Words and Phrases, Permanent Edition, for all other definitions of "Premature".

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action on a contract by C. Leon de Aryan against Roy O. Akers. Judgment for plaintiff, and defendant appeals.

Reversed.

Hearing denied; TRAYNOR, J., did not participate.

Roy O. Akers in pro. per.

C. Leon de Aryan in pro. per.

KNIGHT, Justice.

Plaintiff sued on a verbal contract to recover $2.10. The action was brought and tried in the Superior Court of San Diego County. Findings of fact and conclusions of law were waived, and judgment was entered in favor of plaintiff for the sum demanded, from which judgment defendant appeals. The grounds of appeal, as defendant states them in his brief, are: "First. That the evidence is insufficient to justify the decision. Second. That said decision is against the law." Each point is well taken.

It appears from the admitted allegations of the complaint and the undisputed evidence that the plaintiff, C. Leon de Aryan, during the month of January, 1940, paid to the defendant, Roy O. Akers, $70 for printing one weekly issue of "The Broom," a weekly newspaper owned and published by plaintiff, and at the same time paid to defendant, under protest, the additional sum of $2.10 as a sales tax. The latter sum, so the complaint alleges, was paid pursuant to a verbal agreement between the parties that if the Board of Equalization was legally authorized to collect a sales tax from the defendant Akers, plaintiff's protest should be deemed void; "but if the courts were to rule said collection of a 3 per cent sales tax on $70, in the sum of $2.10 from defendant Akers by the Board of Equalization to be illegal for any cause whatever, said sales tax of $2.10 must be returned to plaintiff." In other words, according to the terms of the verbal agreement pleaded and proved, plaintiff's right to the return of the $2.10, hence his right to bring an action against the defendant for the recovery thereof, accrued only upon the happening of a condition precedent, to-wit, a court determination that defendant was not liable for the payment of said tax; and nowhere in the complaint is it alleged, nor was any evidence introduced to show, nor does plaintiff claim, that prior to the commencement of this action any such court ruling was rendered herein or in any case involving a like situation. To the contrary, the undisputed evidence shows that at the time of the trial herein the controversy between defendant and the Board of Equalization as to whether defendant was liable for the payment of the tax was still pending before said board; and that no court action has ever been instituted to collect the tax. Therefore, under the terms of the verbal agreement sued upon, no cause of action existed in favor of plaintiff for the return of the $2.10 at the time he commenced this action.

In view of our conclusion that the action has been prematurely brought, it is not necessary to discuss the question as to whether such action was properly brought in the superior court.

The judgment is reversed.

PETERS, P. J., and WARD, J., concurred.



49 Cal.App.2d 692

KENNINGTON v. NEFF.

Civ. 12872.

District Court of Appeal, Second District, Division 2, California.

Feb. 11, 1942.

Hearing Denied April 9, 1942.

Appeal and error ⇐994(3)

In action for injuries sustained in an encounter in a saloon whether plaintiff was too drunk at time of encounter to recall and later to testify concerning what occurred, whether plaintiff's testimony was contradictory in itself and to certain extrajudicial statements he had made, and whether plaintiff should have corroborated his testimony, were matters for the trial court.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by George J. Kennington against Art Neff to recover damages for personal injuries. From a judgment for plaintiff, defendant appeals.

Affirmed.

Courtney A. Teel, of Los Angeles, for appellant.

John N. Hurtt, of Los Angeles, for respondent.

HANSON, Justice pro tem.

This is a suit to recover damages for personal injuries suffered by a quarrelsome drunk who invited a physical encounter in a saloon and, in the language of the street, got all and more than he bargained for. As the trial court saw fit to award him damages in the sum of $3,000, defendant is here contending that there was no substantial evidence to sustain the judgment. In support of that contention defendant, while conceding that there was a direct conflict in the evidence, insists that no credence can be given to the testimony of the plaintiff for five reasons: First: Because plaintiff was too drunk at the time of the encounter to recall and later to testify to what occurred. Second: Because plaintiff's testimony was uncorroborated. Third: That plaintiff's testimony was not only contradictory with itself but with certain extra-judicial statements he had made. Fourth: That had the plaintiff's testimony been true he should have corroborated it by his drinking partners, who were available as witnesses. Fifth: That plaintiff not having called his drinking partners to corroborate him, it was obvious that they too had been too drunk to have a recollection of the events so they could testify.

While we think these arguments might well have been made to the trial court, they cannot be entertained here. The trial judge saw and heard the plaintiff, the defendant and the bartender who testified for the defendant. He evidently disbelieved the defendant and his witness and believed the testimony of the plaintiff. As the testimony of the plaintiff—contradictory in certain immaterial parts—was adequate to sustain his cause of action, it rested with the trial court to determine whether it was based on memory of the events or was fabricated for want of recollection. Under those circumstances we must accord full weight to the holding below.

Moreover, we have read the entire record and are satisfied that no grounds for reversal exist, either on the question of liability or as to the amount of the judgment.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concurred.

49 Cal.App.2d 489

FREDERICK v. NORTH SIDE WATER CO. OF WALNUT.

Civ. 12864.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1942.

1. Action ⇐6

A complaint alleging that plaintiff had a right to "allocate" shares of defendant corporation's stock which it might issue and sell, that corporation represented to plaintiff that it could not borrow $10,000 to pay a creditor unless it could settle controversies with plaintiff, that contract disposing of controversies was entered into, that plaintiff performed covenants thereof, that defendant gave notice of cancellation of contract, and that defendant refused all of plaintiff's demands to fulfill contract or return to plaintiff the rights, interests, privileges, beneficial interest, and equities that he had enjoyed before execution of contract and praying for declaratory relief and damages, was demurrable.

2. Action ⇐6

To be entitled to declaratory relief, it is not enough that there be a controversy, but it must be a justiciable controversy, and the specific claims made must be set forth together with the ultimate facts to sustain them.

3. Appeal and error ⇐949

In absence of a showing of abuse of the discretion given to the trial court to grant or deny declaratory relief, the reviewing court is without power to review.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Wilson D. Frederick against the North Side Water Company of Walnut, Cal., for declaratory relief and damages. From a judgment entered on an order sustaining a demurrer to plaintiff's second amended complaint without leave to amend, plaintiff appeals.

Affirmed.

John E. Martin, of Los Angeles, for appellant.

Horowitz & McCloskey, of Los Angeles, for respondent.

HANSON, Justice pro tem.

This is an appeal from a judgment entered upon an order sustaining a demurrer of defendant corporation to plaintiff's second amended complaint without leave to amend. The action was for declaratory relief, with a prayer for damages in the sum of $6,463. The grounds of demurrer were: (1) that no cause of action was stated and (2) that the complaint was uncertain, ambiguous and unintelligible.

[1] The complaint alleges that during the period 1926 to 1935 plaintiff had a right to "allocate" such shares of defendant company's corporate stock as it might issue and sell; that defendant company in 1934 represented to plaintiff that it was indebted to a creditor in the sum of $10,000 and that it was essential, if it were to continue in business, that it borrow this sum so as to pay the creditor; that the defendant company represented to the plaintiff that it could not borrow the money unless it could settle its controversies with him and eliminate his right in the future to allocate any of its corporate stock; that a written contract (annexed to the complaint) was entered into that disposed of the controversy; that the plaintiff on his part promptly complied with all the covenants thereof but that defendants did not; that two years later—in 1937—the company gave notice of its cancellation of the contract; that thereafter plaintiff demanded of defendant company that it fulfill the terms of the contract or, in the alternative, that it "return to him the rights, interests, privileges, beneficial interest and equities" that he had "held, owned and enjoyed prior to" the execution of the written contract mentioned; that defendant had refused all of plaintiff's demands, and that an actual controversy exists between the parties concerned relative to their respective legal rights and duties. The prayer is for a declaration as to the rights, privileges, equities and duties of the respective parties and for a judgment of $6,463 in favor of plaintiff.

What is meant by the pleader by his reference in the complaint to allocating stock is not stated, nor is there any statement of the "rights, privileges or equities" he claims subsisted in the period prior to the written contract. No factual basis for a recovery of money is alleged. Moreover, there is nothing in the complaint which would give the trial judge the slightest notion as to what the supposed con-

troversy was about, except for what little he could gather from the complaint, the substance of which we have narrated here.

[2, 3] In presenting the case to us appellant presses the argument that an actual controversy existed between the parties and hence that declaratory relief was proper even though there was a breach of the obligation by the defendants. We think the contention overlooks the fact that it is not enough that there be a controversy. It must be justiciable. Moreover, the specific claims made must be set forth together with the ultimate facts to sustain them. The complaint here falls far short of doing so. If plaintiff wishes to rely on the contract his remedy is an action at law for damages, which on the facts shown is adequate. If he does not choose to stand on the contract but instead to enforce such rights as he had prior thereto, he has not shown by the allegations of his complaint that he is entitled to a declaratory judgment. As no abuse of discretion given to the trial court to grant or deny declaratory relief is shown, we are without power to review. See Monahan v. Department of Water & Power, 48 Cal.App.2d 746, 120 P.2d 730.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.



49 Cal.App.2d 537

SHEEHY v. ROMAN CATHOLIC ARCHBISHOP OF SAN FRANCISCO et al.

Civ. 11781.

District Court of Appeal, First District, Division 1, California.

Feb. 6, 1942.

1. Judgment ⇐102, 150

Where a complaint is amended in substance as distinguished from a mere matter of form, it operates to open a default, and it must be served on all adverse parties affected including the defaulting party, since the default on the original complaint is limited in its effect to that complaint, and the defaulting party is entitled to opportunity to be heard under the allegations of the complaint on which judgment is sought against him.

2. Pleading ⇐417

Where a party does not leave his pleading where the order sustaining a demurrer has left it, he "waives" any error on the part of the trial court in sustaining the demurrer.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

3. Pleading ⇐417

Plaintiff, when he amended his complaint after a general demurrer was sustained, in effect admitted that the demurrer was good and that his original complaint was insufficient to state a cause of action.

4. Pleading ⇐417

Where a particular portion of a complaint is questioned on a general demurrer, and the demurrer is sustained, plaintiff, if he abandons his original complaint and files an amendment correcting the questioned allegation, is no longer in a position to say that the original complaint was good as against the judgment sustaining the demurrer and that the court erred in its ruling

5. Pleading ⇐417

Where a general demurrer to a complaint is sustained, plaintiff may test the sufficiency of his complaint on the judgment sustaining the demurrer or he may accept the judgment that the complaint was not good and file an amendment, and, if he elects to file an amendment, he impliedly confesses that the original complaint was not sufficient and that it should be corrected, and, having made that election, he may not then claim the benefit of the original complaint and the amended one also.

6. Judgment ⇐102, 150
Pleading ⇐252(2)

The filing of an amended complaint substituting allegations for hearsay allegations to which a motion to strike and a general demurrer, which were respectively granted and sustained, had been directed, not only vacated a defendant's default but superseded the original complaint, and the original complaint dropped out of the case and ceased to have any effect as a pleading or as a basis for a judgment.

7. Judgment ⇐102, 141

Where an original complaint had dropped out of existence as such when a sec-

ond default was entered against a defendant, and an amended complaint had not yet been served on defendant, the second default stood as a nullity and was properly vacated by the trial court.

8. Judgment ⇐19

Where the efficacy of an original complaint as a pleading had been destroyed by the filing of an amended complaint, and plaintiff declined to offer any evidence in support of amended complaint, the trial court properly refused to give judgment on the original complaint and was bound to render judgment for defendant upon plaintiff's refusal to support his amended complaint with proof.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Andrew J. Sheehy against the Roman Catholic Archbishop of San Francisco, the Right Reverend P. J. Quinn, and others, to recover damages for the death of plaintiff's minor son. Plaintiff dismissed the action as to all of the defendants except the Right Reverend P. J. Quinn, and, from a judgment for that defendant, plaintiff appeals.

Affirmed.

E. C. Mahoney, of Burlingame, for appellant.

Garret W. McEnerney and Henry J. O'Connor, both of San Francisco, for respondent.

B. C. JONES, Justice pro tem.

This is an appeal by the plaintiff from a judgment in an action to recover damages for the death of his minor son. The basis of the action is an injury claimed to have been inflicted upon the child by other students while at play upon the grounds of St. James School. It is alleged that at the time of the injury the St. James School was in charge of the Dominican Order of Sisters under an arrangement with the Rt. Rev. P. J. Quinn, pastor of St. James Church, and that the school and church operated under the direction of the Roman Catholic Archbishop of San Francisco. When the case was called for trial the appellant dismissed the action as to all of the defendants except the Rt. Rev. P. J. Quinn, the respondent herein. He then declined to offer any evidence in support of his amended complaint and judgment went for the defendant. The plaintiff places his reliance entirely upon a default of the defendant entered upon the original complaint.

The action was commenced on November 13, 1935, and on November 15th the complaint and summons were served on the respondent. He failed to appear and on December 11, 1935, his default was entered. The Roman Catholic Archbishop of San Francisco, a corporation sole, one of the other defendants, appeared and entered a general demurrer to the complaint and noticed a motion to strike certain portions thereof. On January 2, 1936, this general demurrer was sustained with leave to amend, and the motion to strike granted. The plaintiff filed an amended complaint on January 9, 1936. This amended complaint was not served on the respondent until October 25, 1937, and was answered by him on December 2, 1937. The trial resulting in the judgment appealed from was had on December 27, 1939, approximately two years after answer to the amended complaint.

After the amended complaint was filed on January 9, 1936, and before it was served on the respondent on October 25, 1937, and on the 11th day of September, 1936, the default of the respondent was again entered for his failure to answer the original complaint. At this time the plaintiff also asked the court to enter judgment against the defendant on the second default. This request for judgment was submitted by the court, and later an order, ex parte, was made setting aside the default and also the order of submission. This order was made on October 15, 1936. When the case was called for trial the plaintiff moved that this order be set aside. This motion was denied, the order of denial being incorporated into and made a part of the judgment appealed from.

[1] The position taken by the appellant is that the filing of the amended complaint did not open the default of the respondent entered upon the original complaint. He urges that the complaint was not amended in substance but in form only, and that it did not affect the default. It is the general rule, and one which is too well settled to be longer open to question, that when a complaint is amended in substance as distinguished from a mere matter of form it operates to open a default and must be served on all adverse parties affected, including the defaulting party. Gutleben v. Crossley, 13 Cal.App.2d 249, 56 P.2d 954;

Linott v. Rowland, 119 Cal. 452, 51 P. 687. As stated in Cole v. Roebling Construction Co., 156 Cal. 443, 105 P. 255, 257, "The reason for this rule is plain. A defendant is entitled to opportunity to be heard upon the allegations of the complaint on which judgment is sought against him. His default on the original complaint is limited in its effect to that complaint; and, if by amendment a matter of substance is added, he should be given the opportunity to contest the same before any judgment is given against him on account thereof."

In the instant case the plaintiff, in paragraph IV of his original complaint, set up certain conversations and complaints of the deceased boy with the defendants concerning the roughness of his playmates. In the amended pleading in lieu of these hearsay allegations he has alleged that he, the plaintiff, "advised defendants that the students at the aforesaid school indulged in very rough pursuits in the playgrounds thereof and that the older students very often inflicted injuries upon the younger students." In other respects the original and amended complaints are almost identical. While neither the demurrer, the motion to strike, nor the orders disposing of the same, directed to the original complaint, are included in the record on appeal, counsel for both the appellant and the respondent have proceeded in their briefs upon the theory that both the motion to strike and the general demurrer were directed to the hearsay allegations of paragraph IV, and that they were respectively granted and sustained. It is this change which plaintiff insists is not an amendment in a matter of substance but in form only.

[2-5] It was upon leave being granted to amend after the general demurrer to his complaint had been sustained that plaintiff filed his amended pleading. He made an election not to stand upon the allegations of his complaint as originally presented but availed himself of the opportunity granted to bind the defendant under a new complaint. The courts have declared on many occasions that when a party does not leave his pleading where the order sustaining the demurrer has left it, he waives any error on the part of the trial court in sustaining the demurrer. Gale v. Tuolumne Water Co., 14 Cal. 25; Madden v. Occidental, etc., S. S. Co., 86 Cal. 445, 25 P. 5; Ganceart v. Henry, 98 Cal. 281, 33 P. 92; Brittan v. Oakland Bank of Savings, 112 Cal. 1, 44 P. 339. When he amended his complaint after the general demurrer was sustained he in effect admitted that the demurrer was good and that his complaint was insufficient to state a cause of action. As is stated in Home Real Estate Co. v. Winnants, 39 Cal.App. 643, 179 P. 534: "'But, when he takes leave to amend, he virtually asserts that he has not set up his whole case in his petition; and, although the judgment is that his petition does not show a cause of action, yet the leave to amend takes from the judgment that quality of finality which is necessary to make it an estoppel, and thus "sets the matter at large"'". Where, as here, a particular portion of a complaint is questioned upon a general demurrer and the demurrer is sustained, the plaintiff, if he abandons his original pleading and files an amendment correcting the questioned allegation, no longer is in a position to say that the original pleading was good as against the judgment sustaining the demurrer and that the court erred in its ruling. Upon the order sustaining the demurrer being made, the pleader has two avenues open to him. He may test the sufficiency of his pleading upon the judgment sustaining the demurrer, or he may accept the judgment that the complaint was not good and file an amendment. If he elects to pursue the latter course he impliedly confesses that the original pleading was not sufficient and that it should be corrected. Having made his election, he may not then claim the benefit of the original pleading and the amended one too. Gale v. Tuolumne Water Co., supra. As pointed out, it is alleged that the St. James School and the St. James Church were both operated under the direction of the Roman Catholic Archbishop of San Francisco, and if the plaintiff is not in a position to claim that the amendment was not one of substance as to the one defendant, he is not as to the others.

[6-8] Not only did the filing of the amended complaint vacate the default of the defendant entered on December 11, 1935, but it superseded the original complaint which dropped out of the case and ceased to have any effect as a pleading or as a basis for a judgment. Collins v. Scott, 100 Cal. 446, 34 P. 1085; Linott v. Rowland, supra; Gutleben v. Crossley, supra. At the time the second default was entered on September 11, 1936, the original complaint had gone out of existence as such, and the amended complaint had not yet been served on the defendant. The second default stood as a nullity and was properly vacated by the

trial court. Likewise the efficacy of the original complaint as a pleading having been destroyed by the filing of the amended complaint, no judgment could be based upon it. Only the amended complaint was left to plaintiff as a pleading upon which to base a judgment against the defendant, and in support of which pleading he declined to put in any evidence. The trial court properly refused to give judgment upon the original complaint, and was bound to render judgment for the defendant upon the refusal of the plaintiff to support his amended complaint with proof.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.



49 Cal.App.2d 431

McMAHAN et al. v. BARINGER.

Civ. 12762.

District Court of Appeal, Second District, Division 3, California.

Jan. 30, 1942.

1. Judgment ⇐304, 340

The court has power to set aside judgments and orders inadvertently made which are not actually the result of the exercise of judgment, but it has no power, having once made its decision after regular submission, to set aside or amend judicial error, except under appropriate statutory procedure.

2. Judgment ⇐340

Where demurrer came on regularly for hearing and having been regularly submitted for decision, court made an order sustaining demurrer without leave to amend and entered judgment dismissing action, and there was no showing of mistake, inadvertence, surprise, excusable neglect, clerical error, or that the judgment as signed did not express actual judicial intention of the court at time it was signed, trial court was without power to vacate the judgment and grant plaintiff permission to file an amended complaint. Code Civ.Proc. § 473.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action in tort by Walter C. McMahan and others against Charlotte Baringer. From an order vacating a judgment entered on sustaining a demurrer to complaint without leave to amend, vacating the order sustaining the demurrer, and granting plaintiffs permission to file amended complaint, defendant appeals.

Reversed.

Lasher B. Gallagher, of Los Angeles, for appellant.

Pearlson & Singer, of Los Angeles, for respondents.

PARKER WOOD, Justice.

The appeal is from an order which (1) vacated a judgment that had been entered upon an order sustaining a demurrer to the complaint without leave to amend, and (2) vacated the order sustaining the demurrer without leave to amend, and (3) granted plaintiffs permission to file an amended complaint.

Appellant contends that the court did not have authority to make the order. The contention is well taken.

Respondents filed a complaint in tort. Appellant filed a demurrer to the complaint. the demurrer came on regularly for hearing and, having been regularly submitted for decision, the court made an order sustaining the demurrer without leave to amend and signed and entered a judgment which dismissed the action as to appellant. Two weeks thereafter plaintiffs served and filed a notice of motion to vacate the judgment and order, and for permission to file an amended complaint, a copy of which accompanied the notice. The motion was granted.

The notice did not state the grounds or papers upon which the motion would be based. No affidavits were filed. The only part of the record which indicates a theory upon which the motion was made is the citation, in the notice, of section 473 of the Code of Civil Procedure. There was no showing of mistake, inadvertence, surprise, excusable neglect, clerical error, or that the judgment as signed did not express the actual judicial intention of the court at the time it was signed. The judgment was not void.

Apparently, in granting the motion, the court concluded it had made an error in the exercise of judgment.

[1, 2] While a court has power to set aside judgments and orders inadvertently made which are not actually the result of the exercise of judgment, it has no power, having once made its decision after regular submission, to set aside or amend judicial error except under appropriate statutory procedure. Bastajian v. Brown, 1941, 19 Cal.2d 209, 120 P.2d 9; Stevens v. Superior Court, 1936, 7 Cal.2d 110, 59 P.2d 988; Fisch & Co. v. Superior Court, 1935, 6 Cal. App.2d 21, 43 P.2d 855.

Respondents' contention that the case of Carter v. Shinsako, 42 Cal.App.2d 9, 108 P. 2d 27, is controlling cannot be sustained. The facts in that case were materially different from those in the present case. There it was established by affidavit in support of the motion that after the order sustaining the demurrer was made, and while proceedings for a modification of the order were pending, the judge inadvertently signed a judgment of dismissal.

The order is reversed.

SCHAUER, P. J., and SHINN, J., concurred.



49 Cal.App.2d 491

DARSIE v. DARSIE.

Civ. 13190.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1942.

1. Divorce ⇐160

Where defendant in divorce action had answered original complaint and had entered into a property settlement and had stipulated that action could be set as a default matter, but thereafter plaintiff filed an amended complaint and defendant's default was duly entered upon such amended complaint, the statute limiting relief to prayer of the complaint where there is no answer was applicable. Code Civ.Proc. § 580.

2. Pleading ⇐252(2)

An amended complaint supersedes original complaint and thereafter original complaint performs no function as a "pleading".

See Words and Phrases, Permanent Edition, for all other definitions of "Pleading".

3. Divorce ⇐104

Where amended complaint was filed by plaintiff in divorce action, it superseded the original complaint as a pleading, and defendant's acts with reference to original complaint could not be considered in determining his status with reference to the amended complaint.

4. Divorce ⇐160

Where defendant in divorce action answered original complaint but filed no answer to amended complaint, and it appeared that defendant's counsel was present in same courtroom on another matter at time of hearing on defendant's default and expressly declined to participate in the proceeding, defendant was not represented by counsel at hearing and his default was properly entered.

5. Divorce ⇐203

Where prayer of complaint in wife's divorce action failed to request alimony and husband's default was duly entered, trial court did not have power to make an award of alimony to wife, but such fact would not deprive court of power given it under statute to provide for maintenance of children and wife where divorce is granted for husband's offense. Code Civ.Proc. §§ 307, 580; Civ. Code § 139.

6. Divorce ⇐6½

A divorce action is in nature of an "action in equity".

See Words and Phrases, Permanent Edition, for all other definitions of "Action in Equity".

7. Divorce ⇐203

The relief granted to a plaintiff in a divorce action, if no answer is filed, cannot exceed that which is demanded in the complaint. Code Civ.Proc. §§ 307, 580.

8. Courts ⇐90(1)

Courts are slow to interfere with a principle announced by a decision and may uphold it even though they would decide otherwise, were the question a new one.

HANSON, Justice pro tem., dissenting.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by Ruth B. P. Darsie against William Watters Darsie for divorce. From a default judgment awarding alimony, the defendant appeals.

Judgment modified and as so modified affirmed.

For prior opinion, see 118 P.2d 898.

Joe Raycraft, of San Pedro, for appellant.

Louis Lombardi and G. L. Funai, both of Los Angeles, for respondent.

McCOMB, Justice.

From the portion of a judgment in an interlocutory decree of divorce awarding alimony to plaintiff, defendant appeals.

These are the essential facts:

Plaintiff filed a complaint for divorce from defendant to which defendant filed an answer and cross-complaint. Subsequently the parties executed a property settlement agreement and stipulated that plaintiff could file an amended complaint and that the clerk of the court be authorized to set the case for trial upon the amended complaint as a default matter.

An amended complaint was filed, the prayer of which read thus: "Wherefore, plaintiff prays that the bonds of matrimony now existing between plaintiff and defendant be dissolved, and for such other and further relief as to the Court may seem just."

Thereafter the court entered defendant's default to the amended complaint. At the time of the hearing of the application for divorce defendant's counsel was present in the same courtroom where the matter was being heard in connection with another case, but declined to appear in the present action. Thereafter the trial judge entered an interlocutory judgment of divorce providing, among other things, that the defendant pay to plaintiff the sum of $5 per month as alimony until the further order of the court.

It is necessary for us to determine two questions, which will be stated and answered hereunder seriatim.

[1-4] *First: Does section 580 of the Code of Civil Procedure apply to a case where the defendant fails to answer an amended complaint and his default is duly entered upon such amended complaint, and where prior thereto defendant has answered the original complaint and has entered into a property settlement and stipulated that the action may be set as a default matter?*

This question must be answered in the affirmative. The law is established in California that an amended complaint supersedes the original complaint and thereafter the original complaint performs no function as a pleading. (Bray v. Lowery, 163 Cal. 256, 260, 124 P. 1004; Collins v. Scott, 100 Cal. 446, 453, 34 P. 1085.) Therefore, since in the present case an amended complaint was filed by plaintiff, it superseded the original complaint as a pleading, and defendant's acts with reference to the original complaint may not be considered in determining his status with reference to the amended complaint. In the present case, since defendant did not answer or appear in response to the amended complaint, his default was properly entered. The fact that defendant's counsel was present in the same court on another matter at the time of the hearing on the default in the instant case and expressly declined to participate in the proceeding makes it clear that defendant was not represented by counsel at the time the order in question was made.

[5] *Second: In an action for divorce, where the prayer of the complaint fails to request alimony and defendant's default is duly entered, is it error for the trial court to make an award of alimony to plaintiff?*

The second question must likewise be answered in the affirmative, and is governed by the following rules:

[6] (1) A divorce action is in the nature of an action in equity. (Harron v. Harron, 123 Cal. 508, 509, 56 P. 334.)

(2) In California there is but one form of civil action for the enforcement of private rights or the redress of private wrongs. (Sec. 307, Code Civ.Proc.)

[7] (3) The relief granted to a plaintiff in a divorce action, if no answer be filed, cannot exceed that which is demanded in the complaint. (Sec. 580, Code Civ. Proc.; Bennett v. Bennett, 50 Cal.App. 48, 49, 194 P. 503; Lang v. Lang, 182 Cal. 765, 769, 190 P. 181; see Horton v. Horton, 18 Cal.2d 579, 116 P.2d 605.)

Applying the foregoing rules to the facts of the instant case, this being a divorce action it came under the equitable cognizance of the court. Since in California there is only one form of action, section

580 of the Code of Civil Procedure was applicable; and as plaintiff had failed to apply for alimony in the prayer of the amended complaint, to which defendant's default was entered, it was error for the trial court to make an order awarding plaintiff alimony.

The foregoing conclusion does not deprive the court of the power given it under section 139 of the Civil Code to provide for the maintenance of children and the wife where a divorce is granted for an offense of the husband. Should the trial court be of the opinion that an award of alimony is proper in a case where a default has been entered to a complaint for divorce which fails to contain a prayer for alimony, the court may order that the default be set aside, the prayer of the complaint amended to demand alimony and that the complaint as amended be served upon the defendant. Or, the trial judge may issue an order to show cause, requiring defendant to appear and show cause why he should not be required to pay alimony for the support of his wife and/or children.

[8] The precise point presented in the instant case was decided by this court in the year 1920, in the case of Bennett v. Bennett, supra. That case has been accepted by the legal profession as the correct rule for over twenty-one years. A question once deliberately examined and decided should be considered as settled and closed to further argument. Courts are slow to interfere with a principle announced by a decision and may uphold it even though they would decide otherwise, were the question a new one. (See 15 C.J. (1918) 916, sec. 304; 21 C.J.S., Courts, § 187.)

A rule other than that announced in the Bennett case would require an attorney to advise his client in every divorce action to file an answer and be present at the hearing with witnesses so that his client might be protected from the whim or view of the trial judge at the time of the hearing of the application for divorce based on an incomplete presentation of the evidence; this even though the parties have entered into a property settlement which is fair and satisfactory to both of them. Such a rule would be contrary to section 580 of the Code of Civil Procedure and reason. We cannot see wherein it would serve any useful purpose to depart from the law as now established in this jurisdiction.

In Parker v. Parker, 203 Cal. 787, at page 792, 266 P. 283, at page 285, Mr. Justice Shenk, after citing Bennett v. Bennett, supra, says: "None of the cases relied upon go to the length of holding that the granting of relief in excess of that demanded by the complaint renders the judgment void on its face. They do however, uniformly hold that the granting of such excessive relief is erroneous, from which relief may be granted under section 473 of the Code of Civil Procedure or which may be corrected by appeal, either by a reversal or by a modification of the judgment, neither of which courses was pursued by the defendant in this case."

See, also, Wallace v. Wallace, 111 Cal. App. 500, 506, 295 P. 1061, where Bennett v. Bennett is cited and approved.

For the foregoing reasons the decree is modified by striking therefrom the following: "the defendant shall until further order of court pay to the plaintiff the sum of Five Dollars per month, payable on the first day of each month, commencing with the first day of May, 1941." Otherwise it is affirmed, defendant (appellant) to recover his costs on appeal.

W. J. WOOD, Acting P. J., concurred.

HANSON, Justice pro tem. (dissenting).

On rehearing the court recedes from the view it expressed in its former opinion in this case, reported in 47 Cal.App.2d —, 118 P.2d 898. The present opinion does not attempt to challenge the view there expressed. Instead, the decision is rested largely on the fact that as the procedural rule announced in the case of Bennett v. Bennett has been on the books for twenty years it should be followed because the profession has accepted it as the correct rule ever since. I do not know upon what data this assertion is made, but assuming its correctness the fact nevertheless is, as I pointed out in our original opinion, that alimony or support money has been awarded since the days of the Ecclesiastical courts not on issue joined but as an incident of divorce. The case turns on that point and that alone, and the majority opinion does not meet it. Accordingly, while I am reluctant to disagree with my associates I have here no other alternative.

49 Cal.App.2d 599

OGLE, County Counsel, v. ECKEL, County Auditor.

Civ. 2971.

District Court of Appeal, Fourth District, California.

Feb. 9, 1942.

Hearing Denied April 8, 1942.

1. Statutes ⇐93(9)

The office of county counsel, as intended to be created under statute authorizing the board of supervisors in counties having a population of 100,000 or more to appoint a county counsel, is a "county office" within constitutional provision prohibiting Legislature from passing local or special laws creating offices or prescribing powers and duties of officers in counties. Pol.Code, § 4041.12a, as added by St.1941, p. 2075, § 2; Const. art. 4, § 25, subd. 28.

See Words and Phrases, Permanent Edition, for all other definitions of "County Office".

2. Statutes ⇐93(9)

The statute authorizing the board of supervisors in counties having a population of 100,000 or more to appoint a county counsel is not a "local" or "special law" within constitutional provision prohibiting Legislature from passing local or special laws creating offices or prescribing powers and duties of officers in counties but it is a "general" or "uniform law". Pol.Code, § 4041.12a, as added by St.1941, p. 2075, § 2; Const. art. 4, § 25, subd. 28.

See Words and Phrases, Permanent Edition, for all other definitions of "General Law", "Local Law", "Special Law", and "Uniform Law".

3. Statutes ⇐93(9)

The mere fact that the statute relating to the office of county counsel provides that in counties having a population of 100,000 or more the board of supervisors may appoint a county counsel does not necessarily classify such counties in violation of constitutional amendments and thereby cause the statute to become a "local" or "special law" as opposed to a "general" or "uniform law". Pol.Code, § 4041.12a, as added by St.1941, p. 2075, § 2.

4. Statutes ⇐93(9)

The Legislature may classify counties according to population for the purpose specified in the statute authorizing the board of supervisors in counties having a population of 100,000 or more to appoint a county counsel, and, such classification being permissible, the statute in its operation and effect applies equally and uniformly to all persons and things falling within the designated class. Pol.Code, § 4041.12a, as added by St.1941, p. 2075, § 2; Const. art. 11, § 5.

5. District and prosecuting attorneys ⇐2(1)

Under constitutional provision that the Legislature, by general and uniform laws, shall provide for election or appointment of certain county officers and such other county officers as public convenience may require, the Legislature had authority to provide for appointment of county counsels in counties having a population of 100,000 or more and to prescribe the duties of the office and fix the term thereof. Pol.Code, § 4041.12a as added by St.1941, p. 2075, § 2; Const. art. 11, § 5.

6. Constitutional law ⇐63(3)

The state may, through its Legislature, and in the exercise of its sovereign power and will, in all cases where the people have not restricted or qualified such exercise of that power, apportion and delegate to counties any of the functions which belong to it.

7. Constitutional law ⇐66

A statute may be conditional and its taking effect may be made to depend upon some subsequent event, and affirmative legislation may, in some cases, be adopted, of which the parties interested are at liberty to avail themselves or not, at their option.

8. Constitutional law ⇐66
District and prosecuting attorneys ⇐2(1)

The Legislature had power to provide in the statute authorizing the board of supervisors in counties having a population of 100,000 or more to appoint a county counsel that counties might come within or remain without the provisions of the statute, as the board of supervisors of the respective counties might determine. Pol.Code, § 4041.12a. as added by St.1941, p. 2075, § 2.

9. Constitutional law ⇐63(3)
District and prosecuting attorneys ⇐2(1)

The statute authorizing the board of supervisors in counties having a population of 100,000 or more to appoint a county counsel is not unconstitutional as delegating to boards of supervisors power which is granted to Legislature under constitutional pro-

vision that Legislature, by general and uniform laws, shall provide for election or appointment of certain county officers and such other county officers as public convenience may require. Pol.Code, § 4041.12a, as added by St.1941, p. 2075, § 2; Const. art. 11, § 5.

Original mandamus proceedings by Joel E. Ogle, as County Counselor, etc., against L. H. Eckel, as County Auditor, etc., to compel respondent to draw a warrant in favor of petitioner for services rendered by petitioner to Orange County as county counsel.

Writ issued.

Joel E. Ogle, of Santa Ana, in pro. per., and Earl Redwine, of Riverside, for petitioner.

George F. Holden, Dist. Atty., S. B. Kaufman, and Theodore R. Coomber, all of Anaheim, for respondent.

L. E. GRIFFIN, Justice.

Petitioner, as County Counsel of Orange County, seeks a writ of mandate directed to respondent as Auditor of Orange County requiring him to draw his warrant in favor of petitioner in the sum of $285.70, as and for compensation claimed to be due petitioner for services rendered to Orange County as County Counsel thereof from October 17, 1941, to November 3, 1941.

Petitioner alleges in the petition (1) that the position of County Counsel of Orange County was created and given certain powers dependent on action of the county board of supervisors pursuant to and in compliance with the provisions of chapter 618 of the Statutes of 1941, p. 2074. (2) That pursuant to section 2 thereof the board of supervisors of that county, which county has a population of more than 100,000 inhabitants, did on September 16, 1941, adopt an ordinance which by section 57c thereof fixed his monthly compensation; that this ordinance is now in effect; that on September 16, 1941, petitioner was appointed County Counsel by resolution of the board of supervisors effective October 17, 1941; that respondent is the Auditor of Orange County; that petitioner demanded that respondent draw and deliver his warrant for the sum above mentioned; that sufficient funds are available for such purposes; that respondent refused to draw the warrant "because of the fact that said respondent entertained some doubt as to the constitutionality of chapter 618 of the statutes of 1941" and "* * * that section 4041.12a of the Political Code is in violation of article XI, section 5, and article IV, section 25, subsection 28, of the Constitution of the State of California * * *"; that a writ should be issued because on the validity of section 2, of chapter 618, page 2074 of the Statutes of 1941, depends the orderly administration of the county government of the county of Orange for the reason that many and various duties heretofore required to be done by the District Attorney of Orange County are now by statute required to be done by the County Counsel of the county of Orange; and that all of the more populous counties falling within the provisions of this chapter will be confronted with the same problems and difficulties regarding the orderly administration of county government as are now confronted by that county.

Respondent demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. No other appearance was filed. Respondent did not desire to file an answer. The facts set forth in the petition therefore stand undenied. Respondent now contends that section 4041.12a of the Political Code and the ordinance of the county of Orange creating the office of County Counsel are null and void as being in violation of article XI, section 5, and article IV, section 25, subdivision twenty-eighth of the Constitution.

Section 4041.12a of the Political Code provides in substance that in counties having a population of 100,000 or more, the board of supervisors may appoint a county counsel, and said section further provides that the county counsel shall perform all duties required by law of the district attorney, except the duties of public prosecutor. It further provides that the county counsel shall be appointed for a period of four years and until his successor is appointed. It is now argued that under the constitutional provisions above mentioned the legislature had no power to classify counties except for the purpose of fixing the compensation of officers, and that any attempt by the legislature to classify the counties for the purpose of creating an office that is not uniformly established throughout all the counties is null and void, citing Rauer v. Williams, 118 Cal. 401, 50 P. 691; San Francisco v. Broderick, 125 Cal. 188, 57 P. 887; Galvin v. Board of

Supervisors, 195 Cal. 686, 235 P. 450; Sanchez v. Fordyce, 141 Cal. 427, 75 P. 56; Payne v. Murphy, 18 Cal.App. 446, 123 P. 350; Pratt v. Browne, 135 Cal. 649, 67 P. 1082; Welsh v. Bramlet, 98 Cal. 219, 33 P. 66. In other words, it is argued that any laws creating a county office or regulating the duties of a county officer, in order to be general and uniform, must be applicable to all of the counties in the state; that section 4041.12a of the Political Code delegates the authority to the board of supervisors of each county having a population of 100,000 or more to appoint a county counsel and that under article XI, section 5 of the Constitution the powers granted to the legislature in that section cannot be delegated to the board of supervisors, citing Arnold v. Sullenger, 200 Cal. 632, 254 P. 267; Coulter v. Pool, 187 Cal. 181, 201 P. 120; People v. Wheeler, 136 Cal. 652, 69 P. 435.

[1] The office of county counsel, as here intended to be created and classified by the duties and functions to be performed, is a county office within the meaning of article IV, section 25, subdivision twenty-eighth. Coulter v. Pool, supra. Under article XI, section 5, the legislature, by general and uniform laws, is empowered to provide for the appointment, in the several counties, of such county officer, if public convenience may require, prescribe the duties thereof, and fix the term of office. The board of supervisors of each respective county is authorized to regulate the compensation. The purpose of the constitutional provision requiring that laws throughout the state, affecting municipal corporations, be uniform in character, arose as a design of the framers of the Constitution to prevent, on the part of the legislature, a practice theretofore permissible, of singling out a particular town or city, and passing legislation directly affecting it and no other. It was believed that the exercise of this power by the legislature led to abuses, and that a constitutional provision relieving cities from this particular form of legislative control and preserving to them their autonomy unimpaired except by general legislative action, would better subserve the purposes of good government. In the case of counties, the Constitution then permitted a classification by population only for the purpose of fixing the compensation of officers, and strictly insisted that the system of county governments should be uniform throughout the state and that the duties of the officers recognized by this system should likewise be prescribed by general and uniform law. Const., art. XI, sec. 4 [now repealed]; art. XI, sec. 5; Rauer v. Williams, supra. The provisions of the Constitution were much broader in respect to the right of the legislature to classify cities and towns than they were respecting counties, because cities containing a large population required different legislation from those composed of a few hundred inhabitants. Rauer v. Williams, supra. If the act creating the county office here involved is classified as a local or special law, then that act is in violation of article IV, section 25, subdivision twenty-eighth of the Constitution and void.

[2, 3] The question then presented is whether this act may be classified as a local or special law. We think not. Article XI, section 4, prior to its repeal on June 27, 1933, provided in part that "The legislature shall establish a system of county governments, which shall be uniform throughout the state * * *." The original section, article XI, section 5, read in part that "The Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of Boards of Supervisors * * * and such other county * * * officers as public convenience may require, and shall prescribe their duties, and fix their terms of office. It shall regulate the compensation of all such officers, in proportion to duties, and for this purpose may classify the counties by population * * *." The 1908 amendment to this section only added an additional provision in reference to grand and trial jurors. The 1928 amendment contained the same provision that the counties may be classified for the purpose of regulating the compensation of officers. The 1933 amendment was enacted, as above mentioned, but in respect to the provision in reference to classification of counties by the legislature provided that "It shall regulate the compensation of boards of supervisors, district attorneys and of auditors in the respective counties and for this purpose may classify the counties by population." The boards of supervisors in the respective counties, under the new amendment of 1933, regulate the compensation of all officers in said counties other than the boards of supervisors, district attorneys, auditors and judges of the municipal courts. The legislature (Chap. 643,

Stats.1933, p. 1674) adopted a new section (4056d) to the Political Code in conformity with the constitutional provision as adopted. The authority of the legislature to establish the office of county counsel in the several counties under the 1933 constitutional amendment, if public convenience may require, from the very wording of the act must be conceded. We do not understand that merely because section 4041.12a of the Political Code provides that in counties having a population of 100,000 or more, the board of supervisors may appoint a county counsel, necessarily classifies such county in violation of any constitutional amendment and thereby causes that section to become a local or special law as opposed to a general or uniform law.

[4] In the early case of Sanchez v. Fordyce, 141 Cal. 427, 75 P. 56, the court held, under the county government act of 1901, that the provision "in townships having a population [of] less than six thousand there shall be but one justice of the peace and one constable" was constitutional. The court said that if they were to adopt a rule which would not allow the classification according to population, we would destroy the power of the legislature to classify counties, the power to classify school districts in proportion to population for the purpose of assigning teachers, and the power to make many other provisions which the public convenience may require. It will be noticed that there was considerable change made in 1933 in article XI, section 5, of the Constitution compared to the original section and the previous amendments thereto. The decisions cited by respondent under the original provision and previous amendments thereto are therefore not applicable as a true guide in the construction of the 1933 amendment. The legislative history or argument advanced to the people as a reason for the adoption of the 1933 amendment is enlightening. It is therein stated that it was the purpose of the proposed constitutional amendment to vest more power in the board of supervisors and to make the government of the county more responsible to local demands. All of the cases cited by respondent were decided prior to the repeal in 1933 of article XI, section 4 of the Constitution. This was the prohibitive section and contemplated and commanded a uniform system of county government. Martin v. Superior Court, 194 Cal. 93, 105, 227 P. 762. This left section 5 of article XI, which merely states that the legislature "may" classify counties for the purpose of fixing the compensation of certain designated officers. Prior to 1933, section 4 of article XI provided that "the legislature shall establish a system of county governments, which shall be uniform throughout the state * * *." This in effect practically prohibited the classification of counties for any purpose. However, an exception was stated in the succeeding section (article XI, section 5) wherein authority was granted to classify for the purpose of fixing compensation. The legislature, therefore, since the adoption of the 1933 amendment and the repeal of article XI, section 4, may now classify counties according to population for the purpose specified in the act here involved. This question was presented and similarly discussed by our own Supreme Court in Consolidated Printing & Publishing Co. v. Allen, 18 Cal.2d 63, 112 P.2d 884. This classification being permissible, it is not and cannot be denied that the law purports to and undoubtedly does, in its operation and effect, apply equally and uniformly to all persons and things falling within the designated class. Martin v. Superior Court, supra.

[5] As to the question of the legislature delegating the authority to the board of supervisors to appoint a county counsel, it seems clear from the constitutional provision as amended in 1933, that the legislature has the authority to provide for the appointment and prescribe the duties of the office and fix the term thereof. The Constitution does not designate that the legislature shall make the appointment but only requires it to provide for the appointment. The power to fix the compensation of such an officer by the board of supervisors has been directly given to the board of supervisors by the provisions of the act itself.

[6-9] The state may, through its legislature, and in the exercise of its sovereign power and will, in all cases where the people themselves have not restricted or qualified such exercise of that power, apportion and delegate to the counties any of the functions which belong to it. Watson v. Greely, 67 Cal.App. 328, 227 P. 664; Scott v. Boyle, 164 Cal. 321, 128 P. 941; Barton v. Kalloch et al., 56 Cal. 95, 110; Ryan v. Riley, 65 Cal.App. 181, 223 P. 1027. A statute may be conditional and its taking effect may be made to depend upon some subsequent event. Affirmative legislation

may, in some cases, be adopted, of which the parties interested are at liberty to avail themselves or not, at their option. The legislature had the power to provide, in the act under consideration, that counties might come within or remain without the provisions of the act, as the board of supervisors of the respective counties might determine. Davis v. County of Los Angeles, 12 Cal.2d 412, 84 P.2d 1034; Board of Law Library Trustees of Orange County v. Board of Supervisors, 99 Cal. 571, 573, 34 P. 244. This principle has been followed in the late case of Housing Authority of the County of Los Angeles v. Dockweiler, 14 Cal.2d 437, 446, 94 P.2d 794. There is no merit to respondent's second contention.

For the reasons expressed, the writ should issue and it is so ordered.

BARNARD, P. J., and MARKS, J., concurred.



49 Cal.App.2d 542

CONNELL v. BOWES et al.

Civ. 12012.

District Court of Appeal, First District, Division 1, California.

Feb. 6, 1942.

1. Venue ⇐43

The right to a change of venue is generally determined by the allegations of the complaint and the condition of things at the time the parties claiming the change first appear in the action.

2. Venue ⇐43

A second motion for a change of venue should be discouraged, if the complaint and the conditions remain unchanged. Code Civ. Proc. § 396.

3. Venue ⇐72

Where a change of venue of action to compel specific performance of a contract to sell shares of corporate stock was sought on the ground that defendants resided in the county to which change was sought and that contract was entered into and to be performed in that county, the court had the right to inspect the allegations of the complaint to determine whether jurisdiction was in the county wherein the action was filed.

4. Venue ⇐70

In action to compel specific performance of contract to sell shares of corporate stock, where complaint alleged that contract was in writing, was entered into in the county of suit, and provided for delivery of stock upon the payment of specified sum, and that plaintiff had tendered the purchase price in the county of suit, but defendants had failed to deliver stock, a denial of defendants' motion for change of venue, supported by affidavit alleging that defendants were residents of another county and that contract was entered into and to be performed in such other county, would have been proper.

5. Venue ⇐67

Where order denying defendants' first motion for change of venue had become final, an amendment to the original affidavit of merits could not be considered on their second motion for change of venue until the order of denial of the first motion had been set aside. Code Civ.Proc. §§ 396, 473.

6. Appeal and error ⇐965

Where allegations of complaint, showing that venue was properly laid in the county of suit, were denied by affidavit of merits filed in support of defendants' motion for change of venue to another county in which they allegedly resided and in which contract sued on allegedly was entered into and to be performed, trial court's finding on such conflicting allegations would not be disturbed except for an abuse of the discretion.

7. Venue ⇐43

In action for specific performance of contract to sell shares of corporate stock, where complaint alleged that contract in writing was entered into in the county of suit and that plaintiff had tendered the purchase price in such county but defendants had refused to deliver the stock, after an order denying the motion for change of venue to county of defendants' alleged residence had become final, court did not abuse its discretion in denying a second motion for change of venue based on an additional ground, and in refusing to set aside denial of the first motion, and to permit defendants to file an amended affidavit of merits. Code Civ.Proc. §§ 396, 473.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by James P. Connell against E. L. Bowes and others for the specific performance of a contract for the sale by defendants of 2,500 shares of the stock of a hotel corporation. From an order denying defendants' motion for a change of venue, and an order denying their application for an order, pursuant to section 473 of the Code of Civil Procedure, setting aside an order, which had become final, denying their first motion for change of venue, permitting the filing of amended affidavit of facts thereon, and restoring such motion to the calendar, defendants appeal.

Orders affirmed.

Charles A. Christin and T. J. Keegan, both of San Francisco, for appellants.

James R. Agee and Harold C. Holmes, Jr., both of Oakland, for respondent.

WARD, Justice.

Appeal by defendants from two orders—one denying their motion for a change of venue, and the other denying an application for relief under the provisions of section 473 of the Code of Civil Procedure.

The action is one to compel the specific performance of an alleged contract for the sale by defendants Bowes of 2,500 shares of the stock of defendant hotel corporation to plaintiff. The complaint alleges that the contract is in writing, was entered into in Alameda County and provides for the delivery of the stock upon the payment of a specified sum on or before January 2, 1945; that on the 25th day of July, 1940, in the county of Alameda plaintiff tendered the purchase price, but defendants failed and refused to deliver the stock. Appellants filed a demurrer and notice of motion for change of venue, accompanied by affidavit, averring the residence of all the defendants in the City and County of San Francisco. No reference was made in the motion or in the supporting affidavit to the allegation in the complaint that the contract was entered into in the county of Alameda. The motion was denied. No appeal was taken from the order, which has become final. Subsequently defendants filed a second motion for change of venue to the City and County of San Francisco, also based upon the residence of defendants therein; in addition they averred that the contract was entered into, and to be performed, in said city and county; they denied the allegation in the complaint that it was entered into, or to be performed, in the county of Alameda. The second motion was timely and the supporting affidavit set forth the original and a new statement of facts.

[1, 2] The right to a change of venue is generally determined by the allegations of the complaint and the condition of things at the time the parties claiming the change first appear in the action. Remington S. M. Co. v. Cole, 62 Cal. 311; Story v. Christin, 137 Cal.App. 484, 30 P.2d 1016. A second motion for a change of venue should be discouraged if the complaint and the conditions remain unchanged. McNeill & Co. v. Doe, 163 Cal. 338, 125 P. 345; Code Civ.Proc. sec. 396. It was never contemplated that determination of the merits of an action should be delayed by repetition of a motion for change of venue when it appears that the second motion is based upon a ground that could have been presented upon the first motion.

[3, 4] The new state of facts set forth in the second motion related to the claim of defendants that the contract was to be performed in the City and County of San Francisco. In considering such motion the court would have the right to inspect the allegations of the complaint to determine whether jurisdiction was in the county wherein the action was filed. Sheeley v. Jones, 192 Cal. 256, 219 P. 744; Turlock Theatre Co. v. Laws, 12 Cal.2d 573, 86 P.2d 345, 120 A.L.R. 786. An inspection demonstrates that a denial of the second motion could have been sustained upon the record.

The second motion was accompanied by an application for relief under section 473, Code Civ.Proc., i.e., an order setting aside the denial of the first motion for change of venue, permitting defendants to file an amended affidavit of merits thereon, and restoring such motion to the court's calendar, upon the ground of excusable neglect, inadvertence and surprise, based upon an affidavit that the defendants' attorney had misunderstood statements of his clients relative to the county wherein the contract had been entered into. It appears from appellants' brief that two contracts had been entered into, one in Alameda County and one in the City and County of San Francisco.

[5] Appellants call attention to Palmer & Rey v. Barclay, 92 Cal. 199, 28 P. 226, and Jaques v. Owens, 18 Cal.App. 114, 122

P. 430, in support of their theory that the original affidavit of merits could have been amended. Amendments to affidavits of merit were allowed in the cases cited, but before an order made denying the motion for change of venue. In the present proceeding an amendment to the original affidavit of merits could not be considered on the second motion for change of venue until the order of denial of the first had been set aside.

[6, 7] The court in its discretion had a right to weigh the statements in the second affidavit against the allegations of the complaint, and its finding will not be disturbed unless an abuse of such discretion appears. Under all of the circumstances as they appear in the record, the decision of the trial court is conclusive.

The order of August 12, 1940, denying defendants' second motion for change of venue, and that made and entered on the same day denying relief under the provisions of section 473 are and each of them is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.



49 Cal.App.2d 516

BELYEW v. UNITED PARCEL SERVICE OF OAKLAND et al. (CITY OF OAKLAND, Intervener).

Civ. 11722.

District Court of Appeal, First District, Division 2, California.

Feb. 5, 1942.

1. New trial ⇐75(1)

Under Code provision, power to grant a motion for new trial because of inadequacy of damages awarded is not limited to those cases in which amount awarded is so inadequate that it shocks the conscience and raises an inference of passion or prejudice of the jury, but new trial may be granted if it clearly appears to the trial court from the evidence believed by it that the damages awarded were inadequate. Code Civ.Proc. § 657, subd. 6.

2. Appeal and error ⇐979(5)

On appeal from an order granting a new trial because of inadequacy of damages awarded, only question for review is whether trial court abused its discretion in determining that the damages awarded were inadequate. Code Civ.Proc. § 657, subd. 6.

3. Damages ⇐132(3)
New trial ⇐75(4)

Award of $2,460 to 43 year old policeman who sustained injury to upper spinal region and who was required to wear a cast for the purpose of pushing his chin up and out in order to stretch his neck, and who approximately 15 months after the accident was still disabled, was inadequate and warranted granting of a new trial. Code Civ.Proc. § 657, subd. 6.

4. Damages ⇐135
New trial ⇐75(4)

In action for injuries sustained by policeman wherein city intervened, an award of $3,702.63 which was the exact amount expended by city for wages paid to policeman, for medical and hospital fees paid, for services to the policeman, and for repairs to automobile, and which did not cover any allowance for further treatment of the policeman or for wages during any further period of disability, was inadequate and warranted the granting of a new trial. Code Civ.Proc. § 657, subd. 6.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action for injuries by Hal A. Belyew against United Parcel Service of Oakland, a corporation, and others wherein the City of Oakland intervened. Verdict for the plaintiff and intervener, and from an order granting them a new trial because of inadequacy of damages awarded, the defendants appeal.

Affirmed.

Hoge, Pelton & Gunther and A. Dal Thomson, all of San Francisco, for appellant.

Nathan Goldwater and Leo Murcell, both of Oakland, for plaintiff and respondent.

F. Bert Fernhoff, City Atty., and John W. Collier, Asst. City Atty., both of Oakland, for intervener and respondent.

SPENCE, Justice.

Plaintiff, a sergeant of police employed by the city of Oakland, sought damages for injuries sustained by him in an accident alleged to have been caused by the negligence of defendants. The city of Oakland filed its complaint in intervention seeking the damages which it had sustained by reason of said accident. A jury trial was had and a verdict was returned awarding damages to plaintiff in the sum of $2,460 and awarding damages to plaintiff in intervention in the sum of $3,702.63. Both plaintiff and plaintiff in intervention were dissatisfied with the amounts awarded. Both made motions for a new trial and an order was made by the trial court granting said motions "upon the ground of the insufficiency of the evidence to sustain the verdicts rendered in the above entitled action." Defendants appeal from said order.

At the opening of the trial, defendants admitted liability and no question of liability is presented on this appeal. The briefs of the parties are devoted entirely to a discussion of the extent of the damages suffered and a discussion of the question of the propriety or impropriety of the trial court's order granting a new trial because of the alleged inadequacy of the damages awarded.

[1, 2] At the outset, it should be stated that when a trial court grants a motion for a new trial because of the inadequacy of the damages awarded, it acts upon the broad ground of the "Insufficiency of the evidence to justify the verdict" (Code of Civil Procedure, section 657, subd. 6), and its power to grant such motion is not limited to those cases in which the amount awarded is so inadequate that it shocks the conscience and raises an inference of passion or prejudice on the part of the jury. Hoffart v. Honig, 41 Cal.App.2d 271, 106 P.2d 630; Hoffmann v. Lane, 11 Cal.App. 2d 655, 54 P.2d 477; Peri v. Culley, 119 Cal. App. 117, 6 P.2d 86. On the contrary, it is the duty of the trial court in considering such motion to weigh the evidence, to exercise its independent judgment and to grant a new trial if it clearly appears to the trial court from the evidence believed by it that the damages awarded were inadequate. Peri v. Culley, supra; see also Fisher v. Zimmerman, 23 Cal.App.2d 696, 73 P.2d 1243; Green v. Soule, 145 Cal. 96, 78 P. 337. If the motion is granted, the only question presented on an appeal from the order granting such motion is the question of whether the trial court abused its discretion in determining that the damages awarded were inadequate. Sanford v. Wilcox, 13 Cal.App.2d 193, 56 P.2d 548.

Defendants' argument in support of their contention that the order should be reversed is based upon the premises that plaintiff's injuries were slight; that plaintiff was a malingerer; that he recovered sufficiently so that he might have returned to work long before the trial; that his failure to return to work constituted a "deliberate endeavor to make his injury appear more serious"; and that his continued absence from his duties was wholly unjustified. While there was some conflict in the evidence relating to the nature and extent of plaintiff's inquiries, the evidence most favorable to plaintiff shows that none of said premises adopted by defendants can be accepted by this court on this appeal from the order granting a new trial.

Prior to the time that the accident occurred, plaintiff was a healthy, able-bodied man of the age of 43 years. He was injured on August 10, 1939. He had stopped his car at an intersection awaiting the change of traffic signals. While his car was so standing, it was struck violently from the rear by the truck of the defendants. The force of the impact violently snapped his head back and his main injury was an injury to the upper spinal region. The exact nature of this injury was difficult to ascertain because of the difficulty encountered in obtaining satisfactory X-ray pictures in that region. As the immediate result of the impact, plaintiff was dazed; he experienced great pain all along the spine and particularly across the back of the neck and across the shoulders; and he temporarily lost control of his arms and experienced a tingling sensation and numbness in his arms. He was taken to the hospital in an ambulance and he remained there for 21 days. Boards were placed under his body and traction was applied to stretch his neck by attaching apparatus under his chin and applying a fifteen-pound weight over a pulley. He was forced to lie flat on his back for eighteen days in traction, during which time he suffered great pain and was unable to get much sleep. Thereafter a large cast was applied for the purpose of

pushing his chin up and out in order to stretch the neck. He insisted on going home but he carried the cast for a month and thereafter he wore a steel brace for many months and until shortly before the trial.

Treatments continued two or three times per week after plaintiff left the hospital, including stretching treatments, manipulation of the head and stretching of the spine, which treatments were very painful. There were approximately sixty such treatments as well as deep massage and heat treatments. In the early part of 1940, the doctors advised occupational therapy and he attempted to return to work. This attempt lasted but 2½ days and he was unable to continue. He was in a very nervous condition, and the doctors advised plaintiff to go away. He did so and did engage in light work assisting the carpenters around the house in order to tone up his muscles.

The trial was held approximately fifteen months after the accident. He was still disabled and expressed a willingness to undergo any treatment to get relief, including the recommended Skeletal treatment. At that time, his head was still forced into such a position that it was held toward his right shoulder with his chin pointed toward the left. He could not turn his head to the left beyond the mid line. Plaintiff testified that at that time his legs and arms were as good as ever, except for a numbness in the inner arm, but that in attempting to raise his right arm above his shoulder, a catch came in his neck; that he still experienced almost continuous pain and had not been relieved of pain since the accident; that he suffered pain at night and had not averaged four hours' sleep a night in fifteen months; that he had a continuous ringing through his head and a continuous pain at the base of his skull; that he also suffered pain through his spine at the level of the bottom of his arm pits; that any motion of his head was very painful; and that when he was able to get to sleep, any rolling over caused such pain and shock that he was awakened.

The doctors who had treated plaintiff substantiated the foregoing testimony and described in detail their findings and treatment. They described plaintiff's main injury as a sprain of the cervical spine of considerable severity, evidenced by muscle spasm and marked edema. It was suspected that there had been some fracture or dislocation and numerous X-rays were taken. The doctors had never been able to determine definitely whether there was such fracture or dislocation because the region of the spine affected was an exceedingly difficult region in which to take X-rays. It appeared that the failure of plaintiff's injuries to respond more rapidly to the treatment given indicated that Skeletal treatment should be applied. This treatment involves traction applied by the use of calipers with very sharp points inserted in the outer table of the skull. In plaintiff's case the recommended treatment would involve about four weeks of hospitalization and about four or five months' treatment thereafter. The doctors did not feel absolutely certain that this treatment would bring plaintiff back to normal but they apparently felt reasonably certain and felt that plaintiff could return to work in about six to eight months after the commencement of such treatment.

[3, 4] We believe that the foregoing summary of the evidence is sufficient to show that plaintiff suffered a severe, painful and disabling injury which had not responded well to the treatment given; that further treatment was required to restore plaintiff to normal; and that even with such further treatment there still remained some doubt concerning the results thereof. As above stated, the award made to plaintiff himself was in the sum of $2,460. The award made in favor of plaintiff in intervention was $3,702.63. The last-mentioned amount covered the exact amount expended by plaintiff in intervention up to the time of trial for wages paid to plaintiff, for medical and hospital fees paid for services to plaintiff, and for repairs to its automobile. It did not cover any allowance for further treatment of plaintiff or for wages during any further period of disability. We believe it is clear from what has been said that this court may not hold that the trial court abused its discretion in determining that the damages awarded were inadequate.

The order granting a new trial is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

49 Cal.App.2d 597

PEOPLE v. PASCUA DEL PRADO.

Cr. 3538.

District Court of Appeal, Second District, Division 2, California.

Feb. 9, 1942.

1. Criminal law ⇐260(11)

If circumstances shown in evidence reasonably justify finding of court, trying criminal case without jury, that defendant was guilty of crime charged, reviewing court's opinion that such circumstances might also reasonably be reconciled with defendant's innocence will not justify reversal of judgment of conviction.

2. Robbery ⇐24(1)

Evidence *held* sufficient to sustain judgment of conviction for second-degree robbery.

3. Criminal law ⇐938(1)

Whether motion for new trial after judgment of conviction for crime should be granted on ground of newly discovered evidence is within trial court's discretion on issues whether due diligence was exercised and whether different decision would be reasonably probable on presentation of new evidence.

4. Criminal law ⇐1156(3)

To justify reviewing court in disturbing trial court's findings, on hearing of convicted defendant's motion for new trial on ground of newly discovered evidence, as to whether due diligence was exercised and different decision would be reasonably probable on presentation of new evidence, clear and unmistakable abuse of discretion must be shown.

5. Criminal law ⇐938(3)

Where convicted defendant knew, at time of his trial for robbery, that another man was awaiting trial for participating in same robbery, but failed to present him as witness for defense, order denying defendant's motion for new trial on ground of newly discovered testimony of such other accused, who was acquitted, must be affirmed, in absence of showing of clear and unmistakable abuse of trial court's discretion in finding that due diligence was not exercised and that different decision was not reasonably probable on presentation of new evidence.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Tony Pascua Del Prado was convicted of robbery in the second degree, and he appeals.

Affirmed.

Arthur F. Larrabee, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

W. J. WOOD, Justice.

Defendant was found guilty of the crime of robbery in the second degree at a trial by the court without a jury. He has appealed from the judgment of conviction and from the order denying his motion for a new trial.

[1, 2] It is contended that the evidence is insufficient to establish that the crime of robbery was committed and that defendant participated therein. The complaining witness, Agapito Fortuno, a Filipino chauffeur, testified that he was returning from his work in Beverly Hills on the night of May 15, 1941. On arriving at the neighborhood of his home on North Fremont Street in Los Angeles he was accosted by another Filipino, with whom he was not acquainted. This Filipino asked the witness if he "wanted a girl." Upon a negative answer by the witness the other Filipino struck him with his fist and a fight ensued. Three other Filipinos, none of whom was an acquaintance of the witness, joined in the attack upon Fortuno. The defendant was identified as one of these assailants by Fortuno, who testified that "he was grabbing me by the waist and trying to grab my wallet." In the struggle Fortuno was struck with a blunt instrument and became unconscious. When he regained consciousness he complained to police officers in the vicinity, who took him to the Central police station and later to his home. The next morning Fortuno discovered that the sum of $30 had been taken from his wallet.

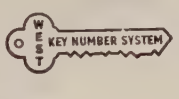
If the circumstances shown in evidence reasonably justify the finding of the trial court, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not justify a reversal of the judgment. People v. Newland, 15 Cal. 2d 678, 681, 104 P.2d 778; People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467.

Measured by this rule the evidence is sufficient to sustain the judgment of the trial court.

[3-5] In support of his motion for a new trial defendant filed affidavits by his attorney and by one Velasquez, who had been charged with participation in the robbery and who had been acquitted. Although defendant knew at the time of his own trial that Velasquez was awaiting trial for participating in the same robbery, he nevertheless failed to present him as a witness for the defense. The question whether a motion for a new trial should be granted is within the discretion of the trial court as to the issue whether due diligence has been exercised and as to the issue whether a different decision would be reasonably probable upon the presentation of the new evidence. A clear and unmistakable abuse of discretion must be shown before a reviewing court would be justified in disturbing the findings of the trial court. No such showing has been made. People v. Loveless, 140 Cal.App. 291, 294, 35 P.2d 574.

The judgment and the order are affirmed.

MOORE, P. J., and McCOMB, J., concurred.



49 Cal.App.2d 576

PEOPLE v. ROBINSON.

Cr. 3516.

District Court of Appeal, Second District, Division 1, California.

Feb. 9, 1942.

1. Criminal law ⇐1159(2)

Reviewing court cannot substitute its judgment on the facts for that of the jury or trial court, and, before the verdict or judgment of trial court can be set aside on appeal on ground of insufficiency of the evidence, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence to support the conclusion of the trial court.

2. Criminal law ⇐553

In prosecution for robbery heard by court without a jury, trial court was authorized to reject accused's version of robbery and accept as true the testimony of the complaining witness and other evidence of the prosecution, and therefrom to draw an inference of accused's guilt. Code Civ.Proc. §§ 1847, 2061.

3. Robbery ⇐24(1)

Evidence sustained conviction of robbery.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Maurice Robinson was convicted of robbery, and he appeals from the judgment and an order denying a new trial.

Affirmed.

R. E. O'Neill, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

To an information accusing him of the crime of robbery defendant entered a plea of not guilty and admitted, as charged, that he had suffered a prior conviction of a felony. After trial before the court, a jury having been waived, defendant was found guilty of robbery in the second degree. From the judgment of conviction and from the order denying his motion for a new trial he prosecutes this appeal, urging, as his sole ground for reversal, that the evidence is insufficient to support the judgment.

From the evidence adduced by the prosecution, it appears that on the evening of April 21, 1941, at or near midnight, the complaining witness, James H. Staples, and a party of friends, went to a night club on Central Avenue in Los Angeles, where they met the defendant, who said he was the head waiter and would get them a table. The party ordered Coca Colas, and Staples had a bottle of whiskey which he passed around. The defendant was seated at or near the table of Staples' party. About one o'clock defendant appeared to be sick, and asked Staples to take him out so that he could get some fresh air. After they got outside and walked around the corner, defendant asked Staples how much money he had, and Staples replied that he

did not have any. Then, according to Staples testimony, defendant "made a pass" at him, and reached over and put his hand in Staples' left trouser pocket, whereupon Staples struck at defendant. At that moment someone grabbed Staples and started to choke him; he was hit on the head and knocked unconscious. When he recovered consciousness he found his billfold, bank book and money were gone.

About three o'clock on the morning of April 22d, police officers, in answer to a call, came to 1032 East 42d Street, about one and one-half blocks from the night club, where they found defendant attempting to enter the house, claiming that he lived there. Upon ascertaining from defendant that his address was 1338 East 48th Place, the officers took him to that address, where he was admitted. About five minutes after the officers left defendant, they received a radio call describing defendant as being wanted for robbery, whereupon they returned to defendant's home and arrested him. While the defendant was being removed from the premises at 1032 East 42d Street, one of the officers found Staples' billfold, bank book and driver's license lying on the sidewalk in front of the house. One of the officers testified that when they found the defendant on 42d Street he appeared to have been drinking; that he was unbalanced, but "not down"; that he could walk without support; that his answers were coherent, except as to where he lived.

In his own behalf defendant testified that he was not a waiter or head waiter at the night club; that he met the complaining witness, Staples, and his party, at the club, and at Staples' invitation had several drinks between midnight and two o'clock; that about a quarter of two Staples suggested going out for more whiskey; that about two o'clock defendant began to feel sick, and that he went outside with Staples; that he remembered Staples' talking to two men on the sidewalk, but that he, the defendant, continued down the street; that he was feeling sick and wanted to sit down some place. The defendant asserted that he did not assault Staples. He testified that he did not see Staples again until he was taken to the police station; that he did not know how long he was on the porch at 1032 East 42d Street; that he took no part in any robbery or assault of the complaining witness. In rebuttal, Staples testified that as they left the club defendant said, "Hello, boys," to two men on the sidewalk, but that they left them behind and continued down the street.

In support of his contention that the evidence is insufficient, appellant points out that he did not flee from the scene of the crime; that the evidence does not show possession by him of the fruits of the robbery, nor is there any evidence that appellant had anything to do with the placing of the billfold and papers where they were found on the sidewalk, and that no connection is shown between appellant and the person or persons who assaulted Staples. It is just as reasonable, argues the appellant, to suspect that Staples was assaulted and robbed by unknown persons acting independently, as to believe that appellant, feigning drunkenness, lured Staples out of the club to be robbed by appellant and his accomplices. This contention cannot prevail. If the account of the complaining witness be accepted, then the trial court's finding of appellant's guilt is amply supported. In addition to the evidence which placed appellant at the scene of the robbery at the time it occurred, the record contains, as hereinbefore stated, the positive testimony of the complaining witness that appellant was attempting to rob him at the moment the complaining witness was struck down by a blow on the head. If the testimony of Staples be true, then appellant's version of what occurred, to-wit, that he was drunk and sick, and that he staggered on down the street, leaving Staples talking to two men near the cafe, must be false, as must also be his testimony that the two men were unknown to him. As to appellant's alleged drunkenness, the testimony of the complaining witness, members of his party, and the police officer would warrant the conclusion that while appellant had been drinking, he was not drunk. Appellant himself testified that he did not begin drinking until about midnight, and that he had "two or three" drinks. Appellant testified that he did not go out with Staples until after two o'clock, but it was stipulated at the trial that police officers, if called, would testify that the crime was reported at 1:50 a. m.

[1-3] Nothing is more firmly established in the law of this state than the rule that an appellate court may not substitute its judgment on the facts for that of the jury or trial court, and that before the verdict of the jury or the judgment of the trial court can be set aside on appeal upon

the ground of insufficiency of the evidence to support it, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence to support the conclusion of the trial court. People v. Tom Woo, 181 Cal. 315, 184 P. 389; People v. Tedesco, 1 Cal.2d 211, 34 P.2d 467. The jury, or as in this case the trial court, when a jury is waived, is the exclusive judge of the credibility of witnesses (Code Civ. Proc., sec. 1847) and of the value and effect of the evidence presented. Code Civ.Proc., sec. 2061. It necessarily follows that the trial court in this case was authorized, if it conscientiously felt warranted in so doing, after full and fair consideration thereof, to reject appellant's version of the affair and accept as true the testimony of the complaining witness and the other evidence of the prosecution, and therefrom to draw an inference of appellant's guilt.

An examination of the record discloses no prejudicial error. The judgment and the order denying defendant's motion for a new trial are, and each is, affirmed.

YORK, P. J., and DORAN, J., concurred.



49 Cal.App.2d 473

CARPENTER v. DEVITT.

Civ. 11815.

District Court of Appeal, First District, Division 2, California.

Feb. 2, 1942.

Hearing Denied April 2, 1942.

1. Automobiles ⇐19

Under statute providing that no transfer of title to motor vehicle shall be effective without change of registration except as transferor may be estopped by law to deny transfer, where dealer repossessed automobile sold under conditional sale contract and delivered it to buyer's father who paid amount then due, the cost of repossession and assumed balance of payments under contract, but no change was made in registration of automobile which was registered in son's name, as between the son and father, the son was "estopped" by law to deny the transfer. Vehicle Code, § 186, St.1935, p. 118.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

2. Estoppel ⇐98(1, 4)

The execution creditor and sheriff acting for him in attempting to satisfy judgment debt by execution are "privies" of the judgment debtor and take no better title than the judgment debtor possesses, and are bound by the same estoppel as binds him.

See Words and Phrases, Permanent Edition, for all other definitions of "Privy".

3. Attachment ⇐178
Execution ⇐111, 268, 269

The lien of an execution and attachment proceedings attaches to the real and not to the apparent interest of the judgment debtor to his property, and the purchaser at execution sale takes subject to such existing liens and equities as the property was subject to in the hands of the debtor, unless he can show he purchased property without notice of the existence of such liens or equities.

4. Automobiles ⇐19

Where dealer repossessed automobile sold under conditional sale contract and delivered it to buyer's father who paid amount then due, the cost of repossession and assumed balance of payments under contract, but no change was made in registration of automobile which was registered in son's name, and sheriff levied writ of execution on automobile to satisfy judgment against the son at time when automobile was in possession of father who filed a third party claim, the son being estopped to deny title of the father, sheriff acting with full knowledge of the father's rights was bound by the same estoppel, and father could properly maintain action for conversion against sheriff. Vehicle Code, § 186, St.1935, p. 118; Code Civ. Proc. § 689.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action for conversion of an automobile by J. L. Carpenter against J. R. Devitt. From a judgment for the plaintiff, defendant appeals.

Affirmed.

W. A. Deans, of Santa Cruz, for appellant.

J. L. Carpenter, in pro. per.

DOOLING, Justice pro tem.

Appeal from a judgment for the value of an automobile in an action for conversion. Defendant and appellant, as sheriff of Santa Cruz County, levied a writ of execution upon the automobile to satisfy a judgment against A. R. Carpenter. Plaintiff and respondent filed a third party claim pursuant to section 689, Code of Civil Procedure, and the execution creditor having given the sheriff the undertaking provided for in that section, the sheriff sold the automobile at execution sale. This action followed.

The evidence showed that one Watkins, a dealer, had originally sold the automobile to A. R. Carpenter on conditional sale contract. A. R. Carpenter having defaulted in certain payments Watkins repossessed the automobile. Thereafter respondent J. L. Carpenter (who is the father of A. R. Carpenter), A. R. Carpenter and Watkins entered into an agreement among themselves whereby respondent assumed the balance of the payments under the contract with his son, paid Watkins the amount then due plus the costs of repossession and the car was delivered to respondent as purchaser. The car had been registered in the names of Watkins as legal owner and A. R. Carpenter as registered owner. No change was made in the registration. Respondent continued to make the payments to Watkins and at the time of the levy on the car only one monthly instalment remained unpaid. The indebtedness upon which the judgment and execution were based was not incurred in reliance upon the apparent ownership of the car by A. R. Carpenter.

Appellant relies upon section 186 of the Vehicle Code, St.1935, p. 118 and the case of Coca Cola Bottling Co. v. Feliciano, 32 Cal.App.2d 351, 89 P.2d 686, 687. Section 186 of the Vehicle Code read at the time of the execution: "No transfer of the title or any interest in or to a vehicle registered hereunder shall pass nor shall delivery of any said vehicle be deemed to have been made and any attempted transfer shall not be effective for any purpose until transfer of registration is made and the department has issued a new certificate of ownership and registration card with respect thereto as provided herein, except as a transferor may be estopped by law to deny a transfer. * * *"

In Coca Cola Bottling Co. v. Feliciano, supra, the court did not discuss or decide the effect of the proviso of this section which reads "except as a transferor may be estopped by law to deny a transfer."

In the later case of Dennis v. Bank of America, etc., Ass'n, 34 Cal.App.2d 618, at page 623, 94 P.2d 51, 54, the court said of this proviso: "The same section also provides that the provisions thereof cannot be availed of by a transferor who 'may be estopped by law to deny a transfer'. In Boles v. Stiles, 188 Cal. 304, 204 P. 848, 849, this language was construed to mean that where, as in the case before us, the transferring dealer by his own act and agreement placed respondent in the 'immediate and exclusive' possession of the automobile, such transferor cannot invoke the provisions of the quoted statute."

[1] It is plain under the authorities that in a suit between respondent and A. R. Carpenter the latter would be "estopped by law to deny a transfer." Dennis v. Bank of America, etc., Ass'n, supra; Boles v. Stiles, supra; Pacific Acceptance Corp. v. Jones, 95 Cal.App. 365, 370, 272 P. 1084; Kenny v. Christianson, 200 Cal. 419, 423, 424, 253 P. 715, 50 A.L.R. 1297.

[2] The execution creditor and the sheriff acting for him in attempting to satisfy the judgment debt by execution are privies of the judgment debtor and take no better title than the judgment debtor possesses. They are bound by the same estoppel that binds him.

[3] "The lien of an execution and attachment proceedings attaches to the real and not to the apparent interest of a judgment debtor in and to his property, and the purchaser at an execution sale takes subject to such existing liens and equities as the property was subject to in the hands of the debtor, unless he can show he purchased the same without notice, either actual or constructive, of the existence of such liens or equities." Richman v. Bank of Perris, 102 Cal.App. 71, 88, 282 P. 801, 809; Anglo-California Trust Co. v. Oakland Railways, 193 Cal. 451, 469, 225 P. 452; Wood Estate Co. v. Chanslor, 209 Cal. 241, 286 P. 1001.

In Wood Estate Co. v. Chanslor, supra, the court applied this rule specifically to an estoppel of the judgment debtor saying at page 250 of 209 Cal., at page 1004 of 286 P.: "It is too elementary to need citation of authority that, if the corporation is estopped, in absence of fraud, the estoppel likewise applies against the credi-

tors of the corporation. This is so because the creditors get only the rights of the debtor, and no more. 10 Cal.Jur. 652."

[4] It follows that A. R. Carpenter being estopped to deny the title of respondent the appellant sheriff, acting with full knowledge of respondent's rights as set out in his third party claim, was bound by the same estoppel.

The respondent having had possession of the automobile at the time of the levy and appellant being estopped to deny his title the action for conversion was properly maintained. Pendell v. Thomas, 95 Cal. App. 33, 272 P. 306; Davis v. Cline, 184 Cal. 548, 195 P. 42; Mueseler v. Bridgewater, 138 Cal.App. 217, 31 P.2d 1089.

Judgment affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



49 Cal.App.2d 545

DALY v. MATHEWS et al.

Civ. 12880.

District Court of Appeal, Second District, Division 2, California.

Feb. 6, 1942.

1. Municipal corporations ⇐808(1)

Under the common law there is no liability upon the part of an adjacent landowner for injuries occurring on a public sidewalk.

2. Municipal corporations ⇐808(1, 4)

The abutting landowner is not bound to keep the sidewalk in front of his premises in repair or in a safe condition for public travel, in absence of statute or ordinance imposing such a duty upon him.

3. Municipal corporations ⇐808(1)

Where a portion of a sidewalk is used for the particular benefit of adjacent landowner, the landowner is liable for a negligent construction or maintenance which proximately causes personal injury to a pedestrian.

4. Municipal corporations ⇐808(1)

Abutting property owners were not liable to a pedestrian for injuries sustained from a fall in stepping from a sidewalk onto a depressed driveway which crossed sidewalk, where depth of driveway at curb line was six and one-half inches below adjacent curbs, and there was no contention that driveway was not properly constructed or that it was out of repair, and driveway was in the same shape as other driveways in the city, and there was no defect in original construction of driveway.

5. Municipal corporations ⇐768(3), 808(1)

If the continuance of a depressed driveway in a sidewalk under surrounding conditions was inherently dangerous to pedestrians, liability to a pedestrian for injuries sustained in a fall while stepping from sidewalk onto driveway rested with city and not with abutting landowners.

6. Municipal corporations ⇐816(8), 818(10)

Where complaint in action for personal injuries referred to and annexed as an exhibit a copy of an ordinance declaring that a public sidewalk which as a matter of fact is in a condition to endanger persons passing thereon is a nuisance and unlawful, but complaint did not charge that defendants had violated ordinance, the ordinance was admissible as evidence only in support of some other allegation of negligence, and then only if ordinance conferred a right on plaintiff for a violation of it.

7. Municipal corporations ⇐808(7)

An ordinance merely declaring that a public sidewalk which as a matter of fact was in a condition to endanger persons passing thereon was a nuisance and unlawful did not confer a right of action on a pedestrian, who was injured in a fall while stepping from a sidewalk onto a depressed driveway, against abutting property owners for violation of ordinance.

8. Pleading ⇐8(17)

In pedestrian's action against abutting property owners for injuries sustained from a fall in stepping from a sidewalk onto a depressed driveway, a complaint containing allegations that owners negligently maintained a public sidewalk at a level below normal surface level of adjacent balance of sidewalk and curb, thereby endangering safety of persons using sidewalk and curb in customary manner, which allegations were

mere "conclusions" of pleader, did not state a cause of action.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Mabel A. Daly against Lucile G. Mathews and others for personal injuries. From an order granting a new trial in favor of plaintiff after judgment for defendants, defendants appeal.

Reversed.

Eugene S. Ives and Leonard Wilson, both of Los Angeles, and Paul E. Schwab, of Beverly Hills, for appellants.

Felix H. McGinnis, of Los Angeles, for respondent.

HANSON, Justice pro tem.

The primary question presented in this case is whether abutting property owners are liable to a pedestrian for an injury which she suffered from a fall in stepping from a sidewalk onto an unlooked for depressed driveway which crossed the sidewalk. The case reaches us on an appeal from an order granting a new trial in favor of the plaintiff after judgment for the defendants.

The controlling facts are undisputed. It appears that several years ago the sidewalk with its driveway was constructed in front of the property here involved, in the city of Beverly Hills. The driveway extends along the curb line a distance of 10 feet and inward and upward from the curb towards the property a distance of 4 feet. Its depth at the curb line is 6½ inches below the adjacent curbs, and it slopes gradually to the sidewalk surface for a distance of 4 feet. Some time after the sidewalk with its driveway had been constructed a two-story office building was erected across the entire front of the property, thus obviating any further need of the driveway as a method of ingress and egress by vehicles. In that condition defendants acquired the property in 1936. In September of that year the city enacted an ordinance which declared that it should be "a nuisance and unlawful for any person * * * owning real estate * * * to permit any public sidewalk * * * to be * * * in a condition to * * * endanger persons * * * passing thereon or thereover." The ordinance further provides that any person may file with the clerk of the city court a verified statement of any violation of the ordinance, and that thereupon an order shall issue under the seal of the court directing the owner complained of to appear and show cause why the nuisance should not be abated by repair of the defective condition. It is further provided that a trial may be had on the issue as made, and that if an order is issued directing an abatement of the nuisance and it is not complied with, the person thus failing shall be guilty of a misdemeanor and upon conviction shall be punished either by a fine or by imprisonment in jail, or both. The ordinance does not prohibit driveways, nor does it declare them to be nuisances per se. Nowhere does it declare that driveways generally, or driveways not in use as driveways, must be reconstructed so as to leave level sidewalks only in front of properties. It merely declares that a public sidewalk which as a matter of actual fact is in a condition to endanger persons passing thereon is a nuisance and unlawful. The ordinance contains no provision conferring a right of action on any party injured by reason of a violation of the ordinance.

At noon on December 17, 1938, the daughter of plaintiff stopped her car directly in front and immediately alongside of the driveway. Thereupon the plaintiff, who was on the other side of the street, crossed over in order to enter the car. As she desired to sit in the seat with her daughter, who was occupying the driver's seat, it was necessary for plaintiff to pass in front of the car and to go up over the curb to the sidewalk. This she did, looking down as she stepped up onto the sidewalk. The day was clear and dry and her sight was unimpaired. After reaching the sidewalk she turned abruptly to her right so as to pass along the hood of the car to the door thereof. In so doing she did not look down so as to observe the sidewalk, nor did she notice the depression therein caused by the driveway. Without looking she went forward a step or two and then, as her foot reached the unexpected depression, lost her balance and pitched forward, and as a result was injured.

On these facts the question is whether a verdict if rendered for the plaintiff could stand. If not, it was error to grant a new trial after judgment for the defendants.

In our opinion the trial court correctly found for the defendants in the first instance and committed reversible error when it granted a new trial. Moreover, we are of the view that the motion for judgment on the pleadings, based on the ground that the complaint did not state facts sufficient to constitute a cause of action should have been sustained.

So far as the driveway was concerned, there was nothing about it that was different from any other properly constructed and well-maintained driveway. There is no dispute here but that the driveway was properly constructed, and none that it was out of repair or had a single flaw in it. This driveway, it was stipulated, was substantially in the same form and shape as the other driveways in that city. We pass to a consideration of the legal questions involved.

[1-3] Under the common law there is no liability upon the part of an adjacent landowner for injuries occurring on a public sidewalk. Eustace v. Jahns, 38 Cal. 3; Martinovich v. Wooley, 128 Cal. 141, 60 P. 760; Bolles v. Hilton & Paley, Inc., 119 Cal.App. 126, 6 P.2d 335. Likewise in this state there is no obligation on the abutting landowner to keep the sidewalk in front of his premises in repair or in a safe condition for public travel, in the absence of statute or ordinance imposing such a duty upon him. Cases supra; Restatement, Torts, sec. 288. Where a portion of a sidewalk is used for the particular benefit of the adjacent landowner, such as grates or glass therein for light, or sidewalk elevators or heavy planked driveways, it has been held that the abutting landowner is liable for a negligent construction or maintenance which proximately causes personal injury to a pedestrian. No case, however, has gone so far as to charge an abutting landowner with liability for the condition of a driveway, whether used or not by him, unless he personally created, through use or otherwise, some unsafe condition therein.

The case of Granucci v. Claasen, 204 Cal. 509, 269 P. 437, 59 A.L.R. 435, heavily relied upon by respondent, is not contra to what we have said. In that case the abutting property owner had constructed, with the permission of the city, a special type of driveway for her exclusive benefit; and so it was held that she was directly liable to a pedestrian for an injury caused by her failure to keep the driveway in repair. The case is an exception to the rule and its doctrine does not cover the case before us nor should it be extended to it.

[4] The facts of the case at bar bring it squarely within the holding of the Massachusetts court in Heaney v. Colonial Filling Stations, 262 Mass. 338, 159 N.E. 916, where it was held that a perpendicular drop of 5½ inches in the grade of a driveway with the sidewalk adjoining does not render the abutting owner liable, and as a matter of law is reasonably safe and convenient for the use of pedestrians. Cf. also Joel v. Electrical Research Products, Inc., 2 Cir., 94 F.2d 588.

[5] In the instant case it is conceded that there was no defect in the original construction of the driveway and that it was in the same condition at the time of injury as at the date of its construction. In short, there was no defect or flaw in the driveway. The sole claim is that the continuance of the driveway in the sidewalk under the surrounding conditions was inherently dangerous to pedestrians. If it was, the liability to the plaintiff therefor rested with the city and not with the abutting landowners.

[6-8] The complaint refers to and annexes as an exhibit a copy of the ordinance. But nowhere does the complaint charge that the defendants in any respect violated it. Cf. Lake Erie, etc., Co. v. Mikesell, 23 Ind.App. 395, 55 N.E. 488. Accordingly, the ordinance was admissible in evidence, as evidence, only in support of some other allegation of negligence, and then only if the ordinance conferred a right on the plaintiff for a violation of it. As we have seen, the ordinance does not confer such a right, and so it was erroneously admitted in evidence and erroneously considered, if it was, on the motion for judgment on the pleadings. Moreover, the complaint failed to charge any act of negligence, and so far as it attempted to do so it was done by way of conclusion only and not by the statement of any ultimate fact. The allegation in the complaint that defendants "negligently * * * maintained a public sidewalk * * * at a level below the normal surface level of the adjacent balance of said sidewalk and curb, thereby * * * endangering the safety of persons using said sidewalk and curb in the normal and customary manner," states at best a mere condition and the conclusion of the pleader. The allegation is of no greater import or significance in re-

spect to negligence than if it had merely averred that a level sidewalk was maintained, thereby endangering pedestrians. An allegation that an owner maintained steps from a sidewalk to his house clearly would not imply he was negligent. So here, something more than maintaining a driveway across a sidewalk below its level is necessary to show the maintenance was negligent. The allegation that it was dangerous is the conclusion of the pleader. No doubt the notion back of the allegation is that "but for" the depression existing by reason of the lowered driveway in the sidewalk the plaintiff would not have been injured; but this is not an allegation of negligence.

As the ordinance imposed no liability on the defendants for the maintenance of the driveway and sidewalk and, what is more important, conferred no right of action in favor of an individual pedestrian against the abutting owners, no cause of action based on the ordinance was stated. Aside from the ordinance no basis for a claim of common-law negligence was alleged in the complaint or shown by the evidence. Accordingly, as a judgment for the plaintiff would lack support, it was error to grant a new trial.

Order reversed.

MOORE, P. J., and McCOMB, J., concurred.



49 Cal.App.2d 465

FIRST FEDERAL SAVINGS & LOAN ASS'N OF ALTADENA v. JOHNSON, State Treasurer et al.

Civ. 6557.

District Court of Appeal, Third District, California.

Jan. 31, 1942.

Hearing Denied March 30, 1942.

1. Taxation ⇐6

States may not impose taxes on the assets or property, with the exception of realty, of any agency or branch of the federal government, without consent of Congress.

2. Taxation ⇐6

Congress may lawfully authorize states to levy and collect taxes on certain property and assets or income derived from governmental agencies doing business within the states, by appropriate legislation therefor.

3. Taxation ⇐9

In view of provision of federal statute that no state taxing authority shall impose any tax on a federal savings and loan association, greater than that imposed by such authority on other similar local mutual or cooperative thrift and home-financing institutions, the state may impose on a federal savings and loan association, franchise tax computed on basis of annual net income derived from investments of both local funds and federal funds, where the tax is not greater than that levied on a similar state institution. Gen.Laws 1937, Act 8488; Const. art. 13, § 16; Home Owners' Loan Act of 1933, §§ 1 et seq., 4(c), 5(h), 12 U.S.C.A. §§ 1461–1468, 1463(c), 1464(h).

4. Statutes ⇐206

Statutes should be construed, if possible, so as to give force and effect to all language employed therein.

5. Taxation ⇐165

Federal savings and loan association was not free from state franchise taxes because it did not hold a franchise from the state. Gen.Laws 1937, Act 8488; Const. art. 13, § 16; Home Owners' Loan Act of 1933, §§ 1 et seq., 4(c), 5(h), 12 U.S.C.A. §§ 1461–1468, 1463(c), 1464(h).

6. Taxation ⇐37

In view of state statute authorizing the taxing of all banks, including national banking associations, located within the state, and all financial, mercantile, manufacturing and business corporations, levy of franchise taxes against a federal savings and loan association was not void because the state failed to take advantage of the authorization conferred by the federal savings and loan association act to tax such association's franchise and income by thereafter enacting a statute to that effect, since the association was a "financial corporation" within the statute. Gen.Laws 1937, Act 8488; Const. art. 13, § 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Financial Corporation".

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Action by the First Federal Savings and Loan Association of Altadena against Charles G. Johnson, as state treasurer, etc., and others, to recoup franchise taxes levied by the state. From a judgment of dismissal after a general demurrer to the complaint had been sustained, the plaintiff appeals.

Judgment affirmed.

McEachern & Ritchie, of Pasadena, for appellant.

Earl Warren, Atty. Gen., and H. H. Linney and Valentine Brookes, Deputy Attys. Gen., for respondents.

THOMPSON, Acting Presiding Justice.

The plaintiff has appealed from a judgment of dismissal which was rendered against it after a general demurrer to the complaint had been sustained. By this action the plaintiff sought to recoup franchise taxes levied by the State of California pursuant to article XIII, section 16, of the State Constitution, and the corresponding enabling act of the legislature. Stats.1929, p. 19; Deering's Gen.Laws, 1937, Act 8488. The taxes were paid under protest.

The complaint alleges that plaintiff is a Federal Savings and Loan Association, organized under the United States statute, and doing business in Los Angeles, California; that it was granted a federal charter in 1934, as a branch of the government, under the Home Owners' Loan Act of 1933, 12 U.S.C.A., p. 984, §§ 1461–1468, to finance the building of homes in California, pursuant to that act of Congress; that the federal government supplied the plaintiff with the aggregate sum of $775,000 for the purpose of such loans, all of which was used for that purpose, together with other corporation funds; that pursuant to California law (Stats.1929, p. 19, as amended, Act 8488, 2 Deering's Gen.Laws of Calif., p. 3851), the defendants levied and collected from plaintiff franchise taxes in the aggregate sum of $2,056.93, computed on the same basis applicable to "other similar local mutual * * * and home financing institutions" which taxes were paid under protest. The complaint alleges that the taxes in question were computed on the basis of the annual net income of plaintiff derived from investments of "both locally deposited funds and funds invested by the Federal Government." The complaint asks for repayment of said sum of $2,056.93 on the ground that it was illegally levied and collected.

The defendants demurred to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action. The demurrer was sustained. The plaintiff failed to amend its complaint. Judgment was thereupon rendered dismissing the suit. From that judgment the plaintiff has appealed.

The appellant contends that the franchise tax in question was illegally levied and collected by the State of California for the reason that all assets, except the real estate of the plaintiff, First Federal Savings and Loan Association of Altadena, are exempt from all state taxes since it is an agency of the United States and Congress has not affirmatively authorized such property to be taxed, and that, in any event, the state lacks authority to levy such taxes based on the portion of plaintiff's income which is derived from the investment of funds furnished by the federal government.

We are of the opinion the complaint fails to state facts sufficient to constitute a valid cause of action for the repayment of franchise taxes levied and collected pursuant to law, and that the demurrer to the complaint was therefore properly sustained. The judgment of dismissal necessarily followed.

[1] Ever since the Supreme Court of the United States rendered its opinion in the famous case of McCulloch v. State of Maryland, reported in 4 Wheat. at page 316, 17 U.S. 316, 4 L.Ed. 579, it has been recognized as a fact that the states of this union may not impose taxes upon the assets or property of any agency or branch of the federal government, with the exception of real property, without consent of Congress. For the purposes of this appeal, it may be conceded the plaintiff in this case is an instrumentality of the federal government for the purpose of loaning its money advanced to relieve financially distressed owners of farms and homes, pursuant to the provisions of the Home Owners' Loan Act of 1933, which was adopted by Congress as an emergency measure under the general welfare clause of the federal Constitution. It may also be conceded that mere silence or failure on the part of Congress to enact legislation with respect to the taxing of property of particular governmental agencies, may be deemed to constitute a prohibition against the levying of such taxes by a state. First National Bank v. Richmond, C.C., 39 F. 309.

[2] It is, however, acknowledged that Congress may lawfully authorize the states to levy and collect taxes on certain property and assets or income derived from governmental agencies doing business within such states, by appropriate legislation therefor. From time to time, ever since 1864, Congress has specifically authorized the states to levy and collect taxes on specified classes of property and incomes of particular governmental agencies. In 1923, Congress specifically authorized the states to tax the shares, dividends and net income of "National banking associations" located within their borders, to the extent and in the manner prescribed by section 548 of the Federal Code. 12 U.S.C.A p. 604, sec. 548, as amended in 1926. That section provides in part:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may * * * tax such associations on their net income, or * * * according to or measured by their net income."

Pursuant to the foregoing authorization on the part of Congress, article XIII, section 16, of the Constitution of California was adopted in 1930, authorizing the levying and collection of annual franchise taxes against all "banks, including national banking associations, located within the limits of this state" and against all "financial, mercantile, manufacturing and business corporations" similarly located and doing business in California, for the privilege of operating therein, "equivalent to four per cent of their net income." To carry into effect the provisions of the preceding section of article XIII of the Constitution, the Legislature of California adopted chapter 13 of Statutes of 1929, which is found at page 19 thereof.

The Federal Home Owners' Loan Act of 1933 provides for the creation of the "Home Owners' Loan Corporation," which it specifically declares "shall be an instrumentality of the United States." 12 U.S.C.A. p. 985, § 1463. With respect to that particular corporation, subdivision (c) of that section specifically exempts all of its property and assets, except real property, from taxation in the following language:

"The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation."

The following section 1464, 12 U.S.C.A. p. 994, was amended by Congress in 1934, authorizing the creation of Federal Savings and Loan Associations, as distinguished from the previously-mentioned Home Owners' Loan Corporation. It is declared that such a Federal Savings and Loan Association shall automatically become a member of the Federal Home Loan Bank of the particular district in which it is located. It is not stated that such *associations* shall become "instrumentalit[ies] of the United States," as it was specifically declared with respect to the Home Owners' Loan Corporation. Nor is it stated in section 1464, supra, as it was unqualifiedly declared in section 1463, that the corporation's property and assets are exempt from taxation. On the contrary, it is clearly inferred by the provisions of subdivision (h) of section 1464, that states are authorized to tax the income derived from such associations. It provides that:

"Such [savings and loan] associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States, * * and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter *imposed by the United States;* and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income *greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.*" (Italics added.)

It is not contended that the taxes which were imposed in the present action were greater than those which were levied upon similar thrift or home-financing institutions in California. It must be conceded that the taxes which are involved in this suit were computed in exact accord with the procedure which is followed in California with respect to other similar financial institutions.

[3, 4] Although the language of subdivision (h) of section 1464, with respect to state taxation of federal agencies is negative in form, its meaning is clear and un-

ambiguous. We are of the opinion it constitutes federal authority for states to levy and collect franchise taxes from Federal Savings and Loan Associations, as agencies of the United States Government, doing business within such states, based upon their net incomes, provided the rate is not greater than that which is imposed upon other similar local mutual or cooperative thrift and home-financing institutions. That method is the precise manner in which the State of California computed the franchise taxes which were levied against the net income of the plaintiff association. There was no discrimination in fixing the taxes which are involved on this appeal. Our conclusion in regard to the authority for states to impose taxes upon the incomes of such federal agencies, furnishes the only reasonable construction of which the language of subdivision (b) of section 1464 is susceptible. Statutes should be construed, if possible, so as to give force and effect to all of the language employed therein. If Congress had not intended to authorize states to impose taxes upon the incomes of such federal agencies, it would have omitted the latter portion of that subdivision of the section entirely, and prohibited absolutely taxation of their properties by both the government and the states. The fact that the first portion of that paragraph specifically exempts the property of such associations from taxation "by the United States" and then separately prescribes the manner or extent to which state authorities may impose taxes thereon, furnishes conclusive evidence that Congress intended thereby to authorize states to tax the designated properties of such Federal Savings and Loan Associations. Our construction of the language of subdivision (h) of section 1464 is supported by the following recent decisions: Texas Unemployment Compensation Comm. v. Metropolitan Bldg. & Loan Ass'n, Tex. Civ.App., 139 S.W.2d 309; First Federal Sav. & Loan Ass'n v. Loomis, 7 Cir., 97 F.2d 831, 121 A.L.R. 99.

[5] There is no merit in appellant's contention that it is exempt from taxation because the association does not hold a franchise from the State of California. It is alleged that plaintiff was duly granted a charter by the United States Government on July 10, 1934, and that it continued to operate thereunder, in the State of California, by virtue of the provisions of the Home Owners' Loan Act of 1933. It is not necessary for banks or savings and loan associations to hold franchises issued by the State of California to make them liable for taxes under article XIII, section 16, of the Constitution or the legislative enabling act of 1929. These laws provide that banks, including national banking associations, "located within the limits of this state" shall be liable for the taxes. The law imposes the taxes upon all franchises whether they be national or local in character. See Matson Navigation Co. v. State Board of Equalization, 3 Cal.2d 1, 6, 43 P.2d 805; Butler Bros. v. McColgan, 17 Cal.2d 664, 111 P.2d 334. The case of People v. Alaska Pacific Steamship Co., 182 Cal. 202, 187 P. 742, relied upon by the appellant to support its contention that it is exempt from taxes because it holds no franchise from the State of California, contains no language in conflict with what we have previously said in that regard.

[6] Nor is there merit in appellant's assertion that the levy is void because the State of California failed to take advantage of the authorization conferred by the Federal Savings and Loan Association Act of 1934 to tax its franchise and income by thereafter enacting a statute to that effect. The California statute of 1929, in accordance with article XIII, section 16, of the Constitution, is sufficiently broad and comprehensive to include the power to tax the franchise and net income of the plaintiff as a savings and loan association. Indeed, the law authorizes the taxing of all "banks, including national banking associations, located within the limits of this state" and all "financial, mercantile, manufacturing and business corporations." Certainly the plaintiff is a financial institution. The law clearly authorizes the taxing of all named industries which were doing business in the State of California at the time the statute was enacted, and also all such associations and institutions which may thereafter conduct their businesses within the borders of the state, regardless of when they were created or organized.

Finally, the appellant contends that even if the Federal Savings and Loan Association Act does authorize the taxing of franchises and net incomes, to some extent, "they nevertheless do not have power to tax plaintiff on its entire net income, but must of necessity be limited in its taxation to that portion of plaintiff's income which is derived from the use of locally invested funds, and defendants have no power whatsoever to levy, assess and collect any tax

from that portion of plaintiff's net income derived from the investment of funds invested with plaintiff by the Federal government."

We cannot agree with that construction of the federal statute. No such limitation is placed upon the taxing power of the states by the provisions of subdivision (h) of section 1464. It authorizes the state to tax all incomes of such associations. That provision contemplates the taxing of all such associations or their franchises, capital, reserves, surplus, loans *or income* to an extent not "greater that that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." This absence of a limitation leaves the clear inference that the entire income is taxable and that the portion which is derived from loans of funds invested by the federal government is not exempt. If Congress had intended to exempt the income derived from that source it would have so stated. The Supreme Court of the United States, in the case of Tradesmens National Bank of Oklahoma City v. Oklahoma Tax Comm., 309 U.S. 560, 60 S.Ct. 688, 84 L.Ed. 947, determined that the State of Oklahoma was authorized under the National Bank Act, 12 U.S.C.A. p. 604, § 548 to levy and collect franchise taxes on the entire net assets or income of the bank, notwithstanding the fact that it included therein tax-exempt federal securities. The syllabus in that case correctly announces the decision of the court in that regard as follows: "A state has power to levy on a franchise a tax measured by net assets or net income, including tax-exempt Federal instrumentalities or their income." Section 548, supra, which was involved in that case, authorized states to "tax such associations *on their net income.*" It then provides, similar to section 1464, that such taxation on net incomes shall not discriminate against the banks, but must be computed in the same manner and not higher than the franchise taxes which are imposed upon "other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits." It will be observed that the language of section 548 is quite similar to the language of subdivision (h) of section 1464 in that regard. It follows that the principle which was involved in the Oklahoma case, supra, is determinative of that issue in this case. To the same effect is the case of Pacific Company, Ltd. v. Johnson, Cal., 285 U.S. 480, 52 S.Ct. 424, 76 L.Ed. 893.

We are satisfied the portion of the net income of the plaintiff association which was derived from funds furnished by the federal government is not exempt from the franchise tax imposed by the State of California in this case.

The judgment is affirmed.

STEEL, J., pro tem., and TUTTLE, J., concurred.



49 Cal.App.2d 522

GRAHAM v. CALIFORNIA DRILLING EXPLORATION CO. et al.

Civ. 2572.

District Court of Appeal, Fourth District, California.

Feb. 5, 1942.

Mechanics' liens ⇐260(4)

A mechanic's lien foreclosure sought by way of answer and cross-complaint to a suit to foreclose a materialman's lien on the same property was barred where the answer and cross-complaint were filed more than 90 days from the recording of cross-complainant's lien, notwithstanding that original complaint was filed within the 90-day period. Code Civ.Proc. §§ 1190, 1195.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Suit by D. H. Graham against California Drilling Exploration Company, Siemon Brothers and Associates, Frank Vessels, Big Boy Drilling Company and others to foreclose a materialman's lien, wherein Frank Vessels by affirmative defense and cross-complaint, sought personal judgment against Big Boy Drilling Company and foreclosure of a mechanic's lien. From a decree of foreclosure for Frank Vessels, Siemon Brothers and Associates appeal.

Reversed.

Alfred Siemon and Bennett Siemon, both of Bakersfield, for appellants.

D. A. Boone and James T. Satchell, both of Long Beach, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal by certain defendants from a judgment in favor of defendant Vessels establishing and foreclosing a mechanic's lien against the appealing defendants. There is another judgment disposing of the claims of other parties from which no appeal has been taken.

Plaintiff Graham commenced an action to foreclose a materialman's lien for materials furnished to defendant California Drilling Exploration Company in drilling an oil well, said defendant being the drilling contractor. Defendants and appellants Krebs were the fee owners of the land and defendants and appellants Siemon Brothers and Associates, a limited partnership, were lessees under an oil and gas lease from defendants Krebs. Defendant and respondent Vessels filed an answer which contained "a second and separate affirmative defense" which alleged, among other things, that defendant California Drilling Exploration Company entered into an agreement with defendant Big Boy Drilling Company under which defendant Big Boy Drilling Company agreed to furnish labor and materials to drill the well and that defendant and respondent Vessels furnished labor and materials for that purpose. The prayer of said respondent's answer sought personal judgment against defendant Big Boy Drilling Company and the foreclosure of the mechanic's lien filed by respondent. Defendant Oil Well & Supply Company, sued as a party having an interest, answered and set up a claim to a part of the production. Defendant Big Boy Drilling Company sued as a party having an interest, defaulted to plaintiff's complaint. The claim of plaintiff Graham was satisfied during the pendency of the action and thereafter he took no part in the litigation. Defendant California Drilling and Exploration Company, the drilling contractor, filed an answer contesting plaintiff's claim but did not appear at the trial or take any part in the case after the filing of its answer. Defendants and appellants Krebs, the fee owners, and defendants and appellants Siemon Brothers and Associates separately answered plaintiff's complaint and also contested the claim of defendant and respondent Vessels for a lien.

When the case came on for trial on April 12, 1939, there were no appearances except for plaintiff, for appellants, and for respondent. At that time respondent asked to have the affirmative defense set forth in his answer considered as a cross-complaint, and asked to be given time to serve the defendants, no service of said answer or affirmative defense having been made upon any party except plaintiff. Counsel for plaintiff and for appellants objected but their objections were overruled by the court and the court permitted defendant and respondent Vessels to serve his answer on counsel for appellants as a cross-complaint and required the parties to proceed to trial. The court heard plaintiff's case and then recessed the trial from April 12 to May 12, 1939, to allow appellants time in which to answer said affirmative defense or cross-complaint. Appellants thereafter filed answers which they designated as "Answer to Cross Complaint" denying the material allegation of respondent's answer and further set up the defense that the claim of respondent was barred by the provisions of section 1190 of the Code of Civil Procedure in that no action for the foreclosure of the lien was commenced within ninety days after the filing thereof. On May 12, 1939, the trial was resumed and completed and the case submitted. Before the court decided the case plaintiff filed a stipulation consenting that judgment might be given in favor of appellants on the demand of plaintiff, and thereafter the court filed its decision in favor of defendant and respondent Vessels and the judgment and decree of foreclosure appealed from was entered.

Appellants prosecute this appeal upon several grounds but the principal ground upon which the appellants rely for a reversal of the judgment is that the mechanic's lien of respondent was extinguished by the failure of the respondent to commence proceedings to enforce it within ninety days after the lien was filed. We will discuss this contention of appellants first because if appellants' position is sustained upon this point the judgment must necessarily be reversed and a discussion of the other points raised will be unnecessary.

Section 1190 of the Code of Civil Procedure, so far as applicable here, provides

as follows: "No lien provided for in this chapter binds any property for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court * * * to enforce the same."

The record in this case shows that respondent's claim of lien was filed and recorded on December 20, 1937. Plaintiff's complaint was filed on February 14, 1938, and the answer of respondent which contains the "separate affirmative defense" asking for the foreclosure of respondent's lien, and which the trial court permitted to stand as a cross-complaint, was filed on April 20, 1938, but was not served on any party other than plaintiff until the trial commenced on April 12, 1939.

Appellants contend that, taking the view most favorable for respondent, respondent's proceeding to enforce his lien was not commenced until April 20, 1938, the date upon which his answer was filed and that the ninety-day period after the filing of respondent's lien expired on March 20, 1938.

Respondent, in answer to this contention of appellants, asserts that the date of the filing of plaintiff's complaint operated "to suspend the statute of limitations as to any cause, demand or counterclaim which existed in favor of a defendant at the time of such commencement" and that inasmuch as the same property is involved in respondent's answer or cross-complaint as was involved in plaintiff's original complaint the respondent was entitled to have the provision of section 1190, hereinbefore quoted, suspended.

In the case of Whittier v. Visscher, 189 Cal. 450, at page 456, 209 P. 23, at page 25, our Supreme Court said:

"It is next contended that the claim in this case is barred by the statute of limitations. It is conceded that it was not so barred when the original action was begun, and the authorities in this state seem to be agreed that, if the right of action relied on was alive at the commencement of the suit, the statute does not run against it, when, as in this case, the full statutory period has expired thereafter during the pendency of the action and before the claim is pleaded as a cross-complaint. Lyon v. Petty, 65 Cal. 322, 4 P. 103; Perkins v. West Coast Lumber Co., 120 Cal. 27, 52 P. 118; McDougald v. Hulet, 132 Cal. 154, 64 P. 278; Bliss v. Sneath, 103 Cal. 43, 36 P. 1029; Id., 119 Cal. 526, 51 P. 848; Maryland Casualty Co. v. Shafer et al., [57 Cal.App. 573], 208 P. 197. The same rule is stated in 24 R.C.L., § 43, as declarative of the common law, as follows:

"'If, however, a counterclaim or set-off is not barred at the commencement of the action in which it is pleaded, it does not become so barred afterward during the pendency of that action, and in pleading the statute of limitations to a counterclaim it must be shown that the bar of the statute had matured when the original action was commenced, and it is not sufficient to aver a bar when the counterclaim was filed.'"

It is to be noted that the case just cited was an action by plaintiff upon a promissory note of a corporation and that the set-off or counterclaim sought to be established by defendants was a cross-demand against plaintiff's assignor, the original payee of the note in suit, for her stockholder's liability on the note sued upon.

In the case at bar, plaintiff Graham commenced an action against defendants to foreclose a mechanic's lien for certain materials and equipment furnished to defendants other than respondent, and respondent was joined as a person claiming some interest in the premises or improvement. In setting forth his claim of lien in his answer and seeking the foreclosure thereof respondent was not asserting any counterclaim or set-off or cause of action against plaintiff, but was seeking to enforce a lien as against his codefendants, against whom the original action had been commenced by plaintiff.

Section 1195 of the Code of Civil Procedure provides that two mechanic's liens against the same property can be consolidated and tried in one action but this does not mean that the foreclosure of each lien does not involve a separate cause of action, complete and independent in itself, to which cause of action any defenses which existed at the time it was filed may be set up. The mere fact that the law permits different liens to be established and enforced in the same action does not change the various causes of action from the nature of independent actions, and there is nothing in any of the decisions cited by respondent which holds to the contrary. Each cause of action for the foreclosure of a mechanic's lien, whether set forth in a complaint, cross-complaint or complaint in intervention, must stand upon

its own allegations and must be considered as having been commenced on the date it was filed. In Tubbs v. Delillo, 19 Cal.App. 612, 127 P. 514, 517, the court said:

"But, as stated in the Mars case [Mars v. McKay, 14 Cal. 127], the position of the intervenors is the same as though they had brought a new action, and the situation must be viewed in the light of the facts existing at the time the complaint in intervention was filed. * * *

"A complaint in intervention sets up a new cause of action, and admittedly also in favor of a third party, and the doctrine of relation does not apply. To determine, therefore, whether the action has been brought prematurely or whether the statute of limitations has run against it we must look to the date of the filing of the complaint in intervention and not of the filing of the original complaint."

In Sanford v. Bergin, 156 Cal. 43, 103 P. 333, 334, the action was for partition. A defendant, by answer, set up a mortgage and asked to have it declared a lien. The question arose as to whether the debt was barred and the Supreme Court, on appeal, said:

"The action was begun on April 30, 1898. The answer of Jones, in which, for the first time, the mortgage claim was asserted, was filed on April 20, 1903. The filing of this answer must be deemed to be equivalent to an action of foreclosure, and the question of the bar of the statute of limitations or of laches must be decided upon the theory that the action was begun upon the date last mentioned."

In California Savings Bank v. Parrish, 116 Cal. 254, at page 259, 48 P. 73, at page 75, it is said:

"Here it appears that the time within which, under the provisions of the Code, an action could have been brought upon the principal obligation, had expired before the cross complaint was filed. The lien was therefore extinguished, and the demurrer should have been sustained."

In Rowley v. Davis, 34 Cal.App. 184, at page 188, 167 P. 162, at page 164, the court said:

"But the cross-complaint of the defendant Davis was not filed until after plaintiff Rowley, had acquired the title of the defendant and cross-defendant Alice Huse. By filing that cross-complaint the cross-complainant tendered new issues, whereby he set up a cause of action which relates to the date of filing the cross-complaint. This he had the right to do. Johnson v. Taylor, 150 Cal. 201, 208, 88 P. 903, 10 L.R.A.,N.S., 818, 119 Am.St.Rep. 181."

From the foregoing authorities we think it is clear that respondent's action to establish and enforce his mechanic's lien against his codefendants, appellants herein, must be considered as having been commenced on April 20, 1938, and the date on which his answer or cross-complaint was filed, and, in view of the fact that that date was more than ninety days after the recording of his claim of lien, is barred by section 1190 of the Code of Civil Procedure. It follows, therefore, that the court below erred in decreeing the foreclosure of respondent's mechanic's lien.

Numerous other points are raised by appellants, some of which have substantial merit but, in view of the fact that we have already determined that the judgment must be reversed, it is unnecessary to discuss them.

The judgment appealed from is reversed.

BARNARD, P. J., and MARKS, J., concurred.



49 Cal.App.2d 446

ROBBINS INV. CO. Inc., v. ROBBINS et al.

Civ. 13262.

District Court of Appeal, Second District, Division 3, California.

Jan. 30, 1942.

Judgment ⇐768(1)

Where a certified copy of a judgment contained all the essential information required by the statute providing for the creation of a lien upon the property of a judgment debtor upon the recording of an abstract and judgment, the certified copy was an "abstract of judgment" within the meaning of the statute, notwithstanding that it was a full transcription of the judgment and not a summary or epitome, and its recordation created a valid lien on property of judgment debtor. Code Civ.Proc. § 674.

Ordinarily the noun "abstract" denotes a summary or epitome, or that which comprises or concentrates in itself the essential qualities of a larger thing or of several things, and generally means a mere brief and not a mere copy of that from which it was taken, although sometimes used in the sense of copy.

See Words and Phrases, Permanent Edition, for all other definitions of "Abstract" and "Abstract of Judgment".

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Suit by Robbins Investment Company, Inc., against A. C. Robbins and others to quiet title to real property. From a judgment for defendants, plaintiff appeals.

Affirmed.

Neil S. McCarthy, Earl L. Banta, and Howard P. Hall, all of Los Angeles, for appellant.

M. J. Rankin, Milo V. Olson, and Zuckerman & Stein, all of Los Angeles, for respondent Annandale, Inc.

Anne Fulton Robbins, in pro. per.

SCHAUER, Presiding Justice.

This case was submitted to the trial court on stipulated facts; no element of evidentiary conflict is involved and there is no dispute as to what essentially constitutes the sole legal question which must be answered. Hence we refrain from needless narration of the facts and state the question directly: Is a lien impressed on the property of a judgment debtor by the recording in the office of the county recorder of the county where the property is situated of a document certified by the county clerk, which document contains all of the factual data concerning a money judgment required by section 674 of the Code of Civil Procedure to be included in a valid abstract of judgment but which instead of epitomizing the judgment transcribes it in full?

The trial court answered this question in the affirmative and with its conclusion we agree.

The Code section (Code Civ.Proc. sec. 674) states that "An abstract of the judgment or decree * * * certified by the clerk or justice of the court where such judgment or decree was rendered, may be recorded with the recorder of any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards and before the lien expires, acquire. * * * The abstract above mentioned shall contain the following: Title of the court and cause and number of the action; date of entry of the judgment or decree; names of the judgment debtor and of the judgment creditor; amount of the judgment or decree, and where entered in judgment book, minutes or justices' docket."

The document recorded in this case contained every item of data specified in the Code section and was certified by the clerk of the court. The only attack upon it is predicated on the ground that it contained surplusage; i. e., that it was not an abstract but a transcript (complete copy) of the judgment, hence was not entitled to be recorded under our recording laws and its unauthorized recordation failed to impress a lien on the property of the judgment debtor.

For the purposes of a hypothesis for this decision we may assume that the recordation of the document in question is authorized, if at all, only by the above quoted Code section (Code Civ.Proc. sec. 674) and that its unsanctioned recordation would not operate to create a lien. But we conclude that the questioned document satisfies the requirements of an abstract as defined by such Code section. The only definition of the term in our Codes, other than as applied in the small claims court (Code Civ.Proc. sec. 117m), is that quoted above.

Ordinarily the noun "abstract" denotes a summary or epitome, "That which comprises or concentrates in itself the essential qualities of a larger thing or of several things." Webster's New International Dictionary, 2d Ed., 1942. In 1 C.J.S., Abstract, at page 378, among other definitive statements appears the following: "It ordinarily means a mere brief, and not a copy of that from which it is taken, although sometimes used in the sense of copy." These extraneous definitions, however, are not as important as is the language of the Code section itself (Code Civ. Proc. sec. 674), hereinabove quoted. That

language does not purport to avouch that an abstract must essentially comprise anything less than a transcript of a judgment but it does require that it contain more; i. e., a mere copy of a judgment might not, but by said Code provision (Code Civ. Proc. sec. 674) an abstract must, disclose the date of entry of the judgment or decree and where entered in judgment book, minutes or justices' docket. These requirements are of substance, not of form; it is admitted that such requirements of substance have been met. Although it was unnecessary to copy into the document words of the judgment beyond those actually essential to state the data required, their presence in the abstract does not vitiate it (Civil Code, sec. 3537) or render its recordation ineffective.

The case of Frazier v. Crowell, 1877, 52 Cal. 399, cited by plaintiff, does not appear to be inconsistent with or authority against our conclusion. The court in its opinion in that case, at page 401 of 52 Cal. says: "A 'certified' copy is not an 'abstract,' and the statute (Code Civ.Proc. sec. 897) makes the distinction and prescribes the exact form in which the abstract is to be prepared." That Code section (Code Civ. Proc. sec. 897) has long been repealed; it is still true under the present cast of the law, as we have observed, that a mere copy of a judgment does not make an abstract, but that is so because the present law prescribes substance beyond the copy of a judgment; it does not prescribe form. Furthermore, as commendably pointed out by counsel for appellant, the Supreme Court on application for rehearing in the cited case vacated all that portion of its opinion pertinent to our question. This latter fact apparently was not called to the attention of the District Court of Appeal in Erkson v. Parker, 1906, 3 Cal.App. 98, 84 P. 437, 438, also cited by appellant, wherein the vacated portion of the opinion (in Frazier v. Crowell, 1877, 52 Cal. 399) is referred to and quoted as a holding of the court. However, that decision of the District Court of Appeal is likewise not inconsistent with our conclusion here. Its holding simply was that "the filing of an abstract is not a compliance with a law requiring the filing of an authenticated transcript." Our holding is not that the recording of a mere certified copy of a judgment is compliance with a law requiring the recording of an abstract, but is rather that the document which was recorded and which admittedly contained all the required data was, within the purview of the statute, an abstract.

The judgment is affirmed.

SHINN and PARKER WOOD, JJ., concurred.



49 Cal.App.2d 511

GREENE v. FICKERT et al.

Civ. 2570.

District Court of Appeal, Fourth District, California.

Feb. 4, 1942.

1. Waters and water courses ⇐158½(1)

In action to quiet title to easement to use spring on defendants' land adjoining land conveyed to plaintiff by defendants' predecessor in title, evidence *held* sufficient to support trial court's findings that plaintiff's use of spring was exclusive, obvious, and apparent until such predecessor made change therein after conveyance of property to plaintiff, that benefit of such use appeared to belong to plaintiff's property, and that such predecessor intended to transfer right to exclusive use of spring to plaintiff with such property. Civ.Code, §§ 1084, 1104.

2. Appeal and error ⇐1011(1)

In action to quiet title to easement to use spring on defendants' land adjoining land conveyed by their predecessor in title to plaintiff, question, on which evidence was conflicting, as to whether plaintiff was entitled to exclusive, free, and uninterrupted use of spring was for trial court to determine.

3. Appeal and error ⇐1054(1)

In action to quiet title to easement to use spring on defendants' land adjoining land conveyed by their predecessor in title to plaintiff, error, if any, in admission of evidence that spring was used exclusively by plaintiff's predecessors in interest as far back as 30 years was not prejudicial to defendants, where they brought out same evi-

dence by their own witness, and there was other ample evidence to support trial court's conclusion that spring was so used. Civ. Code, §§ 1084, 1104.

4. Appeal and error ⇐193(1)

Where no demurrer to complaint was interposed in trial court, question as to sufficiency of allegations thereof cannot be raised for first time on appeal.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Angus F. Greene against Louise Fickert and another, individually and as administratrices with the will annexed of the estate of Frederick A. Fickert, deceased, to quiet title to an easement to use a spring on defendants' land. Judgment for plaintiff, and defendants appeal.

Affirmed.

A. B. Bianchi, of San Francisco, for appellants.

Frederick W. Welsh, of Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent instituted this action against defendants and appellants Louise Fickert and Nellie Fickert, individually and as administratrices with the will annexed of the estate of Frederick A. Fickert, deceased, to quiet title to an easement to use a certain spring located on appellants' land. The trial court decreed that appellants' predecessor in title, by conveyance of a portion of his estate to respondent, transferred an easement to a spring on grantor's reserved portion in favor of the granted estate. The complaint is in the ordinary form of a complaint in a quiet title action.

From 1910 to 1935, one George H. Palmer and wife owned all of section 18, township 82, S. R. 32 E., M. D. B. & M. in Kern County.

On June 26, 1935, the Palmers deeded to Frederick A. Fickert the N. W. ¼ and the E. ½ of section 18. This deed was based upon some oral agreement of sale between them, made a few months prior to that date. October 30, 1935, Fickert conveyed to respondent Angus F. Greene 185 acres of the south portion of the east half of section 18, which would be approximately the southeast quarter of section 18, which we will designate parcel A, "subject to reservations and rights of way of record * * * together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, * * *." Parcel A is now and has been since 1890, improved by a house, barn, corrals and outbuildings. These improvements are located on the north part of parcel A and immediately adjacent to the north ¼ of the east ½ of section 18, which we will designate as parcel B.

From 1890 until January, 1936, the house and barn on the premises so conveyed by Fickert to Greene (parcel A) received its water supply for household and domestic uses and for watering stock and poultry from one of several springs known as the "house spring," all of which were located north of the house and barn on parcel B. The water was transferred from the "house spring" to the house and barn by means of pipes. There were no springs on parcel A, and no other source of water for household, stock or other use was ever developed on parcel A. The use of the water from the "house spring," at the house and barn, was practically continuous from 1890 to January 1, 1936, except for interruptions due to necessary repairs and infrequent interruptions when no one was living in the house. About March 1, 1935, respondent Greene and his wife entered upon the property described as parcel A, took possession of the house and barn thereon, and lived thereon up to the date of the trial of this action. This entry and occupation was made by virtue of an oral lease between the Greenes and George H. Palmer, owner of the property at that time. Rental therefor was paid to Palmer. Thereafter, when Fickert purchased the property from Palmer, they attorned to Fickert and paid the rent directly to him.

From March 1, 1935, until about January 1, 1936, respondent had the free and uninterrupted use of the "house spring." Subsequent to July 1, 1936, Fickert forcibly tore up the pipe line running from that spring to the house and prevented respondent from enjoying the benefits thereof.

Appellants' answer sets up two defenses: (1) That the right given by Fickert to the Greenes was a mere license to use the water; (2) that in any event Fickert, after arrangements had been made to acquire the Palmer tract, had rearranged the burdens and services as to the various portions of

his common estate so as to allow for the joint user of the water of the "house spring" during the summer ranging season.

The trial court specifically found (1) that at the time of the Fickert-Greene sale, Fickert was the owner of the entire estate, (i. e., of both the servient and dominant tenements); that at the time of conveyance, "the benefit of the exclusive use of said house spring * * * together with the right to pipe the water therefrom and the right to enter upon the land upon which the spring is located, was obvious and apparent, and that said benefit appeared * * * to belong to the property conveyed to said Greenes as between it and the property which the vendor Fickert retained"; (2) that Greene had the exclusive free and uninterrupted use of the "house spring" from March 1, 1935, to January 1, 1936; (3) that during said period, the "house spring" "was obviously permanently used * * *" for the benefit of the Greene parcel. It found generally in accordance with the facts above stated and decreed that respondent was the owner of a right and easement to the use of the "house spring" and of the water from that spring for household and domestic use, and for watering stock and poultry, together with the right and easement to pipe the water from that spring through pipes from the location of the spring and restrain appellants from interfering with the use thereof by respondent.

It is now argued by appellants (1) that there is no evidentiary support for special findings 1 to 3 inclusive; (2) that the court's conclusion that respondent was entitled to all the water from the "house spring" was erroneous and not supported by the evidence.

[1] In an endeavor to prove that respondent was not entitled to the exclusive, free and uninterrupted use of the "house spring," appellants introduced testimony that in September, 1934, grantor Fickert installed a watering trough near the "house spring," connected it up with the spring, used it for watering cattle, and did not permit the house on the Greene portion to use this water or any portion of it except during the nighttime when it was not needed for cattle, and that this situation and arrangement continued during the cattle ranging seasons of 1934 and 1935. The evidence on this question is conflicting. We will refer to sufficient evidence to support the finding complained of.

There is no question but that the "house spring" supplied the house and buildings on parcel A up to a time when Fickert removed a watering trough which had been used at another spring called the "tunnel spring" over the "house spring." At some period in 1934, 1935 or 1936, Fickert made this change. The change allowed Fickert's cattle grazing on parcel B to water from the trough at the "house spring" during the summer months. By a hose connection, the supply could be changed from running to the trough and made to run through the pipes leading to parcel A. Under this change, it was necessary for the owner of parcel A to regulate the flow by walking 1500 feet from the house to the "house spring" each time it was changed. This procedure continued until the pipes were torn up as above indicated.

The question as to the time when this trough was installed at the "house spring" becomes important to show what easement or condition existed at the time of the transfer of parcel A to respondent and whether he would be entitled to the full flow of that particular spring. The evidence in this respect is not only conflicting but confusing. One witness, Gonzales, who was a tenant on parcel A from March, 1933, to March, 1935, testified that he used the "house spring" for two years prior to the time Greene came onto the property; that there was no trough at the "house spring" when he went there. He then testified that "as long as I been there I never seen it," but said in answer to the question: "Was there one before you left?" "Yes, afterwards Mr. Fickert took another trough over there to the other spring" (tunnel spring). Margaret Greene, wife of respondent, who moved into the house on the Greene property about the first day of March, 1935, testified:

"Q. When was the watering trough put in at the house spring? A. Well, they hauled the trough up there and it laid on the ground for three or four weeks, I think, it was hauled up there in August and it was connected * * *

"Q. (Interrupting) August what year? A. I wouldn't want to be hung for this answer, but I think it was in 1936 * * *"

She also testified that the first interruption of respondent's exclusive, free and

continuous use of the spring came six or seven months after she "got the deed" (the deed from Fickert to Greene was dated October 30, 1935). Respondent testified that the change in the trough came about in September, 1936; that he had a conversation with Fickert pending negotiations for the purchase of the property wherein it is claimed that Fickert said: "* * * you got a nice spring there, and went on to tell me the fine watermelons the Davenports raised there and the nice garden that was also raised down by the barn with water from this spring, and that we could have all the garden we ever needed there from water from the spring." Much more evidence to the same effect was produced. Without further repetition of it, it will suffice to say that there was sufficient to support the finding that the change in the "house spring" was not made until sometime after the transfer of the property to respondent and that the use thereof up to the time of the change was exclusive, that such use was obvious and apparent, that the benefit appeared to belong to the property, and that Fickert intended to transfer the right to the exclusive use of that particular spring with the property to respondent.

[2, 3] The question of the conflict in the evidence was for the trial court to determine. There was certain evidence admitted, over objection, showing that the particular "house spring" was used exclusively by respondent's predecessors in interest back as far as 30 years. Even if the reception of this testimony was error, as claimed by appellants, it cannot be said that appellants were prejudiced thereby when they brought out the same evidence by their own witness and where there was other ample evidence to support the conclusion reached.

It therefore follows, under the findings, section 1104 of the Civil Code which provides that "A transfer of real property * * * creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed," section 1084 of the Civil Code, and the decisions thereunder, that appellants' contentions are without merit. Cave v. Crafts, 53 Cal. 135; Kallenburg v. Long, 39 Cal.App. 731, 179 P. 730; Swarzwald v. Cooley, 39 Cal.App.2d 306, 103 P.2d 580; Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 P. 593; Vargas v. Maderos, 191 Cal. 1, 214 P. 849.

[4] Appellants question the sufficiency of the allegations of the complaint. The complaint states a cause of action. No demurrer to the complaint was interposed in the trial court. This question cannot be raised for the first time on appeal. Egilbert v. Hall, 44 Cal.App.2d 305, 311, 112 P. 2d 291. The evidence supports the findings and the findings support the judgment.

Judgment affirmed.

BARNARD, P. J., and MARKS, J. concurred.



49 Cal.App.2d 581

WASHBURN v. WASHBURN.

Civ. 13317.

District Court of Appeal, Second District, Division 2, California.

Feb. 9, 1942.

1. Divorce ⇐298(1)

In proceedings between divorced parents respecting custody of a minor child, the underlying principle, paramount to all others, is the welfare and best interest of child.

2. Divorce ⇐303(2)

Where a court has decreed with respect to the custody of a minor child as between divorced parents, there may be no change in the child's custody except where adequate cause therefor arises out of changed conditions, and, except for a modification based upon adequate grounds, a decree awarding custody is conclusive.

3. Divorce ⇐303(2)

Where a court has decreed with respect to the custody of a minor child as between divorced parents, the conduct of one of the parties to divorce which gives offense to the other, or even to the public at large, is not a matter that calls for a change of custody unless such conduct is shown to affect directly the welfare of child.

4. Divorce ⇐303(2)

Where a court has decreed custody of a minor child to one parent in divorce proceedings, such parent may not be deprived of custody for any supposed unfitness unless it is shown that he or she is so unfit as to endanger child's welfare.

5. Divorce ⇐303(2)

A "custody proceeding" with respect to custody of a minor child as between divorced parents is not one to discipline one parent for such parent's shortcomings as an individual, nor to reward the other for any wrong suffered therefrom, and faults of relatives or ancestors are not a matter of concern in such proceeding.

See Words and Phrases, Permanent Edition, for all other definitions of "Custody Proceeding".

6. Divorce ⇐303(3)

Before a decree awarding custody of a minor child to a divorced parent may be vacated, the evidence must be clear and convincing that the child's welfare and best interest will be directly promoted by a change.

7. Divorce ⇐303(2)

Generally, there may be no change in the custody provisions of a divorce decree respecting custody of a minor child unless material facts occurring subsequent to decree render it essential or expedient for child's welfare that there be a change, and each case must be decided on its own facts.

8. Divorce ⇐298(6)

Under statute, a mother is entitled to custody of a minor child whose custody is involved in divorce proceedings, everything else being equal, unless the child has reached age which necessitates a particular education or preparation for its life work. Civ. Code, § 138.

9. Divorce ⇐303(3)

In proceedings respecting custody of a minor child as between divorced parents, only such evidence as bears on question of child's welfare and best interest is admissible.

10. Divorce ⇐303(3)

Where custody of a minor child as between divorced parents has once been decreed, in subsequent proceedings respecting custody of child evidence concerning child's welfare and best interest must generally be limited to such proper evidential facts as have arisen subsequent to decree, and, this being a matter of "substantive law" and not a "rule of evidence", it is not necessary to object to evidence that goes beyond the rule, since the court may disregard it.

See Words and Phrases, Permanent Edition, for all other definitions of "Rule of Evidence" and "Substantive Law".

11. Divorce ⇐303(3)

Where custody of a minor child as between divorced parents has been decreed, and it is contended that subsequent conduct discloses a vital change in conditions upon which decree was entered, evidence of earlier facts may be shown for purpose of showing a change in conditions, but the decision may not be predicated thereon, except in unusual cases.

12. Divorce ⇐303(2)

As regards right to change of custody, a decree awarding custody of minor children to the mother as between divorced parents conclusively presupposed that the mother was the proper person to have custody of children despite her conduct prior to decree.

13. Divorce ⇐303(3)

An action involving a change of custody of minor children from one divorced parent to the other is a "judicial proceeding" to be conducted in a strictly judicial manner and in which the decision is to be rendered by judge only upon evidence before him.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Proceeding".

14. Divorce ⇐301, 303(3)

Under the constitution, the judicial power to award custody of minor children as between divorced parents is vested in the courts alone, and in the exercise of that power the law requires a full hearing and a decision on evidence produced under oath or upon stipulation of parties.

15. Divorce ⇐303(3)

The power of decision vested in the trial court with respect to custody of minor children as between divorced parents is to be exercised by a duly constituted judge, and that power may not be delegated to investigators or other subordinate officials or attachés of the court, or anyone else.

16. Constitutional law ⇐80(1)

It is the constitutional right of every citizen and litigant to be governed by the

law as expounded by judges and not by officials or employees provided by the legislature to assist a judge in an administrative or quasi judicial capacity.

17. Courts ⇐55

Investigators provided by legislature for the Domestic Relations Department of the Superior Court of the county of Los Angeles and the city and county of San Francisco, through an appointment by a majority of judges of respective counties, are investigators only, and they are not court assistants nor are they endowed with a single judicial attribute, and it is neither their province to recommend a decision or to decide an issue that comes before the court.

18. Divorce ⇐303(3)

An investigator for Domestic Relations Department of Superior Court of Los Angeles county stands in no better position than an ordinary witness in proceedings respecting custody of minor children as between divorced parents, and his report is not "prima facie evidence" and investigator must be available for cross-examination on any matter on which he reports at trial judge's instance, and investigator cannot make a secret report in such proceedings.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Evidence".

19. Divorce ⇐303(3)

Where report submitted by investigator for Domestic Relations Department of Superior Court of Los Angeles county in proceedings wherein a divorced husband sought modification of provisions of divorce decree awarding custody of minor children to wife was composed chiefly of hearsay, and report was not confined to facts which had occurred subsequent to decree, and trial judge had based an order awarding custody of children to husband upon the report and other testimony that was inadmissible, the order was unauthorized.

20. Divorce ⇐303(3)

In proceedings wherein a divorced husband sought modification of provisions of divorce decree awarding custody of minor children to wife, the trial court was not authorized to order wife to repay a certain sum representing a payment for maintenance of children, since that was not a matter within the issues.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Divorce proceedings by Julia C. Washburn against Donald K. Washburn, wherein a decree was entered granting a divorce to plaintiff. From an order modifying provisions in the decree awarding custody of minor children to plaintiff, plaintiff appeals.

Reversed.

Charles V. Caldwell, of Los Angeles, and Howard E. Hurd, of Beverly Hills, for appellant.

Thomas P. Menzies and M. W. Phelan, both of Los Angeles, for respondent.

HANSON, Justice pro tem.

This appeal relates to a contest between divorced parents concerning the custody of their minor children, a girl 9 and a boy 15 years of age. In the decree entered on December 14, 1939, granting the divorce to the mother after a contested trial, it was provided that she should have the custody of the children subject to the right of the father to visit them at reasonable times and to have them in his custody on alternate weekends. Less than six months after the interlocutory decree was entered the father procured an order directing the mother to show cause why the custody of the children should not be awarded to him on the grounds that since the entry of the interlocutory decree (1) she had neglected to care for the children properly and (2) she was no longer a fit and proper person to have their care, custody and control. Except to the extent that these grounds implied that the welfare and best interests of the children required a change of custody, there was no direct issue in respect thereto and no competent evidence was adduced thereon.

Upon the testimony introduced at the hearing and upon a written report and recommendation signed by an investigator with the euphonious superscription of "court assistant," the court awarded the custody of the children to the father. Neither the report nor the evidence was restricted by the court to the period subsequent to the decree. Moreover, it appears from the record that the modification of the custody provisions of the judgment was based upon the mother's conduct prior to the original trial and known to the father. So far as the ruling is based upon the mother's conduct subsequent to the divorce

decree, it appears that such conduct was of a like tenor and no more serious than that which preceded the decree.

The mother contends (1) that there was no evidence of any change of circumstances, nor was she shown to be less fit to have the custody of the children at the time of the hearing than at the time of the decree; (2) that the court based its ruling on matters which were taken into account in the divorce trial and there adjudicated when the court awarded the custody to her; (3) that the court refused to receive evidence bearing on the unfitness of the father to have the custody, and applied one standard of conduct to the mother and another to the father; (4) that the record discloses an abuse of discretion on the part of the trial court.

Inasmuch as the trial court had previously read the report of the domestic relations investigator, it was stipulated by counsel on the trial that the report might be received in evidence. Thereupon counsel for the plaintiff stated that he understood the court was of the view that the report established a prima facie case for the defendant and that it was the duty of the plaintiff to controvert it, after which defendant would have the right of rebuttal. To that the court responded: "* * * the way I think we should proceed in this matter would be that instead of the moving party putting on evidence, that the moving party stand on the report, which is, of course, evidence and subject to be controverted. In other words, it is not conclusive evidence. That is the situation." Aside from the report the only evidence offered on the case of the defendant was testimony pertaining to certain personal conduct of the plaintiff prior and subsequent to the divorce. This testimony was given by two detectives who shadowed the wife from early in November, 1939, to June, 1940. One of the detectives testified he had seen Mrs. Washburn intoxicated on a dozen occasions, but with one exception none of these occasions was shown to have occurred subsequent to the decree of divorce. Other episodes testified to by the detectives occurred prior to the decree, with but two exceptions. One of these is that of her visit to her doctor's apartment on January 10, 1940. She and the doctor both testified that such visit was strictly professional. The other pertained to her meeting the doctor on the preceding December 19th at Palm Springs, but she was there accompanied by her neighbor and friend. All parties involved testified that the meeting was accidental and not prearranged.

It is undisputed that both parties have affection for the children and the children for them. Both children suffer from an asthmatic condition, which in the case of the girl is such as to require rest periods in school. Both parents are equally interested in their welfare and in providing the best educational advantages for them. In that regard the father, when called to the stand by counsel for the mother, testified that he had no educational plans for the children which would work out better for them than those employed by the mother. He also testified that he had visited the home of plaintiff quite often to see his children and always found the house clean, and added that Mrs. Washburn was "one of the best of housekeepers." He always found someone at home with the children if the mother was not there. So far as the evidence goes there is not one iota to indicate that the children did not have the best of care from their mother, and none to indicate that any of the acts or conduct of the mother of which the father complains was known to the children. The maternal grandmother of the children lives in the mother's home and assists with the housework and the care of the children. The father is active in his business and employs a housekeeper to maintain his home; and so if the children were to reside in his home they would be largely under the immediate care of a housekeeper or of a governess if he employed one, as he stated he would if awarded the custody. Moreover, so far as the record discloses the home surroundings are the same now as when the interlocutory decree was signed.

The record does not disclose the ground upon which the decree of divorce was granted. It does, however, show that the parties separated about September 1, 1939, when the husband left home to reside elsewhere. When the wife in October, 1939, filed her action for divorce the husband immediately employed detectives to shadow her, and this shadowing continued not only up to the date of the divorce trial but until after the order to show cause herein was issued and served. What acts or conduct of the wife were relied upon by the husband at the divorce trial to award the custody of the children to him rather than to the wife is not disclosed by the instant

record. The wife's acts and conduct on the night prior to the contested divorce action, upon which the judge below relied so heavily in transferring the custody of the children, was known at the time of its occurrence by the husband. Accordingly we must necessarily assume that the facts in connection with that episode became a part of the record in the divorce action and were considered by the court. If they were not, it is not a matter upon which the husband may rely in the instant case.

[1-7] In custody cases the underlying principle, paramount to all others, is the welfare and best interest of the child. In no way in conflict with this rule is another, equally well established, that once a court has decreed it there may be no change in the child's custody except where adequate cause therefor arises out of changed conditions. This principle is based on the idea not only that the stability of the home life of the children is an important and vital factor, but also that the turmoil of litigation must somewhere end. Short of a modification based upon adequate grounds, the decree awarding custody is conclusive and settled beyond recall other than by appeal. Moreover, the acts and conduct of one of the parties to the divorce which give offense to the other, or even to the public at large, are not a matter that calls for or permits a change of custody unless such acts and conduct are shown to affect directly the welfare and best interest of the child. Where a court has decreed custody to one parent, such parent may not be deprived of the custody for any supposed unfitness unless it be shown that he or she is so unfit as to endanger the child's welfare. A custody proceeding is not one to discipline one parent for such parent's shortcomings as an individual, nor to reward the other for any wrong suffered therefrom. Much less are the faults of relatives or ancestors a matter of any concern. Before a decree awarding custody may be vacated and the child's life unsettled the evidence must be clear and convincing that the child's welfare and best interest will be directly promoted by a change. Generally speaking, there may be no change in the custody provisions of a decree unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the welfare of the child that there be a change. While each case must be solved on its own facts, there are, of course, elemental factors common to all cases that must not be overlooked.

[8] It is not open to question, and indeed it is universally recognized, that the mother is the natural custodian of her young. This view proceeds on the well known fact that there is no satisfactory substitute for a mother's love. So true is this that in this state the code exacts that she shall have custody of her child, everything else being equal, unless the child has reached the age which necessitates a particular education or preparation for its life work. Civ.Code, § 138. In the case of girls it is obvious that they are particularly in need of the sympathy, affection, consideration and tender care which only a mother can give—and so normally they should be in her custody.

[9-11] Only such evidence as bears on the question of the welfare and the best interest of the child is admissible or to be considered. Where custody has once been decreed such evidence must generally be limited to such proper and material evidential facts as have arisen subsequent to the decree. As this is a matter of substantive law and not a rule of evidence, it is not necessary to object to the evidence that goes beyond the rule, as the court must disregard it. Wigmore on Evidence, 3d Ed., § 2. Where it is contended that the subsequent conduct discloses a vital change in the conditions upon which the decree was entered, such earlier facts may be shown for that one purpose; but the decision may not be predicated thereon, except in unusual cases. We have no such unusual case here.

[12, 13] Although we are deprived of a knowledge of the pleadings and the evidence upon which the decree was entered in favor of plaintiff, nevertheless such a decree conclusively presupposes that the mother was the proper person to have the custody of the children despite any conduct prior to the court's decision. The decision may or may not have considered the father an equally proper person to have the custody of the children, but it is clear that the court concluded that the welfare of the children required that the custody be awarded in the manner it decreed. However, we think it needs to be made clear that an action or issue involving the change of custody of minor children from one parent to the other is a judicial

proceeding, to be conducted in a strictly judicial manner, in which the decision is to be rendered by the judge only upon evidence before him.

[14-18] Under the Constitution of this state the judicial power to award the custody of children is vested in the courts alone, and in the exercise of that power the law requires a full hearing and a decision on the evidence produced under oath or upon the stipulation of the parties. The power of decision vested in the trial court is to be exercised by a duly constituted judge, and that power may not be delegated to investigators or other subordinate officials or attachés of the court, or anyone else. The court may not even delegate to a referee the power to decree a divorce upon sworn testimony, duly corroborated, taken by a referee vested with the power to administer oaths. Civ.Code, § 130. It is the constitutional right of every citizen and every litigant to be governed by the law as expounded by the judges, and not by officials or employees provided by the legislature to assist a judge in an administrative or quasi-judicial capacity. Such help as may be accorded a judge to assist him in the exercise of his judicial functions may never be permitted to reach the point where someone else decides the case or an issue before him. Investigators provided by the legislature for the Domestic Relations Department of the Superior Court of the County of Los Angeles and the City and County of San Francisco, through appointment by a majority of the judges of the respective counties, are investigators only; nothing more. They are not court assistants nor are they endowed with a single judicial attribute. It is neither their province to recommend a decision nor to decide a single issue that comes before the court. They do not rank with special masters, commissioners or auditors appointed by the court. They have not even power to administer the oath or to take evidence. It is not contempt of court for a witness or a party to deny them information. They may act as messengers of and acquire information for the judge, but in no event may their influence upon the chancellor guide or control the decision of a cause. The legislature does not prescribe their duties, and their duties are only such as the judges of the court declare; and such may in no event extend beyond the strict limits of the Constitution. The notion that the report of an investigator is prima facie evidence, or that an investigator may delve into and report on factual matters antecedent to the date of a prior decree, has no legal sanction.

[19] There is here no need to mark the exact boundaries beyond which an investigator may not go as to matters which have transpired subsequent to a decree. It is enough to say that an investigator stands in no better position than an ordinary witness, and must be available for complete cross-examination on any matter on which he or she reports at the instance of a judge. Moreover, an investigator may make no secret report, but stands like any other person—subject to an order of contempt if he does. There is no back door to the courts for witnesses, investigators, litigants or others. We pronounce thus positively because there appears over the years to have been a popular misapprehension by the courts as to their relation to their attachés under the statutes. Cf. Wigmore on Evidence, 3d Ed., vol. 1, p. 111; Bestel v. Bestel, 153 Or. 100, 44 P.2d 1078, 53 P.2d 525.

[20] In the instant case the report submitted violates nearly all the rules. It does not possess a single vestige of judicial restraint. Aside from "recommending" a change of custody from the mother to the father, the report, which occupies 15 printed pages of respondent's brief, is a very partial and extreme brief and argument for defendant. Instead of seeking facts during the period subsequent to the interlocutory decree and bearing directly on the issues involved, made necessary by the order to show cause, the report goes back thirty years to narrate the matrimonial history of plaintiff's mother and sister, as well as that of her closest friend. It eulogizes the country home of the father, but reaches conclusions as to his own conduct which are not supported by his own admissions, and evidences the biased credulity of the investigator. It is almost entirely hearsay, and most of it is hearsay piled upon hearsay, with ample ground for appellant's complaint that the report impales her on the apex of a pyramid of neighborhood gossip and hearsay. It contains medical diagnoses and conclusions incapable of acceptance from such a source and directly conflicting with the sworn testimony of a qualified physician.

The force and influence of the investigator's report upon the judge is revealed

by innumerable references to it in his questions to witnesses and his quotations from it as he decided the case from the bench. Moreover, he rested his decision in large part on it as well as on testimony that was inadmissible. For that reason alone there must be a reversal.

[21] A further contention that the court was without authority to order Mrs. Washburn to repay the sum of $250, representing the September payment for the maintenance of the children, is well taken. It was not a matter within the issues.

The order is reversed.

MOORE, P. J., and McComb, J., concurred.



49 Cal.App.2d 433

DAVIES et al. v. SYMMES et al. (GREENSPUN, Intervener).

Civ. 13258.

District Court of Appeal, Second District, Division 3, California.

Jan. 30, 1942.

As modified Feb. 24, 1942.

1. Pleading ⇐263

There is no error in refusing permission to amend answer to set up defenses which are insufficient in law.

2. Quieting title ⇐42

Where motion for leave to amend answer in action to quiet title was not made until over seven months after original answer was filed, refusal of leave to amend would not constitute abuse of discretion, in absence of satisfactory excuse for the delay, if new issues tendered by amendment would have interfered with prompt trial of case in manner fair to all parties, even if amendment pleaded sufficient facts to establish good defense.

3. Mortgages ⇐294

A deed reconveying property from grantees to grantors, reciting that deed was given and accepted in full satisfaction of trust deed indebtedness on premises, was supported by a "valuable consideration", so as to preclude grantors in reconveyance deed from rescinding on ground that transaction was not supported by consideration.

See Words and Phrases, Permanent Edition, for all other definitions of "Valuable Consideration".

4. Quieting title ⇐42

Where, in action to quiet title to land which defendant had reconveyed to plaintiffs, amendment to answer, after pleading plaintiff's deceit and imposition in obtaining reconveyance, alleged that defendant had become ill, and that, believing that in order to recover his health it would be necessary to rid himself of his business worries, he urged plaintiffs to take a reconveyance, which they did, and defendant's evidence was to same effect, defendant's pleading and evidence destroyed his own theory, and the amendment was properly denied.

5. Deeds ⇐68(3)

The fact that grantor becomes worried on being advised that he is suffering from serious malady, and sets about to rid himself of debts and annoying business responsibility in order to devote himself unreservedly to restoration of his health, does not indicate an impairment of his mentality, as respects validity of deed.

6. Mortgages ⇐294

Where grantee, believing he was suffering from serious illness which required him to terminate all business worries in order to recover, reconveyed property to grantors by deed reciting that it was given in full satisfaction of trust deed indebtedness on property, and grantee subsequently recovered his health, his reconveyance deed was not given for an "inadequate consideration".

See Words and Phrases, Permanent Edition, for all other definitions of "Inadequate Consideration".

7. Mortgages ⇐294

Where grantee, believing that he was suffering a serious illness which required that he be relieved of all business worries, insisted that grantors accept in satisfaction of trust deed indebtedness on property, a reconveyance of property over grantors' objections, and, according to grantee's own testimony, grantors' statement of willingness to extend time and carry transaction until question of grantee's health could be more definitely determined, grantee could not subsequently rescind his reconveyance on theory

that he had been imposed upon or overpersuaded by grantors.

8. Pleading ⇐236(7)

Where defendant seeks to amend answer by injecting new issues which would entitle plaintiffs to continuance, he must make a showing excusing want of diligence in making application for amendment, and where he fails to do so, a denial of amendment is not abuse of discretion.

9. Pleading ⇐236(7)

Though fact that an amendment of a pleading will necessitate a continuance does not necessarily furnish sufficient reason for refusing right to amend, it does where there has been a long and unexcused delay.

10. Quieting title ⇐43

The rule that where it is sought to recover possession of property or to quiet title thereto, defendant need not anticipate source of plaintiff's title and may prove, without pleading fact, that it depends on a void conveyance, is an exception to rule that fraud, undue influence, want of consideration, and similar defenses, must be pleaded, and rests on supposition that defendant does not know and excuses him from ascertaining source of plaintiff's title before he answers, and such departure from established procedure is tolerated only through necessity and in exceptional cases.

11. Quieting title ⇐43

The rule applied in certain cases that defendant in action to quiet title is not bound to anticipate source of plaintiff's title and may prove, without pleading fact, that it depends on a void conveyance, was inapplicable, where defendants had purchased land from plaintiffs and had reconveyed it to plaintiffs, but defendants had affirmative duty of proving invalidity of their deed to plaintiffs in order to defeat plaintiffs' title or establish their own, and also of pleading their grounds for rescission.

12. Quieting title ⇐39

Where grantors to whom grantees had reconveyed land sought to quiet title thereto after grantees filed notice of rescission as to their deed of reconveyance, customary practice would be for defendant grantees to have filed a cross-complaint for rescission on which proper issues would have been framed by pleadings.

13. Fraud ⇐41

It is fundamental that wherever fraud constitutes an element of a cause of action or of an affirmative defense, or is foundation of a right sought to be established, it must be pleaded.

14. Contracts ⇐340, 342

Defenses of undue influence and want of consideration must be pleaded.

15. Quieting title ⇐43

In action to quiet title brought by grantors, to whom grantees had reconveyed property, after grantees had served notice on grantors of rescission of their reconveyance deed, original grantees' denial of original grantors' title and an allegation of title in themselves did not authorize admission of evidence of grantors' fraud or undue influence in obtaining the reconveyance and want of consideration therefor, which were not pleaded.

16. Trial ⇐395(6)

Findings that allegations of answer "which are in conflict with the foregoing findings are untrue" were insufficient.

17. Trial ⇐395(9)

Where trial court made specific and sufficient findings on all material issues, judgment was sufficiently supported by findings, notwithstanding insufficiency of other findings.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Arthur Davies and others against Carrick W. Symmes and wife to quiet title to land, in which M. Greenspun intervened. From a judgment for plaintiffs and intervener, defendants appeal.

Affirmed.

Laurence B. Martin and Samuel Reisman, both of Los Angeles, for appellants.

David J. Keily and Wm. P. Mealey, both of Los Angeles, for respondent Davies.

Feinfeld & Feinfeld, of Los Angeles, for intervener and respondent Greenspun.

SHINN, Justice.

Appeal by defendants from a decree in favor of plaintiffs and intervener in an action to quiet title to 4½ acres of land. Appellants appear by counsel other than those who represented them in the court below.

The principal ground relied upon for reversal is that appellants were denied the right to amend their joint answers to the

complaint and the complaint in intervention. While we have concluded that no error was committed in ruling on the applications to amend, the facts of the case are sufficiently peculiar to require a somewhat extended statement. In considering the applications to amend, the inquiry went beyond mere matters of procedure and involved the validity of the proposed defenses.

The complaint to quiet title was filed March 14, 1939. Defendants Carrick W. Symmes and wife (herein referred to as defendants) answered April 14, 1939, denying plaintiffs' title and asserting title in themselves. The complaint in intervention was filed June 8, 1939, alleging that intervener Greenspun held an oil lease with option to purchase the land, executed by plaintiffs on August 8, 1938; that an oil well had been drilled under the lease and was nearly completed. Defendants answered the complaint in intervention, again asserting title in themselves and denying all adverse rights of plaintiffs and intervener. A motion for early trial was granted and the case was set for November 27, 1939. On November 21, 1939, defendants gave notice of an application to amend their answers. The proposed amended answers to the complaint and the complaint in intervention contained substantially the same matter. The motion was presented in the law and motion department and was denied with leave to renew the same before the trial judge; the trial was continued for 30 days. On December 26, 1939, defendants gave notice of a motion to file amended answers differing in material respects from those first proposed, and they presented the motion to the trial judge when the trial was opened January 2, 1940. The record shows that the motion was denied for the following reasons: that no facts were alleged which were unknown to defendants or their counsel when the original answers were filed; that there had been unexcused delay in tendering the amendments; that allowance of the amendments would necessitate a continuance of the trial to the prejudice of the rights of plaintiffs and intervener and, finally, that the proposed defenses, as limited by defendants' opening statement, were insufficient. We should state here that the question of the right to amend the answers was presented and ruled upon at the close of the trial as well as at the beginning. This is an important fact in our consideration of the merits of the appeal.

The second proposed amended answers, which differed from those first proposed in respects to be noticed later, alleged that defendants had purchased the land from plaintiffs in August, 1937, for $4,750, paying $1,000 in cash and giving a note and trust deed on the land for $3,750, upon which they later paid $500; that in December, 1937, defendants had reconveyed the land to plaintiffs, and in that connection three separate grounds for rescission of their deed were alleged or attempted to be alleged, namely, that Dr. Symmes (Carrick W. Symmes) on the date of the deed was mentally incompetent; that plaintiffs had procured the deed through fraud, and in addition thereto that Dr. Symmes was suffering from mental weakness and worry and because thereof conveyed the land and caused his wife to convey it without consideration.

Upon the opening of the trial defendants' counsel offered the amendments and stated at length what they expected to prove should the amendments be allowed. No reference was made to the defense of actual fraud, and there was a definite abandonment of the defense of incompetency. A clear intention was manifested to rest the defense upon the alleged mental weakness of Dr. Symmes and inadequacy, but not total want, of consideration for the reconveyance. This was evidenced by several colloquies between court and counsel. The discussion culminated with the following statement by the court: "There is no intimation of any fraud or improper actions on the part of plaintiffs. Apparently, the only thing is that Dr. Symmes got sick and became scared that he was going to die. That is insufficient." This statement of the court correctly summarized counsel's statement of what the defendants expected to prove and the argument that had been made in the presentation of the application to amend. Counsel throughout the discussion acquiesced in the court's statements of the issue tendered for decision. The ruling which followed, disallowing the amendments, was made under no misapprehension on the part of the court or counsel as to the withdrawal of two of the pleaded defenses and the abandonment of the contention that the deed was given without any consideration. Sufficient reasons for the abandonment of these defenses will be disclosed in the course of our discussion.

The remaining allegations which it was contended constituted a defense to the ac-

tion were in substance the following: that Dr. Symmes became ill mentally and physically to such an extent that he was unable to exercise ordinary care and judgment in the handling of his own affairs; that he believed himself to be suffering with cancer, was on the verge of a nervous breakdown, that he would have to curtail his activities and remain under the care of medical advisers; that he believed that he would be unable to meet the expense of medical care and attention or to pay the balance of the purchase price of $3,250 on the property, although in fact he was well able to do so; that he believed he was more likely to die than to recover and in order to recover it would be necessary for him to get rid of all his worries; that in case of his death his wife would not be able to carry on if she still had and retained said real property; that these matters preyed on his mind until he almost suffered a nervous breakdown, and that all of such facts were known to plaintiffs; that under these circumstances he conveyed the property to plaintiffs for no consideration, although the property at that time, with improvements placed thereon by him, was worth not less than $10,000 and was subject only to an indebtedness of $3,250 in favor of plaintiffs. It was further alleged that plaintiffs had voluntarily offered to extend and carry along indefinitely the said indebtedness of defendants Symmes in the amount of $3,250; that they suggested to Dr. Symmes that his condition of health might not be as bad as he believed it to be and that it was possible that his medical advisers were in error, and further suggested that he take no action to dispose of the property. It was then alleged that Dr. Symmes still urged plaintiffs to accept the conveyance of said property, which they agreed to do, promising at the same time to hold title for defendants and to reconvey it to them upon payment of the trust deed indebtedness if Dr. Symmes recovered within 12 or 15 months. They alleged that they made the conveyance in reliance upon the promise and agreement on the part of plaintiffs to hold title for them and to reconvey it upon the conditions stated; that Dr. Symmes' health did improve; that defendants offered to pay the $3,250 plus taxes and interest and demanded a deed; that plaintiffs refused to accept the money or give the deed and that defendants on February 8, 1939, served on plaintiffs, and on February 14, 1939, recorded, a notice of rescission of the conveyance. It was alleged that they had deposited with the clerk at the time they filed their original answer the sum of $3,000 for payment to plaintiffs for a reconveyance.

In the first proposed amendments presented in the law and motion department no attempt was made to allege fraud. Defendants had had more than seven months since the filing of their original answers in which to consider their defenses. The court at that time pointed out the insufficiency of the proposed answers in that connection, and it would appear that defendants shortly thereafter made the discovery that they had been deceived. Accordingly, the amendments tendered at the time of trial contained an additional paragraph reading as follows: "That plaintiffs herein never had any intention of doing any of the matters and things mentioned herein relative to holding said property for these defendants and conveying same to them as alleged herein, and their representations in that respect were false as they well knew." This paragraph constituted the only attempt made in the answers to allege a fraudulent purpose on the part of plaintiffs.

It is quite obvious that if these defenses were meritorious and they intended to rely upon them, defendants have suffered through loss of the right to prove them. It is not questioned that the defense of mental incompetency was sufficiently alleged. We shall assume, without deciding, that the bare allegation that a promise was made without intention to keep it would be sufficient to charge actual fraud, in the absence of any allegation that the promise was made with a fraudulent intent and purpose to induce the making of the conveyance.

Allowance of the amendments would have made it necessary for plaintiffs and intervener to take a continuance in order to prepare for trial of the new issues. This would have resulted in embarrassment and possible loss to them. Their title would have remained under a cloud for some additional time and this might easily have interfered with their oil development program. But as these defenses were not pressed, we need not consider them further.

There remained a third alleged defense, namely, that Dr. Symmes was suffering from great mental weakness which seriously impaired his business judgment, and that as a result thereof he conveyed away his property for a grossly inadequate consideration. Defendants endeavored to state

a case falling within the rule which allows equitable relief in such cases. Typical situations calling for the application of the doctrine are to be found in Shaffer v. Security T. & S. Bank, 1935, 4 Cal.App.2d 707, 41 P.2d 948, and cases there cited, which are relied upon by defendants. These cases are of interest in our inquiry only because they point out essentials of a case calling for relief under the above rule which are conspicuously absent from defendants' pleaded case.

[1,2] If, therefore, this remaining defense was insufficient, there was no error in refusing permission to amend the answers. It would have been futile to receive proof of facts which were insufficient to constitute a defense to the action. Even had sufficient facts been pleaded to establish a good defense, if the new issues were such that allowance of the amendments would have interfered with a prompt trial of the case in a manner fair to all parties, refusal of the right to amend would not have been an abuse of discretion in the absence of a satisfactory excuse for the delay in making application to amend.

Upon either hypothesis the rulings must be sustained.

In denying leave to amend, the court ruled that the proposed pleading stated no valid grounds for rescission. But, as we have stated, a similar ruling was made at the close of the case. At that time certain evidence had been placed before the court by the defendants which, in our opinion, satisfactorily proved that the pleaded defense had no merit whatever. We shall therefore discuss the pleading and the proof together in judging whether defendants have suffered any injustice.

[3] In the trial plaintiffs introduced in evidence the deed of defendants to plaintiffs dated December 29, 1937. It recited that the deed was given and was accepted in full satisfaction of the trust deed indebtedness. This was a valuable consideration. Intervener introduced his oil lease and option to purchase dated, respectively, August 8, 1938, and August 3, 1938. Defendants then offered in evidence the deposition of plaintiff Arthur Davies, taken at their instance before they filed their answer. In this deposition Davies testified to four or five conversations with Dr. Symmes before the deed was executed, which we find it unnecessary to state except in substance. According to this witness, Dr. Symmes stated that he had been advised that he was suffering from cancer and that he was undergoing expensive treatment therefor; that he repeatedly and persistently requested Davies to take back the property and cancel the trust deed indebtedness; that Dr. Symmes stated emphatically that he wished to rid himself not only of the property itself but also of the nursery business which he had undertaken to conduct thereon and which he had found to be extremely burdensome. Other reasons of similar import were given. Davies testified in detail as to his repeated attempts to dissuade Dr. Symmes from his plans and to his own reluctance to accept the conveyance. In brief, his testimony, if unimpeached, dispelled any suspicion of bad faith on his part. Defendants also, for reasons best known to their counsel, called a witness Byrens, who testified that he had had several conversations with Dr. Symmes nearly a year after the date of the deed, in which he asked that Dr. and Mrs. Symmes execute statements to identify themselves as the grantors in the deed; that Dr. Symmes expressed his willingness to do so, stated that he had purchased the property from plaintiffs but could not "make the grade," no longer had any interest in the property, and that the statements would be executed when his wife returned from a visit. The statements were later found to be unnecessary. The testimony of these witnesses stood uncontradicted. Defendants also offered in evidence three letters written by Dr. Symmes and a notice of rescission signed by Dr. and Mrs. Symmes. The letters read as follows: "Sunday Night. My dear Mr. Davies: I am told by my physicians that I have a fighting chance to get well if I give up down here and get out, and can get rid of all worries. I now see no chance of ever paying for the Gardena property, neither can I depend on Mr. Lands to do so, if I am out of the picture. If you will take my deed for the property and all stationary fixtures thereon, I feel that I must face it and take my loss and get rid of worries. My treatments are almost prohibitive, and I'm losing ground fast,—almost a nervous wreck. May I please ask you to do this one kind act, at once. I shall then tell Lands he is welcome to all the potted plants, and for you and he to come to terms on rental of the property. You cannot lose, and it will help me out personally, and relieve my mind so that if the worst comes to the worst, my wife will be able to carry on without troubles at Gardena.

May I ask you to please make out the necessary papers and forward to us at once, for in so doing I feel that perhaps I can again have a chance. I thought I could carry on, but find I was mistaken. Please let me hear from you at once. Yours truly Dr. C. W. Symmes. I owe nothing save 33.90 to the Water Co. and 25.00 to Duncan, all other bills are paid, and these I will gladly pay you when you accept the deed."

"12/30/37. My dear Mr. Davies: Your letter with papers received this morning. I have gone before a notary with Mrs. Symmes and filled in the statement of identity, also signed the deed as directed. As to Mr. Lands, I will say that he has never entered into the picture as far as the land is concerned, consequently there can be no claim in any title. Any agreement I have had with him, as he put it himself, put him in the light of a hired hand without pay. I will say, however, that after we got into it and his wife quit work he has drawn on me to the extent of about $10.00 per week for living expenses, and this part I was never intended to do. I still wish him well, so if you can arrange with him satisfactorily to stay on, I shall give him my end of all potted plants,—his ½ of all expenses paid by me, and more,—cancel his personal debt to me in money advanced. What more can I do? All I ask is my $500.00 tractor from the place. I enclose $33.90 to the Water Co. which you will please see is paid to them direct. This is for pipe line on the N. end of the acreage which they installed. I shall write Mr. Lands regarding the Duncan $25.00 bill, and tell him that in view of the fact that I give him all these things, I think he should pay this bill. However, will you please see Mr. Duncan, and tell him that if Lands does not pay the bill quite soon, for him to send statement to me and I will pay same. I thank you for your kindness to me, and great consideration toward me in my late troubles, and I assure you I am going to make a gallant fight to get back on my feet. Yours very truly, Dr. C. W. Symmes."

"1/6/38. My dear Mr. Davies: So far Mr. Lands has not been in to see me; neither have I felt equal to call on him. Any arrangement you can make with him will be alright with me, as I feel the sooner I get this thing off my mind the quicker I can pull my nerves together and perhaps pull out of this. If it is going to help Lands in anyway and proper payments can be made with Lands for same, he can have the tractor back to work the ground. I leave it all up to you. Yours very truly, Dr. C. W. Symmes."

The notice of rescission signed by appellants February 8, 1939, was couched in legal phraseology and stated as reasons for the rescission mistake, duress, menace, fraud, undue influence, no consideration, insufficiency of consideration, and that the consideration failed in whole or in part. No reference was made therein to the alleged agreement to reconvey the property.

At the close of the evidence intervener was allowed to file a supplemental complaint alleging that he had tendered to plaintiffs $13,500, the price at which the land had been optioned to him by plaintiffs. Defendants were allowed to file their amended answer to the supplemental complaint in intervention, as theretofore proposed, under a stipulation that plaintiffs and intervener might move to strike out the special defenses pleaded therein. This course was followed and the court struck out all allegations which were not in the original answer. This ruling, as we shall point out, was not erroneous.

[4] Defendants endeavored to plead a case of deceit and imposition practiced upon Dr. Symmes, but in their pleading they went too far and destroyed their own theory. And what they failed to plead to exclude them from the doctrine they rely upon, they proceeded to prove. That doctrine has no application to the facts which defendants themselves developed. The letters of Dr. Symmes clearly showed that he was determined to rid himself of the property. They were devoid of any suggestion that it was to be held for the benefit of defendants and was to be reconveyed, or that Dr. Symmes wanted to get it back in any event. While not conclusive, they furnished strong proof of the fact that he did not rely upon or expect or even have in mind any reconveyance of the property. They expressed his purpose in making the deed as if it was intended to be an unqualified and unconditional conveyance of the land. He could not have more definitely stated his real purpose in disposing of the property than he did in his letters and other declarations. Certainly he acted spontaneously, willing, and advisedly, without confusion in his ideas or uncertainty in his purpose.

[5, 6] The fact that a man becomes worried upon being advised that he is suffering from a serious malady and sets about to rid himself of debt and annoying business responsibility in order that he may devote himself unreservedly to the restoration of his health does not indicate an impairment of his mentality. Upon the contrary, it shows something more than ordinary good sense. And when we consider the matter of consideration which Dr. Symmes received for his deed we must remember that he was not concerned with mere dollars. It was alleged, and evidence was offered by defendants to prove, that he was a man of wealth. He was concerned about his health. The nursery business which he had undertaken had proven expensive and it worried him. He rid himself of it for sufficient reasons; he recovered his health. Who can say that he was foolish or improvident or that the consideration which he received was grossly or at all inadequate?

[7] In the face of the written declarations of Dr. Symmes, and other evidence introduced by defendants, the court could scarcely have done otherwise than strike out the new matter which had not already been abandoned. How could it have been held that Dr. Symmes had been imposed upon or over-persuaded in a transaction which he conceived and practically forced upon plaintiffs? The trial judge thought that defendants not only pleaded but also proved their conveyance to have been given freely, understandingly, and for a sufficient consideration. That is the view of the case which we entertain. It is not at all a case calling for equitable relief. Either plaintiff Arthur Davies was a scoundrel practicing deceit upon a trusting friend or he was an accommodating friend seeking no advantage for himself. He could not have been both. Defendants, insinuating that he was the former, were at some pains in their pleading and proof to show that he was the latter. They must abide by the result.

We might rest our approval of the rulings upon the ground which we have stated but we prefer to go further. Let us suppose that sufficient facts had been alleged to show a case of imposition, such as defendants attempted to allege, or defenses of incompetency and actual fraud. In any of these events plaintiffs and intervener would have been obliged to ask for a continuance. They could not have been compelled to go to trial without ample time in which to prepare their case

[8, 9] There is much authority for the proposition that one seeking to amend under such circumstances must make a showing excusing any want of diligence in making the application, and that where he fails to do so, denial of the privilege of amending is not an abuse of discretion. Williams v. Youtz, 1918, 178 Cal. 107, 172 P. 383; Manha v. Union Fertilizer Co., 1907, 151 Cal. 581, 91 P. 393; Bank of America Nat. Trust & Savings Ass'n v. Goldstein, 1938, 25 Cal.App.2d 37, 76 P.2d 545. Of course the fact that an amendment will necessitate a continuance does not necessarily furnish a sufficient reason for refusing the right to amend, but it does where there has been long and unexcused delay such as we are considering. Aside from the usual claim that counsel had been busy in other matters, the sole excuse was that counsel who filed the original answers believed them to be broad enough to permit defendants to prove grounds for rescission until he was advised by associate counsel shortly before the trial that they were insufficient for that purpose. From the proceedings which we have described it would appear to be somewhat more than doubtful that it was ever intended to rely seriously, or at all, on the defenses of fraud and incompetency. But if we take the explanation at its face value it will be apparent that it was planned from the beginning to prove these grounds for rescission without pleading them. Whether they were added as an afterthought or under a plan to take opposing counsel by surprise, we find ourselves in agreement with the views of the trial judge as to the insufficiency of the excuse offered for the delay. Lest it be thought that the muddled situation described must have resulted from youth and inexperience of counsel, we might add that no such contention is or could well be made upon the record.

[10-12] It is now contended that defendants should have been allowed to prove their defenses under a denial of plaintiffs' title and an allegation of title in themselves. They rely upon the rules stated in Sparrow v. Rhoades, 1888, 76 Cal. 208, 18 P. 245, 9 Am.St.Rep. 197; Bird v. Murphy, 1925, 72 Cal.App. 39, 236 P. 154, and like cases, that where it is sought to recover possession of property or to quiet title thereto, the defendant is not bound to anticipate the source of plaintiff's title and may prove,

without pleading the fact, that it depends upon a void conveyance. This is an exception to the rule that fraud, undue influence, want of consideration, and like defenses must be pleaded. It rests upon the supposition that the defendant does not know, and it excuses him from ascertaining, the source of plaintiff's title before he answers. The effect of it is to permit proof of the void character of a conveyance without the framing of issues by comprehensive pleadings. Such a departure from established procedure is tolerated only through necessity and in exceptional cases. But the rule relied upon could have no application to the facts of the case before us. Defendants had purchased the land from plaintiffs and had reconveyed it to them. They knew that plaintiffs' title depended upon the latter deed, which they sought to rescind. They had the affirmative duty of proving the invalidity of their deed; otherwise they could not have defeated plaintiffs' title or established their own. See Barry v. Sutter, 1914, 26 Cal.App. 240, 146 P. 527. Under customary practice they would have filed a cross-complaint for rescission and proper issues would have been framed by the pleadings. But whether they proceeded by cross-complaint or by affirmative answer, they could not prove grounds for rescission without pleading them. Their deed was voidable at most. More v. Calkins, 1890, 85 Cal. 177, 24 P. 729.

[13-15] It is fundamental that whatever fraud constitutes an element of a cause of action or of an affirmative defense or is the foundation of a right sought to be established, it must be pleaded. Wetherly v. Straus, 1892, 93 Cal. 283, 28 P. 1045; Burris v. Kennedy, 1895, 108 Cal. 331, 41 P. 458; Estate of Yoell, 1913, 164 Cal. 540, 129 P. 999; Virginia, etc., Co. v. Glenwood Lumber Co., 1907, 5 Cal.App. 256, 90 P. 48. It is equally true of the other alleged defences. The offered evidence was correctly excluded as being outside the issues, and the motion to strike portions of the answers was properly granted.

[16-17] Many of the findings are defective. They are to the general effect that allegations of the answers "which are in conflict with the foregoing findings are untrue." Appellants call our attention to the obvious insufficiency of these findings without making mention of the good ones. Nevertheless, we have read all of them and find specific and sufficient findings upon all material issues in addition to the faulty ones. This is enough to support the judgment. Turner v. Turner, 1921, 187 Cal. 632, 635, 203 P. 109.

There are no other points calling for discussion.

The judgment is affirmed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.



49 Cal.App.2d 567

PEOPLE v. PALMER.

Crim. 3494.

District Court of Appeal, Second District, Division 1, California.

Feb. 9, 1942.

Hearing Denied March 9, 1942.

1. Criminal law ⇐1142

Where clerk's transcript on appeal stated that motion for new trial was denied, District Court of Appeal was required to presume that such was the fact. Code Civ. Proc. § 1963, subd. 15.

2. Criminal law ⇐274

Record established that trial court, in prosecution for grand theft, did not abuse its discretion in refusing to vacate and set aside defendant's plea of guilty and to substitute therefor a plea of not guilty, on ground that, at time of entering plea, defendant was denied the right and benefit of counsel, that plea was not freely and understandingly entered, and that plea was result of a failure to settle a civil litigation. Pen.Code, § 1018.

3. Criminal law ⇐274

The statutory provision dealing with withdrawal of plea of guilty should only be utilized on a strong and convincing showing of the deprivation of legal rights by extrinsic causes. Pen.Code, § 1018.

4. Criminal law ⇐274

Evidence in civil action that holder of power of attorney, who had power to receive money and debts due the payee and to endorse checks, traced payee's name on back of check, so as to simulate her true signature, and that he cashed check and col-

lected the amount thereof, raised at least substantial inferences pointing to "embezzlement" and did not show that trial court in grand theft prosecution abused its discretion in refusing to permit him to withdraw his plea of guilty, on ground that cogent, strong, and convincing evidence of his innocence was presented. Pen.Code, § 1018.

See Words and Phrases, Permanent Edition, for all other definitions of "Embezzlement".

5. Criminal law ⇐1186(4)

The determination of a motion for new trial and the pronouncement of judgment in a criminal case are "procedural" in their nature and, in the absence of a miscarriage of justice, will not be disturbed on appeal, even though such proceedings took place after a lapse of the statutory time therefor. Pen.Code, §§ 1191, 1202.

See Words and Phrases, Permanent Edition, for all other definitions of "Procedural".

6. Criminal law ⇐977(3)

The fact that judgment against one who pleaded guilty was not pronounced not more than two nor less than five days after entry of his plea of guilty, as required by statute, did not require reversal of conviction in view that requirement is procedural and that, following entry of plea of guilty, defendant fled from the state and was not apprehended until after a lapse of some twelve years. Pen.Code, §§ 1191, 1202.

7. Criminal law ⇐913(1), 1186(4)

The failure of a court to pronounce judgment within the limited time ordained by statute does not automatically entitle a defendant to a new trial, nor is jurisdiction voided by such delay in every case, but only in cases where a miscarriage of justice results. Pen.Code §§ 1191, 1202; Const. art. 6, § 4½.

8. Criminal law ⇐913(1)

One who pleaded guilty was not entitled to a new trial because of the unavailability of reporter's transcript of proceedings when judgment was pronounced, where defendant, after plea of guilty and before judgment was pronounced, fled from the state and was not returned until some 12 years later, reporter's transcript was not essential to disposition of issues raised on appeal, and plea of guilty was taken down by the clerk of the court, was entered in the minutes, and was before the District Court of Appeal in the clerk's transcript. Pen.Code, § 1017.

9. Jury ⇐29(4)

Where defendant, on plea of not guilty, was accorded a jury trial, and jury was impaneled to try him and was in process of so doing when defendant changed his plea to guilty, and on entry of plea of guilty, nothing remained for jury to pass on, defendant could not contend that he was denied the verdict of the jury on the question of his guilt or innocence.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Arthur Palmer was convicted of grand theft, and he appeals.

Affirmed.

See, also, 122 P.2d 114.

Hearing denied; HOUSER and CARTER, JJ., dissenting.

Morris Lavine and Scheinman & Scheinman, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

On October 10, 1928, through an indictment returned by the Grand Jury of Los Angeles County, defendant was charged in five counts with the crime of grant theft, while an additional count alleged the commission by him of the crime of forgery. At the time of his arraignment on October 16, 1928, defendant waived reading of the indictment, and upon his motion the time for plea was continued until October 19. On the last-named date defendant entered his plea of not guilty, and the cause was set down for trial on November 19, 1928. For various causes and with defendant's consent, his trial date was continued several times until February 25, 1929, upon which date the matter was called for trial. The clerk's transcript reflects that at this time defendant was personally present in court with his counsel, N. Freedman and S. W. Thompson; that a jury was impaneled and sworn to try the cause; the indictment was read and defendant's plea of not guilty was stated to the jury. Thereupon, according to the clerk's transcript, the following transpired: "By leave of Court, the defendant withdraws his plea of 'Not Guilty' heretofore entered, regularly enters his plea of 'Guilty as charged in Count 1 of the indictment' and the pronouncing of judgment and sentence is set for February 28, 1929, at 9:30 A. M. Oth-

er counts are ordered off calendar. S. W. Thompson is allowed to withdraw as counsel for defendant. Defendant to remain on bail." When, pursuant to the foregoing, the case was again called for the purpose of pronouncing judgment and sentence, the defendant was not present. Thereupon his bond was declared forfeited and a bench warrant issued for his arrest.

Nothing more appears in the clerk's transcript for a period of more than twelve years, when on March 12, 1941, the defendant was personally present in court with counsel and asked permission to withdraw his plea of guilty theretofore entered. This application, made in the form of a motion, was denied. However, upon the request of the defendant, he was allowed to file an application for probation. The time for passing upon the application and pronouncing of judgment and sentence was continued from time to time until May 6, 1941. At that time the defendant made a motion for a new trial. His motion for leave to withdraw his plea of guilty and enter a not guilty plea was reconsidered and again denied. The application for probation was denied, and thereupon judgment of imprisonment in the state prison was pronounced. From the judgment of conviction; from what is designated "the failure of the trial court to pass on the motion for a new trial"; from an order denying defendant leave to withdraw his plea of guilty under section 1018 of the Penal Code and enter a plea of not guilty, and from the order denying defendant's motion after judgment requesting that such judgment be set aside, this appeal is prosecuted.

[1] Appellant's contention that the court failed or refused to rule upon his motion for a new trial is without merit. The clerk's transcript on appeal, which we have before us, shows the following as having occurred on May 6, 1941: "Defendant moves the Court for a new trial. Said motion is argued. * * * The Court orders that defendant's motion for a new trial be and the same is hereby denied." We must presume that in preparing the record on appeal official duty was regularly performed (Code Civ.Proc., sec. 1963, subd. 15), and the verity of such record is therefore binding upon us. People v. Jordan, 66 Cal. 10, 4 P. 773, 56 Am.Rep. 73; Brush v. Pacific Elec. Ry. Co., 58 Cal.App. 501, 208 P. 997; Delijian v. Rosenburg, 134 Cal.App. 264, 25 P.2d 228.

It is next contended that appellant's plea of guilty should have been set aside pursuant to the provisions of section 1018 of the Penal Code and a plea of not guilty entered. In support of this claim it is urged:

"A. The appellant at the time of entering the plea was denied the right and benefit of counsel;

"B. His free will and judgment were overcome by extraneous circumstances;

"C. The plea was not freely and understandingly entered;

"D. The plea was the result of a failure to settle civil litigation;

"E. Cogent, strong and convincing evidence of appellant's innocence was presented."

It is argued that appellant was without the advice or benefit of counsel. In that regard, at the hearing of the motion to set aside the plea of guilty, the court took testimony. Defendant himself testified that at the time he pleaded guilty he had never read nor heard read the indictment; that several continuances had been had because of the pendency of negotiations to settle the civil liability upon the part of defendant to the complaining witness; that his attorney, Mr. Thompson, had not discussed the case with him nor with any of his witnesses, and that none of the latter were subpoenaed into court; that he had employed Attorney Freedman only on the evening before the jury was impaneled, and that the last-mentioned attorney was unfamiliar with the facts of his case. Appellant further testified that when his first attorney sought from the court leave to withdraw as counsel, the attorney stated in the presence of the jury that he lacked confidence in his client and that the latter was entirely undependable. All of these facts, appellant urges, show that his own free will and judgment were overcome and that because of his distress of body and mind begotten of his plight, he yielded to the suggestion of one of his attorneys that he enter a plea of guilty.

[2] Defendant's attorney, S. W. Thompson, however, testified that following the return of the indictment and when the grand jury transcript was delivered to him, he conferred with his client and thoroughly and completely discussed with him the nature of the criminal charges lodged against appellant, as well as the issues framed in a civil action brought by the complainant

against him in connection with the transactions which formed the basis of the criminal charges. Attorney Thompson further testified that as the final date set for the trial approached he endeavored to contact appellant, but was unable to do so; that he sent for appellant and communicated with the latter's wife, but that appellant got in touch with him only two or three days before the trial date, at which time he advised appellant that no further continuances could be had and that the case must proceed to trial. The court was also advised of the fact that following the entry of his plea of guilty appellant fled the jurisdiction and for some twelve years remained a fugitive from justice. Under all the facts and circumstances here present, the court did not abuse its discretion in refusing to vacate and set aside the plea of guilty and substitute therefor a plea of not guilty. The record supports neither the unwarranted attack made upon defendant's counsel, S. W. Thompson, nor appellant's contention that he was in a state of confusion, highly nervous and in an upset condition when he gave his consent to the change of his plea from not guilty to guilty.

[3] Section 1018 of the Penal Code is designed to purify and keep pure the administration of justice, and was never intended to enable the guilty to escape punishment. Appellant's claim that he entered his plea of guilty solely on the advice of his counsel representing him in the case avails him nothing, because this falls far short of being a fraudulently obtained plea. The facts in the instant case are not at all parallel to the situation disclosed in People v. Schwarz, 201 Cal. 309, 257 P. 71, relied upon by appellant. The provisions of section 1018 of the Penal Code should only be utilized upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes. To hold otherwise would amount to validation and recognition of a rule that would prove most disastrous in its results so far as order and system in the administration of justice are concerned. The law zealously guards the right of an accused to a fair trial and as well to representation by counsel at all stages of the proceedings against him; but to hold that a defendant represented by able counsel may during his trial change his not guilty plea to that of guilty, flee from the court's jurisdiction, and after twelve years assert his innocence and be permitted to change his plea to not guilty after material witnesses may have died or their whereabouts be unknown, would be to countenance a practice that would reduce to mockery the administration of even and exact justice.

[4] We are not impressed by appellant's argument that strong and convincing proof of his innocence is provided by the decision of our Supreme Court in the case of Kiekhoefer v. United States Nat. Bank, 2 Cal.2d 98, 39 P.2d 807, 96 A.L.R. 1244. This was a civil action commenced by the complaining witness against the bank growing out of the use by appellant of a power of attorney given him by the plaintiff in the civil action. Instead of tending to prove appellant's innocence, we feel that the opinion in the civil case, as well as the facts therein narrated, indicate the contrary. The decision points out that appellant herein received a check out of escrow in the amount of $5,654.91, drawn by the bank in favor of the complaining witness herein. The check was delivered by Palmer, the appellant in the case at bar, who indorsed the same as follows: "Emma Martha Storz" (the name of the complaining witness at that time, she having thereafter remarried) "by Arthur Palmer, Attorney in Fact. Arthur Palmer." Bearing this indorsement, the check was presented by Palmer to the Bank of Italy in Pasadena. The bank, however, refused to accept or pay the check as thus indorsed. Appellant took the check out of the Bank of Italy, cancelled the indorsements then on the check by drawing lines through the same, and again presented the check to said bank with new indorsements thereon as follows:

"Pay to the order of Arthur Palmer Company,

"Emma Martha Storz,

"Pay to the order of Bank of Italy National Trust & Savings Association,

"Arthur Palmer Company."

Arthur Palmer Company was the name in which appellant Palmer carried on his business. The name "Emma Martha Storz" in the new indorsement had been written by Palmer himself. In fact, her name on said indorsement had been traced on the back of the check by Palmer so as to simulate the true signature of Emma Martha Storz. The bank cashed the check and gave Palmer credit for the amount thereof, and thereafter collected the same from the defendant bank upon which it was drawn. The holding in the case was simply that in an action to recover money

paid on the alleged forged or illegal indorsement of a check, where plaintiff gave a power of attorney to an agent authorizing him to receive money and debts due plaintiff and indorse checks there was no principle, either legal or equitable, which would justify a recovery from the bank which paid the check upon such indorsement. The foregoing excerpts from the decision, coupled with a reading of the latter in its entirety, instead of establishing appellant's innocence, tend strongly to raise at least substantial inferences pointing to his guilt of embezzlement.

Instead of entering his plea of guilty by reason of any fraud, duress or other fact which might have affected or overreached his own will or judgment, we are impressed from a reading of the entire record before us that the trial court was justified in assuming that the motive that influenced appellant to enter such guilty plea was his realization of guilt, coupled with the fact that further continuance of his trial was refused by the court, and that by admitting his guilt he would be afforded an opportunity to flee as he did from the jurisdiction of the court.

[5-7] A reversal is urged by appellant on the additional ground that the judgment against him was not pronounced not more than two nor less than five days after the entry of his plea of guilty. Pen.Code, secs. 1191, 1202. It is conceded that following the entry of his plea of guilty in 1929 appellant fled from California and was not apprehended until his arrest in New York for another crime, and after serving a term of imprisonment therefor he was returned to this state by the authorities after a lapse of some twelve years from the date of entry of his plea of guilty in the California court. It is true, as contended by appellant, that the law provides that judgment must be pronounced within a prescribed time, but it has been held that the determination of a motion for a new trial and the pronouncement of judgment in a criminal case are procedural in their nature, and in the absence of a miscarriage of justice will not be disturbed on appeal even though such proceedings took place after a lapse of the statutory time therefor. People v. Pollock, 31 Cal.App.2d 747, 761, 89 P.2d 128. We have no hesitancy in saying that there is no miscarriage of justice in the present case, and that the delay complained of in the matter of pronouncing judgment does not constitute reversible error. There is further justification for so holding, and that is because appellant, during the time intervening between the entry of his guilty plea and the pronouncement of judgment, by his own acts evaded the court, and by his willful conduct in fleeing he himself prevented the imposition of sentence within the time provided by law. Such being the case, he will not be permitted to reap an advantage from his own unlawful act. Palmquist v. State, 30 Fla. 73, 11 So. 521; O'Steen v. State, 92 Fla. 1062, 111 So. 725. It has been repeatedly held in this state that the failure of the court to pronounce judgment within the limited time ordained by section 1191 of the Penal Code does not automatically entitle defendant to a new trial pursuant to the provisions of section 1202 of the same code, nor is jurisdiction voided by such delay in every case, but only in cases where a miscarriage of justice results. Const., art. VI, sec. 4½; People v. Zuvela, 191 Cal. 223, 215 P. 907; People v. Farber, 19 Cal. App.2d 189, 64 P.2d 1138; People v. Rubens, 11 Cal.App.2d 576, 54 P.2d 98, 1107; People v. Stroff, 134 Cal.App. 670, 26 P.2d 315; People v. Miller, 130 Cal.App. 191, 19 P.2d 814; People v. Carter, 130 Cal. App. 95, 19 P.2d 843; People v. Howard, 10 Cal.App.2d 258, 52 P.2d 283; 97 A.L.R. 805, note.

[8] Equally without merit is appellant's contention that he is entitled to a new trial because of the unavailability of the reporter's transcript of the proceedings had on February 25, 1929. It appears that the reporter destroyed his notes some five years after making them, and also that the reporter died within the twelve-year period of appellant's absence from the state. The reporter's transcript is not essential to the disposition of the issues raised on this appeal. Defendant's plea of guilty was taken down by the clerk of the court, entered in the minutes, and is now before us in the clerk's transcript. Section 1017 of the Penal Code requires only that the plea be entered in the minutes and that it need not be taken down in shorthand by the reporter unless so ordered by the court.

[9] Finally, appellant contends that he was denied the verdict of a jury on the question of his guilt or innocence. This contention is answered by the record, which shows that upon his plea of not guilty appellant was accorded a jury trial. Indeed, a jury was impaneled to try him and was in the process of so doing when he changed

his plea to guilty, thereby removing the triable issue raised by his plea of not guilty. Upon the entry of the guilty plea nothing remained for the jury to pass upon, for it is only by a plea of not guilty that the material allegations of the indictment or information are put in issue for trial and determination by the jury, or the court in the event of a waiver of the jury.

For the foregoing reasons, the judgment and all orders appealed from are, and each is, affirmed.

YORK, P. J., and DORAN, J., concurred.



49 Cal.App.2d 579

PEOPLE v. PALMER.

Crim. 3519.

District Court of Appeal, Second District, Division 1, California.

Feb. 9, 1942.

Hearing Denied March 9, 1942.

Criminal law ⇐1023(12)

Though an appeal from an order denying a motion to vacate judgment is ordinarily authorized by statute providing that an appeal may be taken from an order after judgment, which affects the substantial rights of defendant, such an order is not appealable where the motion or application merely asks the court to repeat or overrule the former ruling on the same facts. Pen. Code § 1237, subd. 3.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Arthur Palmer was convicted of grand theft, and he appeals.

Appeal dismissed.

Morris Lavine and Scheinman & Scheinman, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

This is an appeal from an order denying a motion after judgment to vacate such judgment in the above-entitled cause. We have this day filed an opinion in the case of People v. Arthur Palmer, 122 P.2d 109, in which an appeal was taken from the judgment. An examination of the record in the instant case discloses that the issues raised on this appeal were in fact raised on the appeal from the judgment.

It is appellant's contention that this appeal is authorized by subdivision 3 of section 1237 of the Penal Code, which provides that an appeal may be taken from an order after judgment which affects the substantial rights of the defendant. Ordinarily this is true, but it is also well established that an order made after judgment is not appealable where the motion or application merely asks the court to repeat or overrule the former ruling on the same facts. In De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 349, 32 L.R.A. 82, 53 Am.St.Rep. 165, it is said that this is so, because to permit such an appeal "would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appealing, contrary to the intent of the statute." See, also, Kent v. Williams, 146 Cal. 3, 79 P. 527, and Alpers v. Bliss, 145 Cal. 565, 79 P. 171.

If an appellate court were compelled to treat an appeal from an order made after judgment with the same force and effect as one from the final judgment, a convicted defendant could wait several years after his trial until the witnesses for the people had died or moved away, and then proceed to make a motion to set aside the judgment, and if the conviction were reversed and a new trial ordered the proper administration of justice would be seriously threatened. The Penal Code definitely fixes the time for an appeal from the judgment. To allow an appeal from an order denying a motion to set aside or modify the final judgment where, as in the instant case, such appeal is based upon errors and rulings which might properly be considered and which were as a matter of fact considered upon the appeal from the judgment, would in fact amount in criminal appeals to removing entirely the time limitation mentioned. We cannot conceive that such was the legislative intent.

This court being without jurisdiction to entertain the instant appeal, it is ordered that the same be, and it is, dismissed.

YORK, P. J., and DORAN, J., concurred.

49 Cal.App.2d 528

ARMSTRONG v. SMITH.

Civ. 11725.

District Court of Appeal, First District, Division 1, California.

Feb. 6, 1942.

1. Contracts ⇐168

Where plaintiff and defendant entered into a contract whereby plaintiff undertook to construct a dwelling house for defendant, the law implied a promise on the part of defendant to permit the plaintiff to build and according to the details of the contract.

2. Venue ⇐7

Under statute relating to venue in a contract action, a contract action may properly be tried in only two counties, namely, the county in which the defendant resides, and the county in which the contract was made. Code Civ.Proc. § 395(1).

3. Venue ⇐7

Venue statute provision dealing with venue of an action founded on a contract requires that all actions arising on contracts shall be tried in the county in which the defendant resides, or in which the contract was made, unless the defendant has contracted specially and in writing as to the county in which his obligation is to be performed, in which event such county is also a proper county for the trial of the action. Code Civ.Proc. § 395(1).

4. Venue ⇐7

As regards question of venue, the obligation of a contract is incident to its making, is incurred at the time the contract is made, and follows the contract until the contract is extinguished.

5. Contracts ⇐168

The law will come to the assistance of an express contract in order to give it enforceability where under the circumstances it ought to be enforced, but not so with a special contract, in assistance of which nothing will be implied.

6. Venue ⇐7

In using the words "special contract" within the venue statute the legislature must have in mind some contract other than one ordinarily and usually used in everyday transactions of business life, otherwise the word "special" could have no significance, and need not be inserted. Code Civ.Proc. § 395(1).

See Words and Phrases, Permanent Edition, for all other definitions of "Special Contract".

7. Venue ⇐7

Before an action arising on a contract may be brought under venue statute in county where the obligation forming the basis of the suit is performable, the contract must specifically state the place of performance of the obligation. Code Civ.Proc. § 395(1).

8. Statutes ⇐186

One of the cardinal rules to be applied in construing a statute is that the interpretation must be based on the language used, since a court has no power to rewrite a statute to make it conform to an intention not expressed. Code Civ.Proc. § 1858.

9. Statutes ⇐188, 206

In construing a statute, a strained construction should not be placed on its words, and the construction should always be reasonable and according to the common understanding of the language used, with a view to giving effect to all provisions if possible. Code Civ.Proc. § 1858.

10. Venue ⇐7

Where plaintiff agreed to build a house for defendant in Alameda county and defendant agreed to pay a stipulated price, and there were no express stipulations in the contract as to where any of its covenants were to be performed and defendant resided in San Mateo county, an action for defendant's breach of implied obligation not to interfere with plaintiff's performance of the contract was not maintainable in Alameda county under the statute fixing the venue of contract actions in the county in which defendant resides or in which the contract was made unless defendant has contracted specially as to the county in which the obligation is to be performed. Code Civ.Proc. § 395(1).

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by J. R. Armstrong against William Smith to recover for alleged breach of an implied obligation arising under building contract. From an order denying motion for a change of venue to the county

of defendant's residence, the defendant appeals.

Order reversed.

Maurice R. Carey and John A. Gorfinkel, both of San Francisco, for appellant.

Myron Harris, of Oakland, for respondent.

JONES, Justice pro tem.

In this case the appeal is from an order denying a motion for a change of venue to the county of the defendant's residence.

On the 5th of January, 1938, the plaintiff and the defendant entered into a contract whereby the plaintiff undertook to construct a multiple dwelling house for the defendant on a lot in the city of Oakland, county of Alameda. The contract, in a form usually employed by builders, was prepared and executed by the parties in San Francisco. At the time the action was brought the defendant resided in the county of San Mateo. There are no express stipulations in the contract as to where any of its covenants are to be performed, except that the plaintiff so bound himself to build on the lot in Alameda County.

[1] Against this obligation the law implied a promise on the part of the defendant to so permit him to build and according to the details of the contract. Gray v. Bekins, 186 Cal. 389, 199 P. 767.

The plaintiff commenced an action in the Superior Court of Alameda County on November 25th, 1940, seeking to recover damages for a breach of the contract. In paragraph IV of his complaint he alleges that although he, plaintiff, is ready and able to perform, "plaintiff has been prevented from so doing by the neglect, failure and refusal of the defendant to perform said contract on his part and by the refusal of the defendant to allow plaintiff to further perform the same on his part." The defendant demurred to the complaint, and gave notice of a motion for a change of place of trial to the county of his residence. This notice was supported by proper affidavits. The motion came on regularly for hearing and was denied, and it is from this order that the defendant appeals.

The breach alleged is that of an implied obligation arising under the contract. By its terms the plaintiff agreed to build a house for the defendant in Alameda County for which the defendant agreed to pay a stipulated price. This much was expressly agreed to. In addition certain implied obligations arose out of the contract, each of the parties impliedly agreeing not to interfere with full performance by the other. It is upon the alleged breach of the defendant's obligation in this respect that plaintiff seeks to recover.

The appeal calls for an interpretation of section 395 of the Code of Civil Procedure. Subd. (1) of said section, the only part with which we are here concerned, reads as follows: "In all other cases, except as in this section otherwise provided, and subject to the power of the court to transfer actions or proceedings as provided in this title, the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action. If the action be for injury to person, or to personal property, or for death from wrongful act, or negligence, either the county where the injury occurs, or where the injury causing death occurs, or the county in which the defendants, or some of them, reside at the commencement of the action, shall be a proper county for the trial of the action. When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary. If none of the defendants reside in the State, or, if residing in the State, and the county in which they reside is unknown to the plaintiff, the action may be tried in any county which the plaintiff may designate in his complaint, and if the defendant is about to depart from the State, such action may be tried in any county where either of the parties reside, or where service is had. If any person is improperly joined as a defendant, or has been made a defendant solely for the purpose of having the action tried in the county, city and county, township, city or town where he resides, his residence must not be considered in determining the proper place for the trial of the action."

That portion of the said subdivision dealing with the venue of actions arising upon contract and which we are called upon to interpret is the third sentence thereof

which reads: "When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

If it were provided only that when a defendant has contracted to perform an obligation in some particular county, the county in which it is to be performed, or the county in which the contract was entered into, or the county in which the defendant resides, shall be a proper county for the trial of an action upon an obligation growing out of the contract, no difficulty would be presented. In such a case either one of the three counties mentioned would be a proper county for the trial of such an action.

[2] But the legislature did not stop there. It added a limitation, and the limitation which it added is this: "the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed." The effect of the limitation is to cut down the number of counties in which an action may properly be tried to two, namely, the county in which the defendant resides, and the county in which the contract was made.

Having set up the limitation, the legislature created an exception to it, providing that if it be specially contracted in writing as to the county of performance, such county is also a proper county for the trial of an action. Under conditions where the exception is effective, the number of proper counties goes back to three.

[3] No great consequence is to be attached to the general limitation of the section that "When a defendant has contracted to perform an obligation in a particular county," the other provisions are to apply. Obviously, an existing obligation is performable at some place. If it is of such character that it is to be, or may be, performed in different counties no different situation is created than if it is to be performed at a particular place. The express condition of the statute is that unless there is a special contract in writing to the contrary the county in which the obligation is incurred is the venue of an action arising out of it. What the legislature has in substance said is that all actions arising on contract shall be tried in the county in which the defendant resides, or in which the contract was made, unless the defendant has contracted specially and in writing as to the county in which his obligation is to be performed, in which event such county is also a proper county for the trial of the action.

It is suggested by the respondent that since the breach of the obligation made the basis of the action occurred in Alameda County, it follows that the obligation relied on was incurred there. The obligation of a contract as distinguished from the contract itself, has been variously defined by the courts of the different states, including our own, but all to the same point. Of such definitions that found in Aycock v. Martin, 37 Ga. 124, 92 Am.Dec. 56, is appropriate to the contention made by the respondent. The court there said: "'The obligation of a contract is a legal, not a mere moral obligation: it is the law which binds a party to perform his undertaking. The obligation does not inhere or subsist in the contract itself, proprio vigore, but in the law applicable to the contract.' 1st Bouvier's Law Dictionary, 652, and authorities there cited. When the parties entered into the contract now before the Court which the plaintiff seeks to enforce, what was the legal obligation of the defendant? His legal obligation was, to do and perform, just what the laws of the land, applicable to the contract, required him to do and perform, at the time the contract was made, in accordance with its terms and stipulations: that was the exact measure of his legal obligation at the time the contract was made; nothing more, nothing less. The defendant's legal obligation was to perform his contract, as the laws of the land, applicable to that contract, required him to perform it, at the time it was made. That was the extent of his legal obligation to the plaintiff, and just to that extent the plaintiff had the legal right to have it performed, in order to maintain the integrity of the legal obligation of the defendant's contract. If it was not the existing law of the State, applicable to the contract at the time it was made, which created and defined the defendant's legal obligation to perform it, in accordance with its terms and stipulations, what is it that does create and define his obligation to perform it? If there had

been no existing law applicable to the contract, prescribed by the supreme power of the State, at the time it was made, creating and defining the defendant's obligation to perform it, then he would have incurred no other than a mere moral obligation, over which human tribunals have no jurisdiction. It therefore necessarily follows, that the existing law applicable to the contract, prescribed by the supreme power of the State, at the time the contract was made, creates and defines the defendant's legal obligation to perform it, in accordance with its terms and stipulations. 'A perfect right is that which is accompanied by the right of compelling those who refuse to fulfil the correspondent obligation. A perfect obligation is that which gives to the opposite party the right of compulsion.' Vattel, 62. The defendant's obligation to perform his contract in accordance with its terms, was a perfect obligation, because the plaintiff, at the time the contract was made, had the legal right, under the then existing law of the State, to have compelled its performance. The defendant's obligation to perform his contract was just what that existing law made it, just what that existing law required, and would have compelled to be done for its performance, in behalf of the plaintiff, the other party to it. The defendant's obligation to perform his contract, under the then existing law, was perfect, and the plaintiff's right to have that obligation performed as prescribed by that existing law, was also a perfect right."

[4] The obligation of a contract is incident to its making. It is incurred at the time the contract is made and follows it until the contract is extinguished. The obligation arises as soon as the contract takes breath and may be breached at any time while it has life. While it is the law, in conjunction with the contract, which casts the obligation, the law does not wait until it is breached to cast it. This is done when the contract is made. So with the contract before us, all obligations arising under it were incurred at the time and in the county in which it was made.

Of primary importance is the question as to what kind of a contract the legislature intended when it used the term "special contract." In Gulick v. Justice's Court, 101 Cal.App. 619, 281 P. 1031, 1032, a construction has been placed upon the term as it was used in a similar statute. In that case the defendant incurred an indebtedness to the plaintiff in that action in the township of Indio, in Riverside County. The defendant gave to the plaintiff a check dated at Los Angeles, in Los Angeles County, and payable there, in settlement of his obligation. Before this check reached the bank upon which it was drawn, payment was stopped by the defendant. Plaintiff filed suit in Indio Township where the indebtedness was incurred, alleging nonpayment on the check. The demurrer of the defendant to the complaint was overruled, and he then sought in the superior court a writ of prohibition against the respondent court upon the ground among others that the venue of the action lay in Los Angeles County. In this respect it was urged by the defendant that the check constituted a special contract in writing payable and to be performed in Los Angeles, and not in the township of Indio where the obligation was incurred. Reliance was placed upon section 832 of the Code of Civil Procedure, as it then stood. This section provided: "Actions, Where Must Be Commenced. Actions in justices' courts must be commenced, and, subject to the right to change the place of trial, as in this chapter provided, must be tried: * * * 7. When a person has contracted to perform an obligation at a particular place, and resides in another county, township, or city—in the township or city in which such obligation is to be performed, or in which he resides; and the township or city in which the obligation is incurred is deemed to be the township or city in which it is to be performed, unless there is a special contract in writing to the contrary."

The legislature apparently borrowed the last clause of subd. 7 of section 832 and inserted it in section 395 of the Code of Civil Procedure, which is the section which we are now called upon to interpret, with only enough change to make it apply to a county instead of a township. This was probably done for the purpose of securing uniformity in procedure and to obviate possible confusion between the trial of cases in the justices' and superior courts.

In the Gulick case it was held by the trial court that the check sued on did not constitute a special contract in writing within the meaning of the statute, and that the action was properly commenced in the township in which the obligation was incurred. The judgment was affirmed by the district court of appeal on appeal, and a petition to have the cause heard in the Supreme Court was denied by that court.

[5] A special contract has been defined in other jurisdictions as one in which there is expressed particular stipulations with respect to the obligations of the parties, and which, if omitted, the law will not supply. Forester v. Forester, 10 Ind.App. 680, 38 N.E. 426; Jackson v. Creek, 47 Ind.App. 541, 94 N.E. 416. The law will come to the assistance of an express contract in order to give it enforceability where under the circumstances it ought to be enforced, but not so with a special contract. Nothing will be implied in its assistance. This distinction between an express contract and a special contract is pointed out in Pence v. Beckman, 11 Ind.App. 263, 39 N.E. 169, 54 Am.St.Rep. 505. It was there held that under the Indiana Code, following the common law rule, recovery might be had upon an averment of an express contract although an implied contract is proven, and for the reason that an implied obligation may arise upon an express contract but never on one which is special. This distinction is also made in Indianapolis C. T. Co. v. Dalton, 43 Ind.App. 330, 87 N.E. 552, 554, where the holding is that a complaint may declare upon an express contract and a recovery be had upon an implied promise, but it cannot declare upon a special contract and recover upon an implied promise. The court there said, quoting from Forester v. Forester, supra: "'An express contract is one whose terms are uttered or stated in words or writing. An implied contract is a matter of inference or deduction. * * * A special contract is one with peculiar provisions or stipulations not found in the ordinary contract relating to the same subject-matter. These provisions are such which, if omitted from the ordinary contract, the law will never supply. * * * An express contract may or may not be special. But a special contract is always express.'"

[6, 7] As the court stated in Gulick v. Justice's Court, supra: "In using the words 'Special Contract' * * * the Legislature must have had in mind some contract other than one ordinarily and usually used in every-day transactions of business life, otherwise the word 'Special' could have no significance, and need not have been inserted in the section." But we do not understand that the court here intended to say that there should be a separate contract special in its nature upon the same subject matter before the statute would apply, but that if there is embodied in the agreement giving rise to the action an express stipulation with respect to the obligation in question, the requirements of the statute are met. It is our opinion that before an action may be brought under section 395, supra, in the county where the obligation forming the basis of the suit is performable, the contract must specifically state the place of performance of such obligation. If the contract so states, then the provision as to place of performance is both express and special.

[8-10] One of the cardinal rules to be applied in construing a statute is that the interpretation must be based on the language used. The court has no power to rewrite a statute to make it conform to an intention not expressed. As is said in Seaboard Acceptance Corp. v. Shay, 214 Cal. 361, 5 P.2d 882, 884: "It is elementary that there can be no intent in a statute not expressed in its words; that the intention of the Legislature must be determined from the language of the statute. Ex parte Goodrich, 160 Cal. 410, 117 P. 451, Ann. Cas.1913A, 56; In re Application of Monrovia Evening Post, 199 Cal. 263, 248 P. 1017." A strained construction should not, however, be placed upon its words. The interpretation should always be reasonable and according to the common understanding of the language used, with a view to giving effect to all of its provisions if possible. This rule finds legislative expression in section 1858 of the Code of Civil Procedure, wherein it is provided: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained thereon, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." A statute so interpreted is to be applied to the facts as presented. If the parties have only impliedly agreed to a place of performance when the statute says that they should have specially agreed before the remedy sought may be obtained, no redress may be had. The court is powerless to redraft either the statute or their contract and do aught but apply the law to the facts as it finds them.

Sight must not be lost of the fact that on this appeal we are dealing solely with a question of venue. The enforceability of the contract is not in question, nor are any of the issues tendered by the complaint.

The nature of the proceeding excludes all questions except as to whether Alameda County is a proper county for the trial of the action. The place of performance of the defendant's obligation sued on being implied, and not specially contracted, the county in which the obligation was incurred and the county of the defendant's residence are the only proper counties for the trial of the action.

The order appealed from is reversed.

PETERS, P. J., and WARD, J., concurred.



49 Cal.App.2d 500

HOLMAN v. STOCKTON SAVINGS & LOAN BANK et al.

Civ. 6692.

District Court of Appeal, Third District, California.

Feb. 3, 1942.

Hearing Denied April 3, 1942.

1. Contracts ⇐92

Senile dementia does not render one incapable of executing contracts or transacting business.

2. Contracts ⇐99(3)
Reformation of Instruments ⇐45(1)

Evidence supported finding that aged widow was mentally competent and capable of understanding nature of the transactions, so as not to be entitled to cancel or reform certain instruments executed by her in connection with her indebtedness to defendant bank on ground of mental incompetency

3. Fraud ⇐50, 58(1)

Fraud must always be proved by convincing evidence and is never presumed.

4. Evidence ⇐142(1)

In action by aged widow for damages alleged to have been sustained as result of sale of shares of stock in defendant bank, where stock was not listed and had no established market value, evidence with reference to other sales of stock of the bank was admissible on question of value.

5. Appeal and error ⇐1050(1)

In action by aged widow for damages alleged to have been sustained as result of sale of shares of stock in defendant bank, even if the admission of evidence with reference to other sales of stock of the bank was not proper on question of value, the error in admitting such evidence was not prejudicial, where record contained other evidence sufficient to sustain finding that fair and actual value was approximately the price paid therefor.

6. Banks and banking ⇐227(3)
Reformation of Instruments ⇐45(1)

Evidence supported finding that defendant bank did not make any secret profits out of transactions with aged widow in settlement of her indebtedness to defendant bank, which indebtedness she had incurred in her effort to render financial assistance to her children, and that defendant bank was not guilty of any sharp practice or fraud in the transaction, and hence, even though a confidential relationship existed between widow and bank, widow was not entitled to cancel or reform instruments executed by her in the settlement or to recover damages allegedly sustained as result of sale of certain shares of stock in defendant bank at suggestion of defendant bank.

7. Appeal and error ⇐1184

Where it came to attention of District Court of Appeal that appellant had died since argument and submission of the cause, judgment would be ordered filed "nunc pro tunc" as of date of the submission.

See Words and Phrases, Permanent Edition, for all other definitions of "Nunc Pro Tunc".

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Hattie Holman, an incompetent person, etc., against Stockton Savings & Loan Bank and others for cancellation or reformation of instruments, together with injunctive relief and damages sustained as result of sale of shares of stock. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Ira B. Langdon, of Stockton, for appellant.

Rutherford, Jacobs, Cavalero & Dietrich, Newton Rutherford, D. R. Jacobs, Philip

Cavalero, and Stephen Dietrich, all of Stockton, for respondents.

STEEL, Justice pro tem.

This is an appeal from a judgment in favor of the respondents (defendants in the court below) and presents squarely the question as to whether the findings and judgment are supported by the record. The suit, equitable in its nature, was instituted by plaintiff, a widow of the age of 85 years, wherein she sought a cancellation or reformation of certain instruments executed in connection with her indebtedness to the defendant bank, together with injunctive relief and damages alleged to have been sustained as a result of the sale of certain shares of stock. It is alleged that the defendants entered into a conspiracy to unlawfully secure possession, title and control of the property of plaintiff, and that between the years of 1924 and 1938 they did so obtain all of plaintiff's property. That in so doing the defendant bank and its agents and officers used the plaintiff's three children, the defendants George Holman, Charles Holman and Hattie G. Holman as tools or agents in furtherance of such fraudulent scheme to obtain said property.

The record discloses that Mrs. Hattie Holman, plaintiff and appellant herein, had been a lifelong resident of San Joaquin County, and became a widow in 1910; that for a great number of years members of her family had been stockholders and otherwise connected with the defendant bank. At the time she became a widow in 1910 it appears that Mrs. Holman received from her husband's estate property of a value in excess of $100,000, and that this property increased in value to approximately $180,000 in 1924, when the transactions resulting in this litigation are alleged to have commenced. Her property then consisted of stock in the defendant bank, real estate in the city of Stockton, and other property.

Substantially the following is a general résumé of the various financial transactions complained of: The record shows that in May, 1924, the plaintiff and appellant, Mrs. Hattie Holman, executed her promissory note in the sum of $8,000 in favor of the defendant bank, and thereupon instructed the bank, through its assistant cashier, Mr. Holmes, who handled the transaction, to deposit the proceeds thereof to the account of George and Leland Holman, her sons. With reference to this transaction, it is urged on behalf of appellant that the bank was unauthorized to deposit the proceeds of this note to her sons' account. However, the testimony of Mr. Holmes shows that it was appellant's instruction that the money be so deposited. It further appears that the defendant Charles Holman, one of the sons of appellant, was the owner of a dairy ranch situated in San Joaquin County, which was encumbered by a trust deed securing a note of $50,000, and that early in 1925, a notice of default and intention to sell was filed; that at the request and suggestion of the defendant George Holman, a brother of Charles, the defendant bank promised to loan George the necessary money with which to purchase the ranch at the price of $52,400 upon the understanding that George and his wife Elsie would execute a trust deed thereon securing a note in the principal sum of $45,000 (this amount being the maximum loan permitted under the bank's appraisement) and execute an additional note with the appellant here as co-maker, for the balance of the purchase price amounting to $7,400. This transaction was concluded accordingly in July, 1925, and George Holman thereafter operated the ranch for several years without making any profit, and in fact at a considerable loss, he having had to borrow money on many occasions from the defendant bank with which to meet the current taxes, interest, and other operating expenses. These advances were evidenced by notes which were also signed by the appellant as co-maker. In 1935 foreclosure proceedings were instituted by the bank, and the ranch was finally deeded to the bank by George and his wife Elsie in September of that year in satisfaction of their outstanding indebtedness. According to the bank's records it wrote off $9,000 as a net result of this deed of trust loan on the ranch property of George. It appears that during the period that George Holman operated the ranch the appellant not only executed numerous notes in favor of the bank as co-maker with her son George, but she did in many instances execute notes individually, the proceeds of which were deposited directly to her own account.

In December, 1931, she owed the bank $27,500 on direct loans and $32,400 as guarantor, or a total indebtedness of $59,900. During 1932 her guaranteed obligations increased by renewal of the notes comprising the same, including an additional advance of $3,600, and an additional note of $3,000, the proceeds of which were deposited to the account of George Holman, making a total

guaranteed indebtedness of $39,000. During the same year and up to December, 1932, appellant's direct indebtedness increased from said $27,500 to the sum of $30,200. It will thus be noted that in December, 1932, the total liability of appellant to the defendant bank was in the principal sum of $69,200. It will be recalled that the original loan made by defendant bank to George Holman with which to purchase the ranch and which was secured by the trust deed thereon was made upon a percentage basis of the appraised value of the ranch. The subsequent loans were advances made by the bank to George and his wife as evidenced by the several notes which his mother, the appellant herein, guaranteed in the aggregate sum of $39,000, and it is shown that they were so made by the bank solely upon the security of the appellant's guarantee and not that of the property itself or George and his wife. This appears definite even though the notes recite, as is customary, that they are secured by the deed of trust. With this picture before it of $69,200 of unsecured indebtedness of appellant, the bank, through its vice-president, Mr. Eberhardt, one of the respondents here, sent a credit memorandum to appellant showing the then present condition of her account, and stating it was necessary that the indebtedness be secured. The bank suggested that appellant obtain a loan of $18,000 on 267 shares of the bank's stock owned by appellant and apply the proceeds thereof to her indebtedness, thereby reducing it to the sum of $51,200, and further that this latter amount be secured by executing a deed of trust upon certain city property of appellant known as the United States Hotel, and also the assignment of a certain note and deed of trust owned by appellant and referred to as the Williamson note and deed of trust in the sum of $30,000.

In this connection it appears that following several conversations between Eberhardt, appellant, and her daughter Hattie G. Holman, the suggested plan of refinancing was accepted and accordingly appellant pledged her stock consisting of 267 shares to one A. W. Simpson for a loan of $18,000, the proceeds of which were applied upon certain of the outstanding notes of appellant, thereby reducing her total indebtedness from $69,200 to $51,200, which latter amount consisted of $12,200 of her direct indebtedness and $39,000 in notes which she had theretofore guaranteed for her son George. Shortly thereafter in January, 1933, pursuant to the plan suggested and agreed upon, appellant executed her note to the defendant bank in the principal sum of $51,200, and as security therefor executed the deed of trust upon the hotel property and assigned to the bank the Williamson note and deed of trust. In due course the notes in the principal sum of $39,000, which appellant had guaranteed for her son George were endorsed to her by the bank and delivered to her daughter for her.

It may be observed that appellant, by reason of advanced age as well as her physical condition, seldom left her home, and that most of her business transactions were carried on by telephone, correspondence and by and through her daughter Hattie. She was called as a witness at the trial herein, and it is apparent from her testimony that her memory had at that time failed to the extent that she had no comprehension of what was taking place.

In January, 1934, a Mr. Francis Cutting, engaged in real estate brokerage business in Stockton, became the agent of appellant, and thereafter until 1937 actively cared for her properties, collected rents, obtained tenants, and in general transacted such business matters as related to the property and affairs of appellant. It appears that during the latter part of 1934 Mr. Cutting conferred with appellant at her home with reference to selling the 267 shares of stock which she had theretofore pledged. Appellant said she would like to sell the stock, and asked Mr. Cutting if he thought he could sell it. He told her he would try, and after interviewing several persons who he thought might be interested, but who were not, he advised appellant accordingly, and suggested if she would put a definite selling price upon the stock it might help. Appellant then placed the selling price of $25,000 for the stock; shortly thereafter Cutting contacted the defendant Eberhardt, who, after some negotiations, made an offer of $24,000 for the stock, which offer Cutting submitted to appellant, who in turn told him to go ahead and take it and close the transaction.

Additional loans were made by the bank to appellant during the years 1933 and 1934, and in June, 1934, the defendant bank, pursuant to the assignment which they had, foreclosed the Williamson trust deed, buying the property in for and on behalf of appellant. Thereupon appellant executed several renewal notes representing the said additional loans made in 1933 and 1934, as well as a new note in the principal sum of

$2,200, and as security therefor appellant executed a deed of trust upon the property which had just been foreclosed upon, and which trust deed was given as additional security for the balance of all outstanding indebtedness to the bank. This transaction in effect merely substantiated the new deed of trust in the place of the assignment of the former Williamson trust deed, together with the further advances which made the total indebtedness now approximately $60,000.

The record discloses that on or about December 11, 1936, appellant again renewed her notes, and at this time the total of her indebtedness had reached the sum of $79,396.68; she executed two notes, one in the principal sum of $70,000 and another in the principal sum of $9,396.68 (accumulated interest) together with a new deed of trust upon the United States Hotel property. Shortly prior to this transaction the appellant had assigned to the bank the rentals from this property with a temporary arrangement for the bank to pay her $75 per month for living expenses and to meet monthly payments to a building and loan association.

In the forepart of 1938 an offer was received for the purchase of the United States Hotel property together with the furnishings at a figure of $55,000. The furnishings were owned by Mr. and Mrs. George Holman, who insisted upon receiving $7,500 for them. The bank, through Mr. Eberhardt, maintained that no such allowance for the furnishings could be considered as they were not worth more than $2,500. Subsequently the prospective purchaser offered $52,250 for the property without the furnishings, and the bank, under pressure somewhat by the federal and state bank examiners, who were insistent that the loan be placed in a bankable condition, strongly urged and recommended the sale, the consummation of which would have materially reduced appellant's indebtedness and assured her of a net monthly income from the remaining property. Being unable to convince appellant of the advisability of such sale, and after correspondence had passed between them wherein the bank had stated its willingness to assist her but that since the loan was unbankable in its present condition (the bank having been required to write off approximately $22,000) there would be no other alternative, in the event the sale was not made, but to foreclose under the deed of trust. The offer of purchase was not accepted by appellant, and accordingly the bank instituted the present foreclosure proceedings by filing a notice of default in July, 1938.

The record here is voluminous—the opening brief itself comprises over 500 pages, and the trial of the case occupied some five weeks. After submission thereof the trial court made full and complete findings in favor of the respondents and against the contentions of appellant, which findings covered all of the material issues presented by the pleadings. Appellant attacks the findings as lacking evidentiary support, and urges as grounds for a reversal of the judgment that the evidence establishes incompetency of appellant at all times over the period of years during which the various transactions herein related occurred; that the defendants occupied a fiduciary relation toward the appellant; that appellant was induced to execute the various notes, deeds of trust, and the sale of stock, by the exercise of fraud, misrepresentation, concealment, undue influence, and other wrongful acts of the defendants; that appellant had no independent advice, and that the evidence is without serious conflict and preponderates in appellant's favor upon the main issues.

The principal witnesses testifying in support of appellant's incompetency were her children named herein as defendants, and a nurse who attended her in 1935. An examination of this testimony discloses that in the opinion of the several witnesses appellant was incompetent during most of the time here under consideration. The reasons given as the basis for such opinion do not appear to be of much weight. It was admitted by some of the witnesses, and in particular appellant's daughter Hattie, that her mother always signed her checks and understood business transactions when thoroughly explained to her. In one instance concerning a check, the witness was asked:

"Q. And your mother wanted to know whether it was to be charged to the house, or whoever the payee would be? A. Yes, sir. I wrote that out for her and she signed it; that is my handwriting (indicating).

"Q. And your mother wanted to know where the money was going? A. Why certainly. Anyone wants to know where their money is going."

And again the witness testifying in relation to the pledge of the stock, was asked by the court:

"Q. You mentioned bank stock at the time you handed her that attached assignment? A. Yes.

"Q. And explained to her that she was assigning her stock? A. That is correct, yes. But I had to tell her a good many times to explain it.

"Q. Yes. Did she appear to understand it after you explained it several times? A. Oh, about four or five times I had to tell her, then she finally understood it.

"Q. She finally understood it was for a loan? A. That is correct."

George Holman testified that in his opinion his mother was incompetent, giving as some of the reasons therefor that she had hidden a note and some papers under a mattress and had hidden a jelly sandwich under her pillow, and also because she did not tell him about a loan she had made from the building and loan association. The rest of the testimony on this subject runs along the same line, and opposed to this we have the testimony of many disinterested witnesses testifying that she was sane and rational at all times during the period in controversy. Some of these witnesses were Mr. Cutting, who acted as her business agent; appellant's sister, Mrs. Mattie Smith, who had visited back and forth with appellant at frequent intervals and conversed with her many times over the telephone; Mrs. Edna Grupe, a sister-in-law, who had known appellant thirty-eight years, and had visited with her continuously, many times at the home of appellant as well as meeting her at the home of relatives. Also the testimony of Emil Gumpert, who acted as attorney for appellant on an occasion in 1937, and conversed with her, who testified that he did not observe anything irrational in her appearance during the conversation. Dr. Fred J. Couzelman, called by appellant as an expert on mental cases, testified he had examined appellant in January, 1939, which it appears was during the course of the trial, and found her suffering from senile dementia, defined by the witness as old senile decay,—second childhood, and that this condition had probably been coming on gradually for several years.

[1] The law in this state is clear that senile dementia does not render one incapable of executing contracts or transacting business. Gosnell v. Lloyd, 215 Cal. 244, 10 P.2d 45; Estate of Purcell, 164 Cal. 300, 128 P. 932; Rollins v. Smith, 72 Cal.App. 773, 238 P. 171.

[2] An examination of the record compels the conclusion that there is ample evidence to support the court's finding of mental competency and capability of understanding the nature of all transactions which appellant had with the defendants.

The court found "that the defendant children of appellant occupied a confidential relationship toward plaintiff, their mother," which finding is not questioned. The court also made a finding "that plaintiff had and reposed in defendants and each of them confidence and belief." It is appellant's contention that this is a finding that defendant Eberhardt and defendant bank occupied a fiduciary relationship of trust and confidence toward appellant. The court further found in this connection that at no time did the defendant bank, Eberhardt or Simpson assume maangement of plaintiff's business, and "that the relationship between the defendant bank and plaintiff was and is that of debtor and creditor, except that prior to the sale of said 267 shares of stock in 1934 plaintiff was a stockholder in defendant bank."

Irrespective of the conflict in the findings, if any there be on the question of confidential relationship between the bank and appellant, we are satisfied from the record that the evidence would warrant a finding, technically at least, that a confidential relationship existed, that is to say, appellant had confidence in the bank and its officers, due no doubt in a large measure to the fact that she, as well as several members of her family, had long been closely identified with the defendant bank.

However, the evidence shows, and the court has found, that the defendant bank and its officers have never assumed the management of appellant's property, her affairs being handled by herself with the independent advice of members of her immediate family and for a period by Mr. Cutting, her agent, and also at times from her counsel. A large portion of the indebtedness was incurred as early as 1932 and prior to the time the bank had obtained any security from the appellant whatsoever.

[3] The rule that fraud must always be proved by convincing evidence and is never presumed, is so well established in this state that it seems unnecessary to cite authorities. However, in Estate of Mal-

lory, 99 Cal.App. 96, 278 P. 488, 490, it is said: "An essential element of the rule is that one person has suffered some injury through the abuse of confidence by another, and that fact must be alleged and proved. It must be made to appear that the relationship was used to obtain an unfair advantage or that confidence was violated. Dimond v. Sanderson, 103 Cal. 97, 37 P. 189; Cole v. Wolfskill, 49 Cal. App. 52, 192 P. 549."

And in the later case of Original Mining & Milling Co. v. San Joaquin Light & Power Corporation, 220 Cal. 152, at page 165, 30 P.2d 47, 52, the court in discussing the duty with reference to drawing inferences, says: "'If there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of the court or jury to draw the inference favorable to fair dealing. (Citing authorities.) For fraud must always be proved, so that when the plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not be reasonably drawn, he has failed to establish his charge by a preponderance of the evidence, and it becomes the duty of court or jury, as has been said, to find in favor of innocence and uprightness.' Ryder v. Bamberger, 172 Cal. 791, 799, 158 P. 753, 756."

There is no evidence or suggestion of any secret profits having been made by the bank, and all business transactions had with the appellant appear to have been entirely fair and open.

[4, 5] It is argued that the purchase of appellant's stock by the defendant Eberhardt was induced by fraud, misrepresentation and undue influence and at a price far below its actual value. It is contended that evidence was improperly admitted with reference to other sales of stock of the defendant bank on the question of value. The stock was not listed and had no established market value and the rule appears to be that in such cases evidence as to its actual value should not be closely restricted. People v. Schwarz, 78 Cal.App. 561, 248 P. 990; Peek v. Steinberg, 163 Cal. 127, 124 P. 834. At any rate the record contains expert as well as other evidence amply sufficient to sustain the finding that the fair and actual value was approximately the price paid therefor.

[6] With reference to the facts concerning the sale of stock we have hereinbefore related the circumstances giving rise to and surrounding this sale, and we are unable to discover any suggestion of fraud or sharp practice inflicted upon appellant by any one concerned in the transaction.

We are not unmindful of the distress of the appellant as a result of this unfortunate financial reverse, but it seems apparent that it was her desire to render whatever financial assistance she could to her children, and in particular to her son George and his wife, in their ranch operations, even though in so doing it jeopardized her own property to the extent that she lost it. This is not unnatural and frequently happens. Other points are urged but further discussion appears unnecessary.

We conclude that the findings and judgment of the trial court are amply supported by the evidence, and the judgment is therefore affirmed.

[7] Since the argument and submission of this cause, it has come to the attention of the court that appellant, Mrs. Hattie Holman, has died. It is ordered, therefore, that this judgment be filed nunc pro tunc as to the date of submission, to-wit, January 6, 1942. Estate of Randall, 194 Cal. 725, 230 P. 445; Estate of Dolbeer, 149 Cal. 227, 86 P. 695, 9 Ann.Cas. 795; 2 Cal.Jur. 974.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

HATCH v. CALKINS et al.

Civ. 11775.

District Court of Appeal, First District, Division 2, California.

Feb. 3, 1942.

Rehearing Denied March 5, 1942.

Hearing Granted April 3, 1942.

1. Evidence ⇐82

Where a judicial record is not conclusive, it is presumed that it correctly sets forth the rights of the parties. Code Civ. Proc. § 1963, subd. 17.

2. Judgment ⇐855(1)

On motion for leave to enforce judgment after five years under statute, evidence was sufficient for trial court to find that judgment had not been paid as contended by defendant. Code Civ.Proc. § 685.

3. Judgment ⇐855(1)

That judgment sought to be enforced was more than 30 years old, and that defendant by reason of plaintiff's delay was deprived of the testimony of two deceased persons to prove his defense that the judgment had been paid, should be considered in determining whether plaintiff was barred by laches from having judgment enforced. Code Civ.Proc. § 685.

4. Action ⇐63

Lapse of time will not bar relief under the doctrine of "laches", where circumstances exist which excuse the delay and render it inequitable to interpose the bar.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

5. Appeal and error ⇐949
Equity ⇐84

What constitutes an excuse for an apparently unreasonable delay in determining whether relief is barred by laches depends on the circumstances of the particular case and rests in the sound discretion of the chancellor, and the conclusion reached by him will not ordinarily be disturbed on appeal.

6. Judgment ⇐855(1)

On a motion for leave to enforce a judgment more than 30 years old which on its face showed that it had not been paid and satisfied, the chancellor did not abuse his discretion under the evidence in not applying the doctrine of laches. Code Civ.Proc. § 685.

7. Appeal and error ⇐931(6)

Where a hearing was had before the trial court, and the memorandum decision of the trial court recited that its decision was based on the competent portion of affidavits introduced by the parties on the question whether plaintiff was barred by his laches from enforcing a judgment, it would be presumed on appeal that the trial court based its ruling on competent and not incompetent evidence. Code Civ.Proc. § 685.

8. Evidence ⇐207(1), 208(2)

Excerpts from the pleadings in another action showing that owner of land had agreed to sell a lot to defendant under a contract of purchase and evidence that the court ordered judgment to be entered reciting that owner conveyed lot to defendant's mother-in-law as his assignee, and that she conveyed lot to defendant's wife, were admissible as proof of one link in defendant's title, even if they did not show conclusively that defendant had assigned his contract to hinder his creditors.

9. Judgment ⇐855(1)

An action to recover damages for breach of contract because of defendants' failure to redeem a certificate of stock, where trial court, in its judgment, ordered plaintiff to deliver certificate and awarded him judgment for balance due on contract, was an "action at law" to recover amount specified in contract, plaintiff's remedy at law was complete, and he had no occasion to apply to an equity court for relief by way of specific performance, as against contention that action was one in specific performance and that plaintiff was not entitled to relief of enforcing judgment because he failed to show that certificate was delivered. Civ. Code, § 3302.

See Words and Phrases, Permanent Edition, for all other definitions of "Action at Law".

10. Specific performance ⇐114(1)

A complaint, which did not plead facts showing a mutuality of remedy, did not state facts sufficient to constitute a cause of action for specific performance.

11. Judgment ⇐855(1)

The trial court did not err in overruling defendant's objection to the granting of any relief on plaintiff's motion for leave to en-

force a judgment after five years under statute on ground that each statement in affidavit made in support of motion was hearsay, where only one statement was hearsay, and objection was not based solely on that one statement. Code Civ.Proc. § 685.

12. Trial ⇐76

Where defendant made no objection to any one of various documents as each was offered in evidence on plaintiff's motion for leave to enofrce a judgment after five years under statute, and plaintiff then rested, defendant's objection thereupon made to the granting of any relief because each statement in affidavit in support of motion was hearsay, if it was an objection, came too late. Code Civ.Proc. § 685.

Appeal from Superior Court, City and County of San Francisco; Robert L. McWilliams, Judge.

Action by N. E. Scofield against Willard P. Calkins and W. F. Wilkie for breach of contract, wherein a joint and several judgment was entered against defendants. Plaintiff having died, Frank O. Hatch, as administrator of the estate of N. E. Scofield, deceased, obtained an order to show cause why leave to enforce the judgment should not be granted, and, from an order granting the administrator's motion for leave to enforce the judgment after five years, W. F. Wilkie appeals, defendant Calkins also having died.

Affirmed.

Cushing & Cushing and Everett S. Layman, all of San Francisco, for appellant.

Robert E. Hatch, of San Francisco, Lercara & Nelle, of Oakland, and Charles H. McDonald and Carl Conradi, Jr., both of San Francisco, for respondent.

STURTEVANT, Justice.

Motion for leave to enforce judgment after five years under Code Civ.Proc. sec. 685. Defendant appeals from the order granting said motion.

Prior to November 14, 1906, a corporation had been formed, Calkins Newspaper Syndicate. Willard P. Calkins was president and W. F. Wilkie was secretary. On the date last mentioned the corporation sold to N. E. Scofield 7,000 shares. As a part of the transaction the following instrument was executed:

"Truckee Nov. 14, 1906

"Should N. E. Scofield desire it, and give us at least 10 days notice to that effect, we agree to redeem 7000 shares of the Calkins Newspaper Syndicate stock on July 1st, 1907, paying him $7000 therefor, together with any dividend that may be declared.

"W. F. Wilkie
"Willard P. Calkins."

On June 18, 1907, said notice was given and the stock was tendered but Wilkie and Calkins did not pay any sum except $1,966.75. On February 3, 1909, N. E. Scofield filed an action for breach of contract. Defendants failed to appear at the trial though they had filed an answer. On May 27, 1911, a joint and several judgment was entered against them, providing that the plaintiff should have judgment for $5,591.43 plus costs. Scofield died in 1912; his wife and defendant Calkins died in 1929. On July 12, 1940, the administrator of Scofield's estate obtained an order to show cause why leave to enforce the judgment should not be granted. Defendant has appealed from the order granting plaintiff's motion.

[1, 2] The defendant contends that the judgment has been paid. He bases that contention on the assertion that there is, under the facts, a presumption to that effect. Gaines v. Miller, 111 U.S. 395, 4 S.Ct. 426, 28 L.Ed. 466. Conceding that such is the rule in some jurisdictions, it is not shown to be the rule in this state. Code Civ.Proc., sec. 1959. If such presumption exists it is not conclusive. Code Civ.Proc. sec. 1962. However, assuming for the purposes of this decision that the rule obtains in this state it is not determinative. It is an admitted fact that the defendant W. F. Wilkie never paid the judgment. If it was ever paid, it was paid by defendant Willard P. Calkins. If he paid it he had a claim against his codefendant for contribution. If he ever had such claim it is presumed he would have asserted it. Code Civ.Proc. sec. 1963, subd. 4. That statute provides it is presumed that a person takes ordinary care of his own concerns. But Calkins never asserted that he had such a claim. The record does not show on its face the judgment was paid nor that it has been satisfied. It is presumed that the record is complete. Code Civ.Proc. sec. 1963, subd. 17. That is, it is presumed that a judicial record, when

not conclusive, does still correctly determine or set forth the rights of the parties. Moreover, the record does not show that Willard P. Calkins at any time owned any property except his holdings in the Calkins Newspaper Syndicate. That corporation was declared bankrupt May 3, 1909. Mrs. Calkins obtained a divorce from her husband and was awarded alimony. In a proceeding in that action in 1909, Mr. Calkins testified he had no assets. On May 3, 1909, or prior thereto, he left San Francisco for the Orient and the defendant, W. F. Wilkie testified that he never heard of his whereabouts after that date. This action was commenced February 3, 1909. Judgment was entered May 27, 1911. Manifestly the trial court was authorized to weigh the conflicting presumptions and to hold that the evidence just recited showed the judgment had not been paid and in support of the order appealed from we must assume that it so held.

[3-6] In his second point the defendant Wilkie contends the plaintiff is barred by his laches. He admits he has not paid the judgment but he asserts it is now over thirty years old, and, by reason of the delay of the plaintiff, the defendant has been deprived of the testimony of W. P. Calkins and N. E. Scofield to prove his defense, to-wit, that the judgment has been paid and he argues that it will be inequitable to enforce the judgment against him. Riley v. Blacker, 51 Mont. 364, 152 P. 758. No doubt such facts should be considered in determining the application of the doctrine of laches. But there is also another rule that is applicable. In 21 C.J. 237, "Equity," sec. 230, the author says: "Lapse of time will not bar relief where circumstances exist which excuse the delay and render it inequitable to interpose the bar. There is no absolute rule as to what constitutes an excuse for an apparently unreasonable delay. It depends on the circumstances of the particular case and rests in the sound discretion of the chancellor, and the conclusion reached by him will not ordinarily be disturbed on appeal." Bearing in mind that the chancellor has found the facts against the defendant and that the question is before this court on appeal to be reviewed, the question before us is whether the chancellor abused his discretion in not applying the doctrine. We think it is clear that it may not be said, as a matter of law, that he abused his discretion. Cahill v. Superior Court, 145 Cal. 42, 78 P. 467; Miller v. Ash, 156 Cal. 544, 105 P. 600; Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 P. 360; Taber v. Bailey, 22 Cal. App. 617, 135 P. 975. In Miller v. Ash, supra, the principles involved were closely the same. In 1862 Joseph Read and Catherine Read died leaving two children, Mrs. Miller and a brother, Robert Read. The defendant William Ash was appointed their guardian. A claim existed in favor of the minors against the estate of R. J. Reynolds, deceased. In 1863 the guardian compromised the claim for $4,000 and filed a receipt for that sum among the papers in the estate of R. J. Reynolds. The guardian never filed an account in the guardianship proceedings until the year 1906. Shortly thereafter he died. Robert Read died in October, 1905, leaving three sons surviving him. After the death of Ash, Mrs. Miller and the representatives of the estate of Robert Read commenced an action to compel an accounting by the representatives of the estate of Ash. It was claimed that the proceeding was barred by the laches of the plaintiff. That claim was carefully examined by the court and it was held that the doctrine of laches was not applicable as against the written receipt of Ash. So in the instant case we think it is clear that the doctrine is not applicable as against the judgment showing on its face that it has not been paid and has not been satisfied.

[7] To support his contention that the plaintiff was barred by his laches, defendant introduced in evidence his own affidavit. It contains about sixty folios. Many allegations were made on information and belief. It contains numerous allegations of the places of residence, from time to time, of N. E. Scofield, of his wife, of W. P. Calkins, and of W. F. Wilkie. It contains numerous allegations of the occupations of, and the properties owned by W. F. Wilkie. And it contains numerous allegations of what N. E. Scofield knew, or should have known, from time to time, regarding said facts. Furthermore it contained arguments to the effect, and defendant now argues, that the plaintiff and his decedent were guilty of laches. To rebut the allegations of the defendant, the plaintiff offered several affidavits which were received in whole or in part. Some were expressly limited by the trial court. At this time the defendant quotes passages showing certain allegations were made on information and belief and contends he was

prejudiced by such allegations. The record does not show that the trial court based its ruling on incompetent evidence. The memorandum decision of the trial court recites that its decision was based on the competent portion of said affidavits. As the hearing was had before the court it will be presumed that the court based its ruling on competent and not incompetent evidence. Roth v. Thomson, 40 Cal.App. 208, 216, 180 P. 656; Watt v. Copeland, 92 Cal.App. 161, 170, 267 P. 928; Ericson v. Steiner, 119 Cal.App. 305, 308, 6 P.2d 298; Farmers', etc., Nat. Bank v. Stowell, 6 Cal.App.2d 373, 378, 44 P.2d 392. Furthermore an examination of the affidavits discloses that some of the passages complained of were not objectionable for the purpose for which they were offered. Hester v. Western Life & Accident Co., 67 Mont. 286, 215 P. 508, 509; 20 Am.Jur. 404 "Evidence," sec. 457.

[8] Over the objections of the defendant, the plaintiff introduced in evidence excerpts from the pleadings in an action entitled Brownell v. All Persons. They showed that in 1904 Brownell placed on sale a tract of land near 17th Avenue and K Street in San Francisco; that the owner sold lots therein; among others the owner agreed to sell lot No. 5 to defendant under a contract of purchase. The complaint was filed May 4, 1909. On June 10, 1909, this defendant, W. F. Wilkie, and others, filed an answer admitting said contract agreement. On September 16, 1909, the court ordered a judgment entered which recited that on May 20, 1909, Brownell conveyed lot No. 5 to Laura E. Buckman as assignee of W. F. Wilkie. Laura E. Buckman was his mother-in-law. On July 7, 1911, she conveyed said lot to Elizabeth E. Wilkie, the defendant's wife. That deed was recorded April 19, 1918. The defendant asserts that the decree was an insinuation that W. F. Wilkie assigned his contract to hinder his creditors and that the decree was not sufficient, standing alone, to prove that fact. But the plaintiff was not bound to prove all of his case in one item. The evidence was proof of one link in defendant's title. No motion to strike was made because the evidence was not connected. The evidence was admissible and the objection went only to its weight.

[9, 10] As hereinabove set forth this action (No. 21,160, Superior Court records) was an action brought to recover damages for breach of contract because of the failure of the defendants to redeem the above-mentioned certificate of stock. In its judgment the trial court ordered N. E. Scofield to deliver the stock and awarded him judgment for the amount of the balance due on the contract. This defendant claims the action was one in specific performance and claims this plaintiff failed to show that the certificate was delivered and therefore he was not entitled to relief. We find no merit in the point. The plaintiff's action was clearly one at law to recover the amount specified in the contract. Civ.Code, sec. 3302; Dickinson v. Zubiate Mining Co., 11 Cal.App. 656, 106 P. 123. His remedy at law being complete he had no occasion to apply to a court of equity for relief under an action for specific performance. Furthermore an examination of the complaint shows it did not state facts sufficient to constitute a cause of action for specific performance because it fails to plead facts showing a mutuality of remedy. 23 Cal.Jur. 447.

[11, 12] When the plaintiff's motion came on for a hearing he introduced in evidence, of the records and files in action No. 21,160: (1) The complaint; (2) affidavit for attachment; (3) writ for attachment; (4) demurrer; (5) return on writ; (6) answer of defendants; (7) notice of trial; (8) findings; and (9) decree. He also introduced (1) the order to show cause why a writ of execution should not issue; and (2) the affidavit of Frank O. Hatch made in support of his motion. As each was offered no objection was made to any one of said documents. The plaintiff then rested. Thereupon the defendant objected to the granting of any relief because "each statement in the affidavit" of Frank O. Hatch was hearsay. The objection was overruled and he now assigns that ruling as error. It is a sufficient answer to state that "each statement in the affidavit" was not hearsay and that only one statement was hearsay. The objection was not based solely on that one statement, it was too broad, and the trial court did not err in overruling the objection. Furthermore the objection, if it can be called that, came too late.

The defendant also claims that the plaintiff did not prove facts sufficient. It will suffice to state that that claim is not an open question in this state. Doehla v. Phillips, 151 Cal. 488, 91 P. 330. At page 495 of 151 Cal., at page 333 of 91 P. the court said: "We see no force whatever in the

contention that in making the order for the issuance of the execution, under the circumstances here appearing, the lower court was guilty of an abuse of the discretion confided to it. Admittedly the judgment, which was for money loaned to the appellant, had never been satisfied in whole or in part, and no reason whatever appeared why, in equity and good conscience, he should not be compelled to pay the same. The failure of plaintiff to earlier enforce the judgment which appellant should and could have at any time voluntarily paid was entirely without prejudice to any of his legal rights, and did not render the granting of the order and abuse of discretion. Under such circumstances it would appear that the exercise of a sound discretion would require the enforcement of the judgment. * * * What we have said upon the claim as to abuse of discretion sufficiently disposes of the claim that plaintiff was not entitled to the remedy afforded by section 685, Code Civ.Proc., for the collection of his judgment, by reason of laches." See, also, 24 Cal.Law Review 226.

The order appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



49 Cal.App.2d 479

BERTELSEN et al. v. BERTELSON.

Civ. 12007.

District Court of Appeal, First District, Division 2, California.

Feb. 2, 1942.

1. Quieting title ⇐43

Under statute providing that statement of any new matter in answer in avoidance or constituting a defense or counterclaim must on trial be deemed controverted by opposite party, where defendant in quiet title action denied ownership in plaintiffs and asserted ownership in himself but did not inform plaintiff that he was relying on a deed purporting to have been executed by attorney in fact, plaintiffs were authorized to present any defense they had to the new matter alleged by defendant. Code Civ.Proc. § 462.

2. Principal and agent ⇐152(4)

Where defendant in quiet title action relied on a deed purporting to have been executed by an attorney in fact, plaintiff's claim that attorney in fact attempted to make a deed of gift in violation of terms of power of attorney and in fraud of principal, if established, was a bar to defendant's claim.

3. Principal and agent ⇐152(4)

The power of attorney to plat, sell, contract for the sale of, and convey lands tenements, and hereditaments; to sign, seal, execute, acknowledge, and deliver all deeds, leases, assignments, releases, and discharges, covenant, indentures, contracts, and agreements of every kind, and all other instruments necessary and proper in the due course of business, was "special power of attorney" and a deed not executed in pursuance of the power could not pass title.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Power of Attorney".

4. Evidence ⇐432

Where defendant in quiet title action relied on a deed purporting to have been executed by attorney in fact, plaintiffs, in showing that attorney, in violation of terms of power of attorney and in fraud of principal, attempted to make deed of gift, were not bound by consideration recited in the deed but were entitled to show all the facts and to show that deed was in truth a gift deed.

5. Evidence ⇐432

Where defendant in quiet title action relied on a deed purporting to have been executed by an attorney in fact and plaintiff claimed that deed was gift deed in violation of the terms of power of attorney and in fraud of principal, testimony that principal did not in presence of brother receive any remittance from the defendant was admissible to show that deed was made without consideration.

6. Quieting title ⇐44(3)

Where defendant in quiet title actior relied on deed purporting to have been executed by an attorney in fact and plaintiffs claimed that deed was gift deed in violation of power of attorney and in fraud of principal, only slight evidence was required to prove plaintiff's theory.

7. Principal and agent ⇐190(3)
Quieting title ⇐44(3)

Where defendant in quiet title action claimed under deed purporting to have been executed by attorney in fact and plaintiff claimed that deed was a gift deed in violation of the power of attorney, uncontradicted testimony of principal's brother that principal did not in his presence receive any remittance from the defendant, and that defendant did not tender himself as a witness, sustained finding that no consideration was paid for the deed by defendant or any one for him but that the deed was voluntary, since trial court could assume that the brother testified truthfully or defendant would have contradicted him.

8. Principal and agent ⇐190(3)
Quieting title ⇐44(3)

In action to quiet title wherein plaintiff contended that deed under which defendant claimed and which recited a consideration of $10 was a gift deed in violation of special power of attorney, evidence that property was of value of over $8,000 and that principal did not in the presence of brother receive any remittance from the defendant established "prima facie" that deed was a gift deed or a deed for a nominal sum and conveyed no title, since the "deed for a nominal sum" and a "gift deed" are in effect the same.

See Words and Phrases, Permanent Edition, for all other definitions of "Deed for a Nominal Sum", "Gift Deed", and "Prima Facie".

9. Principal and agent ⇐103(10)

Under a power of attorney, attorney in fact is not authorized to make conveyance without consideration or for a consideration of love and affection, or a merely nominal consideration nor for a consideration running to the agent.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action to quiet title by George Bertelsen and others against Ray W. Bertelson. From a judgment for the plaintiffs, defendant appeals.

Affirmed.

Combs & Murphine and Lee Combs, all of Los Angeles, for appellant.

J. W. Falkner, of El Monte, for respondents.

STURTEVANT, Justice.

In this action to quiet title the trial court made findings in favor of the plaintiffs and from the judgment entered thereon the defendant Ray W. Bertelson has appealed.

The plaintiffs pleaded their action in the ordinary form to quiet title to certain lots located in the county of Los Angeles. The defendant Ray W. Bertelson appeared and answered. In his answer he inserted certain denials, made some admissions, and then alleged "* * * that he now is and during all times mentioned in plaintiffs' complaint has been and was prior to the commencement of this action the owner in fee simple of said real property hereinbefore described; admits that this answering defendant claims and has an interest in the real property hereinbefore described adverse to plaintiffs herein. * * *"

On the trial both parties claimed to deraign title from Christian Bertelsen, a brother of the plaintiff George Bertelsen and an uncle of the defendant Ray W. Bertelson.

The plaintiffs introduced evidence showing ownership in Christian Bertelsen, that he died testate in Los Angeles County, that his will was probated in said county and a decree of distribution was entered awarding to Hans Bertelsen, a brother, various parcels of land, including the parcels described in the plaintiffs' complaint. The plaintiffs also introduced evidence that thereafter Hans Bertelsen died testate in Los Angeles County and after proceedings duly had a decree of distribution was entered awarding various parcels of land including the lots described in plaintiffs' complaint to the plaintiff George Bertelsen, a brother. Except as herein noted no question regarding the title of the plaintiffs is presented in the record.

In support of his claim the defendant introduced evidence showing that on the 31st day of March, 1903, Hans Bertelsen executed a power of attorney to his brother B. Bertelson. At the time that document was executed the principal resided at Holstein, Iowa. However the power of attorney was acknowledged before a notary public on the same day in the county of Pierce, State of Washington. The defendant also offered in evidence a deed dated the 18th day of January, 1938, by said attorney in fact, conveying the parcels in suit to his son, the defendant. The deed was signed Hans Bertelsen by B. Bertelson his attorney

in fact. It recited that it was made in consideration of $10. The power of attorney recited that it authorized the attorney "To plat, sell, contract for the sale of, and convey lands, tenements and hereditaments; to sign, seal, execute, acknowledge, and deliver all deeds, leases, assignments, releases and discharges, covenants, indentures, contracts and agreements of every nature and kind, and all other instruments in writing which he may deem necessary and proper in the due course of business." It contained no other authorization to make any other kind of a transfer.

The defendant Ray W. Bertelson resided at Tacoma, Washington. The deed made to him by B. Bertelson, the attorney in fact of Hans Bertelsen, was made at Tacoma. The plaintiff George Bertelsen at the same time resided with Hans Bertelsen, his brother, at 1501 South Marguerita, Alhambra, California, and, during the last illness of his brother, George was acting as his servitor and secretary. After the defendant had rested the plaintiff George Bertelsen was called as a witness in his own behalf and testified that between the 18th day of January, 1938, the date of defendant's deed, and the 30th day of January, 1938, the date of the death of Hans Bertelsen, the latter did not receive any remittances from Tacoma, Washington.

[1-4] Before proceeding the condition of the pleadings and the issues before the trial court should be noted. As recited above the plaintiffs alleged an ordinary action to quiet title. The defendant admitted many of the allegations but denied ownership in the plaintiffs and asserted ownership in himself. The plaintiffs were not informed as to what documents the defendant would rely on as showing his claim. When on the trial it transpired that the defendant was relying upon the deed purporting to be executed by B. Bertelson as attorney in fact, the statute, Code Civ.Proc., sec. 462, authorized the plaintiffs to present any defense they had to such new matter. Moore v. Copp, 119 Cal. 429, 51 P. 630; Wolf v. Gall, 176 Cal. 787, 169 P. 1017. As one of their defenses to the claim of the defendant it was clearly the theory of the plaintiffs that in violation of the terms of the power of attorney and in fraud of Hans Bertelsen, the principal, B. Bertelson attempted to make a deed of gift to the defendant. If the plaintiffs could establish that theory it was a complete defense to the claim of the defendant. Randall v. Duff, 79 Cal. 115, 125, 19 P. 532, 20 P. 610, 3 L.R.A. 754, 756; Alcorn v. Buschke, 133 Cal. 655, 66 P. 15; Frink v. Roe, 70 Cal. 296, 312, 11 P. 820. The power of attorney was special and if the deed was not executed in pursuance of the power it could pass no title. Dupont v. Wertheman, 10 Cal. 354, 367; Alcorn v. Buschke, supra, 133 Cal. 657, 66 P. 15; Brown v. Laird, 134 Or. 150, 291 P. 352, 73 A.L.R. 877, note 884. As shown by the cited cases such defense sounds in equity. In presenting that defense the plaintiffs were not bound by the consideration recited in the defendant's deed but were entitled to show all of the facts. Brison v. Brison, 75 Cal. 525, 532, 533, 17 P. 689, 7 Am.St.Rep. 189. They were not limited by the recital in the deed that the consideration was $10. Black Eagle Oil Co. v. Belcher, 22 Cal.App. 258, 263, 133 P. 1153. On the contrary they were entitled to show that the deed was in truth and in fact a gift deed. Treat v. Treat, 170 Cal. 329, 336, 150 P. 53, 57. Bearing the foregoing rules in mind, we will now pass to a consideration of the specific points presented by the defendant.

[5, 6] He complains because the trial court, over his objection and exception, allowed the plaintiff George Bertelsen to testify that his brother, Hans Bertelsen, did not in his presence receive any remittance from the defendant. We find no merit in the point. The evidence was not conclusive but it was clearly pertinent to the replication of the plaintiffs. The latter were attempting to prove that the deed was made without any consideration. The plaintiffs were offering the best evidence they had. Having the negative position only slight proof was required of them. 10 Cal.Jur. 1158.

[7] Closely allied with the last point the defendant contends that the trial court erred in making a finding "That no consideration or other thing of value was paid for said deed by said defendant or anyone for him, but that said deed was wholly voluntary." He asserts that said finding was unsupported by any evidence, presumption, or inference. We think those assertions are not supported by the record. We have just cited the oral testimony of the plaintiff George Bertelsen. When he had given that testimony the defendant, according to the statement of his attorney, was in Los Angeles and "available" as a witness. However he did not come into the courtroom and tender himself as a witness. He re-

mained absent and now claims to rely on presumptions and inferences. They are not helpful to him. Under the facts above recited the trial court was at liberty to assume that George Bertelsen had testified to the truth or that the defendant would have come into the courtroom and contradicted him. Bone v. Hayes, 154 Cal. 759, 765, 99 P. 172.

[8, 9] When the parties rested as recited above the plaintiffs had proved a prima facie case. Furthermore there was evidence before the court that the property in suit was of a value of over $8000. The consideration recited in defendant's deed was $10. That was a mere nominal sum. But a gift deed and a deed for a nominal sum are in effect the same. Hanrick v. Patrick, 119 U.S. 156, 172, 7 S.Ct. 147, 30 L.Ed. 396; Huntsman v. Huntsman, 56 Utah 609, 192 P. 368, 370; Peck v. Vandenberg, 30 Cal. 11, 62; Salmon v. Wilson, 41 Cal. 595, 604. As to the authority of an attorney in fact, acting under a power conferred for the benefit of his principal, to make an absolute gift of the property, or convey it away without substantial consideration, we doubt if there is any conflict whatever among the authorities. Mechem, Agency (2d Ed.) sec. 783; 2 Am.Jur. 116; 2 C.J.S., Agency, § 114, p. 1332; 1 Cal.Jur. 758. In 2 C.J.S., Agency, § 114, p. 1332, the author says: "* * * nor does it [a power of attorney] authorize a conveyance without consideration, or for a consideration of love and affection, or a merely nominal consideration, or for a consideration running to the agent." The text is supported by Dupont v. Wertheman, 10 Cal. 354; Mott v. Smith, 16 Cal. 533, 557; Huntsman v. Huntsman, supra; Brown v. Laird, 134 Or. 150, 291 P. 352, 73 A.L.R. 877, and note 884. It follows that, whether the deed to the defendant was made as a gift or merely for a nominal sum, it conveyed no title.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

19 Cal.2d 463

METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA v. ADAMS et al.

SAME v. HOLMES et al.

L. A. 17511.

Supreme Court of California.
Feb. 11, 1942.

As Modified Feb. 19 and 20, 1942.

1. Appeal and error ⇐824

The constitutional provision that the concurrence of four justices present at the argument shall be necessary to pronounce a judgment in bank, although guaranteeing the right to oral argument in matters on the calendar in open session of the Supreme Court, and the concurrence of four members of the court who were present at the argument in pronouncing judgment, does not entitle parties to oral argument in all matters passed upon by the Supreme Court in bank. Const. art. 6, § 2.

2. Courts ⇐102(1)

The granting of a rehearing in Supreme Court was not a pronouncement of "judgment" within the contemplation of constitutional provision, making the concurrence of four justices present at the argument necessary to pronounce a judgment in bank, nor a "judgment" as defined by the Code of Civil Procedure. Code Civ.Proc. §§ 577, 1003; Const. art. 6, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment".

3. Appeal and error ⇐831

The Supreme Court has inherent power to revise, modify, and correct its judgments so long as they are under its control and may, in the exercise of such power, grant a rehearing on application of the parties or on its own motion.

4. Courts ⇐101

The justices entitled to act on matters considered at executive sessions of the Supreme Court are the regular members of the court, except such as may be disqualified or unable to act thereon, and, if a full complement of qualified members is not available, then such justices as may be duly assigned to the court, provided that in no event shall there be more than seven justices acting on a particular matter.

5. Appeal and error ⇐831

The fact that a justice of the District Court of Appeal, assigned pro tempore to the Supreme Court to "assist court", participated in pronouncement of judgment in a matter in which he heard the oral argument, did not disqualify a regular justice of the Supreme Court, who was not present at the oral argument and original submission of the case, from signing the order granting a rehearing. Code Civ.Proc. §§ 577, 1003; Const. art. 6, §§ 1a, 2.

6. Judges ⇐25(2)

The assignment, always temporary, of a justice of the District Court of Appeal to the Supreme Court, does not deprive a regularly constituted member of the Supreme Court of his constitutional functions, when he is able, ready, and willing to act and no disqualification exists. Const. art. 6, § 1a.

7. Judges ⇐24

The Constitution does not prevent a justice of the Supreme Court, either regular or pro tempore, who has not heard the argument, from participating in the pronouncement of a judgment, if four justices who were present at the argument have also participated, or if oral argument has been waived by submission without argument, or if the constitutional requirement of concurrence of four justices present at the argument is waived by stipulation of the parties or otherwise. Const. art. 6, § 2.

8. Appeal and error ⇐831

The regular members of the Supreme Court and such justices pro tempore as are duly assigned to the court and are not disqualified, but not more than seven in all, are competent to act on a petition for rehearing, whether they were present at the oral argument or not. Const. art. 6, §§ 1a, 2.

9. Courts ⇐102(1)

Setting aside the submission of a cause in the Supreme Court is a matter requiring court action, and the vote of four of the justices constituting the court at the time the order is made is necessary to its effectiveness.

10. Courts ⇐102(1)

Where a case was duly transferred to the Supreme Court for hearing and determination, the parties were entitled to a judgment therein by a duly constituted court, but they had no right to a decision by any particular judge or group of judges.

11. Appeal and error ⇐831

The practice of the United States Supreme Court of refusing to grant a rehearing unless a member of the court, concurring in the majority opinion, desires such reconsideration, is a rule of "judicial policy" and works no compulsion on courts of other jurisdictions to adopt it.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Policy".

12. Appeal and error ⇐831

The granting of a rehearing in the Supreme Court after it had previously affirmed a judgment, from which plaintiff had appealed, involved no question of the deprivation of any right of the defendants protected by the federal Constitution, since there is no such "vested right" in a judgment in the party in whose favor it is rendered as to preclude the re-examination and vacation of the judgment in the ordinary mode provided by law. U.S.C.A.Const. Amends. 5, 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Right".

13. Constitutional law ⇐315

The practice of state courts in the matter of re-examination and vacation of judgments in ordinary mode provided by law is a matter of state concern, and, if reasonable opportunity to be heard is afforded the litigants thereunder, no federal constitutional guaranties are violated. U.S.C.A.Const. Amends. 5, 14.

In Bank.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

On rehearing and motion to set aside order granting a rehearing.

Motion to set aside order granting rehearing denied, and former opinion, affirming judgments below, modified to the extent that such judgments below are modified in accordance with stipulations among the parties, and as so modified, affirmed.

For prior opinions, see 116 P.2d 7, 100 P.2d 357, and 99 P.2d 659.

James H. Howard, Charles C. Cooper, Jr., Arthur A. Weber, Donald M. Keith, Hill, Morgan & Bledsoe, and Vincent Morgan, all of Los Angeles, for appellant.

T. P. Wittschen, of Oakland, and J. H. O'Connor, Co. Counsel, and Roy W. Dowds, Asst. Co. Counsel, both of Los Angeles, amici curiæ on behalf of appellant.

John W. Preston, of Los Angeles, Miguel Estudillo, of Riverside, Oliver O. Clark, of Los Angeles, and C. L. McFarland, of Riverside, for respondents.

SHENK, Justice.

This is a motion to set aside an order granting a petition for a rehearing in the above entitled cause and to direct the issuance of a remittitur forthwith.

The proceeding is one in eminent domain. A judgment in condemnation was entered by the Superior Court in Riverside County. On appeal by the plaintiff district the judgment was reversed by the District Court of Appeal. 99 P.2d 659. A petition by the defendants to have the cause heard in this court was granted and it was thereupon transferred to this court for hearing and determination. The appeal was first argued at Los Angeles on June 6, 1940. The late Chief Justice Waste and Justice Houser were absent from the session, and Presiding Justice John M. York of the District Court of Appeal, Second District, Division One, and Justice Homer R. Spence of the District Court of Appeal, First District, Division Two, as justices pro tempore, sat with the remaining justices under assignment by the chairman of the Judicial Council. After oral argument the cause was submitted for decision. The submission was vacated on December 2, 1940, and the cause was again set down for argument, which was held in Los Angeles on April 8, 1941. At that session there were present Chief Justice Gibson, Justices Shenk, Curtis, Edmonds, Carter, Traynor, and the late Presiding Justice John F. Pullen of the District Court of Appeal, Third District, sitting pro tempore under assignment by the chairman of the Judicial Council. Following oral argument the cause was again submitted. On August 4, 1941, a judgment of affirmance was filed, upon an opinion written by Justice Carter and concurred in by the Chief Justice, and Justices Traynor and Pullen. 116 P.2d 7. Justices Shenk, Curtis and Edmonds dissented. On August 22, 1941, a petition for a rehearing was filed by the plaintiff district. In their answer to the petition for a rehearing the defendants raised the point and vigorously contended that "Justice pro tem. Pullen and not Justice Houser must sit in the disposition of the petition for rehearing." Justice Pullen was not present when the

petition for a rehearing was considered and acted upon. Justice Houser was present and participated in such consideration. The point was decided adversely to the defendants' contention and on September 3, 1941, an order granting the petition for a rehearing was signed by Justices Shenk, Curtis, Edmonds and Houser, and was filed in the office of the clerk of this court at Los Angeles during the regular session of the court in that city, at which session all of the regular members of the court were in attendance. On October 14, 1941, the defendants filed a notice of the present motion to set aside the order granting the petition for a rehearing and to direct the issuance of a remittitur forthwith. The notice specified that the motion would be made on the ground that the order of September 3d granting the rehearing was irregular and void for the asserted reason that it did not have the assent of four justices of this court who were qualified to give such assent and that in consequence thereof the judgment of August 4th became final on September 3, 1941.

By an amendment of the defendants' notice of motion, filed on November 4, 1941, the grounds of the motion were enlarged by adding the contention that under the Constitution of the United States, and particularly the fifth and the fourteenth amendments, they were guaranteed the right, after oral argument and decision by this court to have any petition for rehearing determined by the justices of the court who constituted the court at the time of oral argument, submission and decision of the cause, in the absence of any disqualification or incapacity of said justices to act in the matter, and that a denial of the asserted right would deprive them of a property right in said decision contrary to the aforesaid provisions of the federal Constitution. The motion was orally argued before the court in bank on November 7, 1941.

The order of the chairman of the Judicial Council appointing Justice Pullen as a justice pro tempore was addressed to him, was dated March 27, 1941, and assigned him "to sit as a justice of the Supreme Court of the State of California, to assist said Court from April 1 to May 15, 1941, and thereafter to act as such until all matters submitted to you therein shall have been disposed of by you."

Briefly, then, it is the contention of the defendants that since Justice Houser was not present at the oral argument on April 8, 1941, he was not authorized to sign the order granting the rehearing and that said order was and is therefore void and of no effect. Put in another way, the contention is that a majority of the justices who constituted the court at the time of oral argument must concur in any valid order granting a rehearing.

Section 2 of article VI of our state Constitution provides among other things: "The Supreme Court shall consist of a Chief Justice and six Associate Justices. The Court may sit in departments and in bank, and shall always be open for the transaction of business. * * * The Chief Justice may convene the Court in bank at any time, and shall be the presiding Justice of the Court when so convened. The concurrence of four Justices present at the argument shall be necessary to pronounce a judgment in bank * * * to render a judgment a concurrence of four Judges shall be necessary. In the determination of causes, all decisions of the Court in bank or in departments shall be given in writing, and the grounds of the decision shall be stated."

[1, 2] The foregoing quotation contains the only reference to argument in causes pending before the court. In its application the right to oral argument in matters on the calendar in open sessions of the court has always been accorded and the necessity for the concurrence of four members of the court who were present at the argument in pronouncing judgment in the cause has always been scrupulously adhered to and enforced. This right was accorded the parties in the present case and four members of the court who were present at the argument concurred in the pronouncement of the judgment. When this had been done the requirements of the Constitution were fulfilled. But from the constitutional provision concerning argument it does not follow that the parties are entitled to oral argument in all matters passed upon by the court in bank. When not conducting an open session, the court is convened in executive sessions at least two each week. At these sessions numerous matters are ruled upon, such as applications for writs, petitions for transfer from the District Courts of Appeal, and petitions for rehearing of our own decisions. These matters are disposed of by order of at least four members of the court, but no oral argument thereon is provided for by the Constitu-

tion or otherwise permitted and no grounds for the rulings are stated in writing, except in very rare cases in the discretion of the court. The petition for a rehearing in the present case was one of those matters. The action thereon was not to "pronounce a judgment" as contemplated by the constitutional provision above quoted, but was a ruling on the question whether there should be a re-consideration of a judgment theretofore pronounced to the end that further argument be had, if desired, and a judgment thereafter pronounced in all respects as required by the Constitution. A judgment is defined by the code as "the final determination of the rights of the parties in an action or proceeding." Sec. 577, Code Civ.Proc.; 14 Cal.Jur. 852. It is "the law's last word in a judicial controversy." 30 Am.Jur. 821. Such was the judgment of August 4, 1941, in the present matter, subject, however, to the power of the court to order a rehearing. Such an order is not a judgment. Section 1003 of the Code of Civil Procedure provides: "Every direction of a court, judge, or justice, made or entered in writing, and not included in a judgment, is denominated an order."

[3] There is no express provision of the Constitution or in the statutes for a rehearing of a cause in bank. It is, however, an essential ingredient of jurisdiction. This court has inherent power to revise, modify, and correct its judgments so long as they are under its control and may, in the exercise of that power, grant rehearings on applications of the parties or on its own motion. In re Jessup, 81 Cal. 408, 21 P. 976, 22 P. 742, 1028, 6 L.R.A. 594. Nor is there any provision of the Constitution or the statutes as to when a judgment in bank shall become final. Section 45 of the Code of Civil Procedure from 1880 (Amendments to the Code of Civil Procedure 1880, p. 24) until its repeal in 1901, Stats.1901, p. 118, purported to provide that judgments of the court in bank should become final, "unless within thirty days after such judgment an order be made in writing, signed by five justices, granting a rehearing." But said section was declared unconstitutional in In re Jessup, supra, in 1889. Since December 19, 1928, the rules of court, as promulgated by the Judicial Council, have provided: "Unless otherwise specially ordered, or a rehearing be granted, judgments of the Supreme Court in bank become final at the end of the thirtieth day after the date of pronouncement." Rule XXX, 213 Cal., p. lvii.

[4] The justices entitled to act on matters considered at executive sessions are the regular members of the court except such as may be disqualified or unable to act thereon; and if a full complement of the qualified members be not available, then such justice or justices as may be duly assigned to the court, provided that in no event shall there be more than seven justices acting on a particular matter.

But the defendants insist that Justice Houser had no authority to join in ordering a rehearing because of the form of the order assigning Justice Pullen to the court. It will be noted that he was assigned pursuant to the Judicial Council amendment to the Constitution in 1926 (sec. 1a, art. VI) to "assist the court." He was not assigned "to act for a judge who is disqualified or unable to act, or to sit and hold court where a vacancy in the office of judge has occurred."

[5, 6] The order assigning Justice Pullen fixed the time of his service as "from April 1st to May 15, 1941", and it is true that the order assigned him "thereafter to act as such until all matters submitted" to him "therein shall have been disposed of" by him. But the application for a rehearing had never been submitted to him. The matter of the pronouncement of judgment had been submitted to him and he had acted on the matter so submitted. But the question whether the judgment should be set aside and further consideration be given to the appeal in accordance with the showing made by the plaintiff district in its petition for a rehearing was a question separate from and independent of the question of the prior pronouncement of judgment. The question whether a rehearing should be granted was, as above stated, presented to the court with its regular membership participating, and Justice Houser had the power to act on the matter unless disqualified. No disqualification, constitutional, statutory or otherwise, has been shown. The assignment, always temporary, of a justice of the District Court of Appeal to the Supreme Court, does not and can not deprive a regularly constituted member of the Supreme Court of his constitutional functions, when he is able, ready and willing to act and no disqualification exists.

A situation identical in principle was presented to this court in Reeve v. Colusa

Gas & Electric Co., 151 Cal. 29, 91 P. 802. There the plaintiff-respondent moved the court to set aside an order granting a rehearing and to issue a remittitur in accordance with the judgment of the court in bank theretofore made. The case had been first decided in Department Two upon an opinion reversing the judgment for the plaintiff, Justices Henshaw, McFarland and Lorigan joining in the decision. The decision in department was vacated and a rehearing in bank was ordered. At the time the case came on for hearing in bank Justice Sloss deemed himself disqualified and Justice McFarland was ill and unable to be present. In order to secure a full bench for the consideration of the case, the court, under the authority of section 4 of article VI of the Constitution, as amended in 1904, selected from the justices of the District Court of Appeal of the First District, Justice Cooper to act in the place of Justice Sloss, and Presiding Justice Harrison to act in place of Justice McFarland. The cause was orally argued before the court in bank as thus constituted, after which the judgment was affirmed by a decision in which Justices Shaw, Angellotti, Harrison and Chief Justice Beatty concurred, and from which Justices Henshaw, Lorigan and Cooper dissented. The defendant-appellant then filed a petition for a rehearing. At the time this petition came on for determination Justice McFarland had recovered his health and was again able to act, and was present, ready and willing to act on the matter of granting or denying the petition. Justice Harrison was also present, ready and willing to act in the matter and offered to act thereon, if the court so desired. Thereupon it was decided by the justices of the Supreme Court, all of the members being present, that Justice McFarland and not Justice Harrison should participate in the petition for a rehearing, and that, as the disqualification of Justice Sloss was of a continuing nature, Justice Cooper should continue to act in the case. The court as thus constituted then took up the petition for a rehearing and the same was granted by four of the justices, namely, Justices Henshaw, Lorigan and McFarland of the Supreme Court and Justice Cooper of the District Court of Appeal, sitting pro tempore. After the expiration of thirty days following the pronouncement of the judgment the plaintiff moved the court to set aside the order upon the ground that Justice McFarland should not have acted in the matter. The motion to vacate was made on the principal ground that the power of Justice Harrison to act in the case continued until the judgment upon that hearing had become final, or until vacated by a valid order granting a rehearing within thirty days; that until that period had elapsed Justice Harrison's power in the case, so long as he continued qualified, ready and willing to act, was exclusive, and hence that the order granting the rehearing was void because it was made by only three justices qualified and competent to act in the matter. It was held in that case that the merits of the motion would not be inquired into for the reason that inasmuch as the court had theretofore decided that Justice McFarland and not Justice Harrison should participate, said ruling had become the law of the case. Attention was directed to the salutary effect of the application of the rule of law of the case for the reason that if the motion to vacate should be granted, no further consideration could be given to the petition for rehearing notwithstanding the fact that if Justice Harrison had participated it could not be said that he would have been averse to granting it. The Reeve case cannot be distinguished from the matter at bar. There is, however, no necessity for thus strictly applying the doctrine of the law of the case in the present matter, although the propriety of its application is just as apparent if not clearer here than in the Reeve case. There the question of the right of Justice McFarland to participate arose within the thirty day period on the court's own motion, without notice to the parties. Here the question arose on objection of the defendants before the petition for rehearing was granted, and may therefore be said to have been litigated. The two cases are the same on the facts and are parallel in principle. A more extended reference to the Reeve case is found in the case of Fay v. District Court of Appeal, 200 Cal. 522, 533, 254 P. 896.

The defendants criticize the Reeve case, first, on the asserted ground that by the holding therein this court nullified the provisions of section 2 of article VI of the Constitution, which requires the concurrence of four justices present at the argument to pronounce a judgment in bank. The answer is that the defendants, as heretofore pointed out, have misconstrued the nature of the matter before the court in which Justice Houser participated, for in acting thereon the court was not pronounc-

ing judgment. No oral argument is required or permitted on the consideration of a petition for rehearing. The order thereon is not subject to petition for rehearing and no written opinion is required, as in the case of a judgment duly pronounced.

It is then contended by the defendants that the Reeve case should not apply because the law with reference to the assignment of judges has been so changed as to provide that those justices who are present at the oral argument have the exclusive power and right to act on any matter that may arise in the case after the pronouncement of judgment. This is not so, first, because the change in the law does not expressly or impliedly so provide, and secondly, because the essential functions of a justice pro tempore selected by the court to act pursuant to the 1904 amendment to section 4 of article VI of the Constitution are not, so far as the present matter is concerned, any different from those of a justice pro tempore assigned to the Supreme Court by the chairman of the Judicial Council pursuant to section 1a of article VI of the Constitution, adopted in 1926. It is true that the occasions for an assignment were enlarged by the later amendment. Theretofore a justice selected by the court itself could act only in the place of a justice of the court who was disqualified or unable to act. Under the 1926 amendment a justice pro tempore may also be assigned to assist a court whose calendar is congested and to sit and hold court when a vacancy in the office of judge has occurred. The enlargement of the occasions for the assignment of justices pro tempore by the Judicial Council amendment left the essential functions of the judge or justice after he has been duly assigned the same as before that amendment. Fay v. District Court of Appeal, supra.

[7, 8] Furthermore, there is no provision of the Constitution which would prevent a justice of the court, either regular or pro tempore, who had not heard the argument from participating in the pronouncement of a judgment (1) if four justices who were present at the argument have also participated or (2) if oral argument has been waived by submission without oral argument (see Philbrook v. Newman, 148 Cal. 172, 178, 82 P. 772), or (3) if the constitutional requirement of concurrence of four justices present at the argument be waived by stipulation of the parties or otherwise. See Blanc v. Bowman, 22 Cal. 23, 24; Luco v. De Toro, 88 Cal. 26, 25 P. 983, 11 L.R.A. 543; Niles v. Edwards, 95 Cal. 41, 30 P. 134. In 1891 this court said in the Luco case at page 28 of 88 Cal., at page 983 of 25 P., 11 L.R.A. 543: "The rule has always been with respect to petitions for rehearings that as many justices as are necessary to pronounce the judgment must concur in granting a rehearing, or the petition will be denied." It is significant that the phrase "as many justices," and not, "as many of the justices who were present at the argument," was used. It may be said with equal assurance and certainty that the rule has always been that the regular members of the court and such justices pro tempore as are duly assigned to the court and are not disqualified, but not more than seven in all, are competent to act on a petition for rehearing whether they were present at the oral argument or not. This rule has not been questioned since the Reeve case, so far as we have been able to ascertain, and the defendants have not cited an instance to the contrary.

[9, 10] The position of the defendants therefore reduces itself to this: That whenever a cause is submitted to a "panel," as they call it, of justices constituting the court at the time a cause is orally argued and submitted, the individual justices who compose that "panel" are the only justices qualified to act thereafter in any matter affecting that cause until a judgment pronounced therein has become final; and that when justices pro tempore are a part of that constituent membership they and they only are the persons who may act in any matter thus arising thereafter, to the exclusion of any regular member of the court who may be present, and ready and willing to act in such matter. If this argument should prevail it would lead to the following untenable conclusions: that Justices York and Spence, who were present at the oral argument on June 6, 1940, should have acted to the exclusion of Chief Justice Waste, had he been living, and Justice Houser, when the order of submission was set aside December 2, 1940; that on the re-argument on April 8, 1941, Justices York and Spence should have acted to the exclusion of a regular member of the court and of Justice Pullen, and that they would have to act on the present motion. But, say the defendants, the order setting aside the submission could have been made by the Chief Justice alone. Again the defendants are laboring under a misapprehension. The matter of setting aside the

submission of the cause has always been considered as one requiring court action, and the vote of four of the justices constituting the court at the time the order is made as necessary to its effectiveness. This is the uniform practice. It is safe to say that no order setting aside a submission has otherwise heretofore been made. The parties, of course, have the constitutional right to a judgment herein by a duly constituted court, but they have no right, constitutional or otherwise, to a decision by any particular judge or group of judges.

The defendants cite, in support of their theory, the opinion of this court appended to the opinion and order of the District Court of Appeal affirming the judgment of conviction in the case of People v. Ruef, 14 Cal.App. 576, 621, 114 P. 48, 54, wherein it was held on a motion to set aside an order granting a hearing in this court, that Justice Henshaw was disqualified from acting on the petition for a hearing because of his absence from the state at the time the order purporting to grant the same was made, and that as only three other members of the court had signed the order the same was ineffective to transfer the cause to this court. The court stated at page 630 of 14 Cal.App., at page 53 of 114 P.: "The moment Justice Henshaw left the state, in view of the authorities already referred to, he became unable to exercise any judicial function as a justice of the Supreme Court, in this state or out of it, and this disability continued during the whole period of his absence." The ruling in that case was obviously correct but no such situation is here presented.

[11] There is nothing in the cases in other jurisdictions, relied upon by the defendants, that is controlling. They cite cases following the practice in the United States Supreme Court to the effect that no rehearing will be granted unless a member of the court concurring in the majority opinion desires such reconsideration. That rule is one of judicial policy and works no compulsion on courts of other jurisdictions to adopt it, and involves no fundamental rights. Cases in other states, such as Cordner v. Cordner, 91 Utah 474, 64 P.2d 828; Woodbury v. Dorman, 15 Minn. 341, 15 Gil. 274; and Gas Products Co. v. Rankin, 63 Mont. 372, 207 P. 993, 24 A.L.R. 294, also cited by the defendants, likewise reflect policies in state practice with which we are not here concerned, at least to the extent that they should be adopted in preference to a practice in this state under which the courts and litigants have proceeded with apparent general satisfaction.

[12, 13] No question of the deprivation of any right of the defendants protected by the federal Constitution is properly involved. In granting the rehearing this court, by a majority of its qualified members, was merely exercising its power of control over litigation pending before it and before final determination. No judgment finally determining the rights of the litigants has as yet passed beyond the control of the court. The cause is still pending. The court up to this time has deprived the litigants of nothing. When a judgment has been pronounced and has become final and not until then have any rights of the defendants, constitutional or otherwise, been unduly disturbed. There is no such vested right in a judgment in the party in whose favor it is rendered as to preclude its re-examination and vacation in the ordinary modes provided by law. Garrison v. City of New York, 88 U.S. 196, 21 Wall. 196, 22 L.Ed. 612. The practice of the state courts in such matters is a matter of state concern and if reasonable opportunity to be heard be afforded the litigants thereunder no federal constitutional guarantees are violated. Freeland v. Williams, 131 U.S. 405, 417, 9 S.Ct. 763, 33 L.Ed. 193; King v. West Virginia, 216 U.S. 92, 93, 100, 30 S.Ct. 225, 54 L.Ed. 396.

The motion is denied.

GIBSON, C. J., and CURTIS, EDMONDS, and TRAYNOR, JJ., concurred.

PER CURIAM.

Pursuant to the stipulation on file herein among the parties to the appeals in the above entitled causes, the judgments appealed from are hereby modified in accordance with said stipulation, and as so modified said judgments are affirmed without costs to any party to said appeals either in the trial court or on appeal. Upon the going down of the remittitur the trial court is directed to enter the judgments as so modified. Also pursuant to said stipulation the remittitur shall issue forthwith.

19 Cal.2d 553

EAGLE OIL & REFINING CO., Inc., v. PRENTICE et al.

L. A. 18055.

Supreme Court of California.

Feb. 18, 1942.

1. Judgment ⇐181

The issue to be determined by trial court in considering a motion by plaintiff for summary judgment is whether defendant has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself or the true facts in the case. Code Civ.Proc. § 437c.

2. Judgment ⇐185

Affidavits filed on behalf of defendant in opposition to a motion by plaintiff for summary judgment under statute should be liberally construed to the end that defendant will not be summarily deprived of the full hearing available at a trial of the action and rights incident thereto, and affidavits of plaintiff in support of motion should be strictly construed. Code Civ.Proc. § 437c.

3. Judgment ⇐178

The procedure authorized by statute respecting a motion by plaintiff for summary judgment is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact. Code Civ.Proc. § 437c.

4. Judgment ⇐185

Facts alleged in affidavits of the party against whom a motion for summary judgment under statute is made must be accepted as true, and such affidavits, to be sufficient, need not be composed wholly of strictly evidentiary facts. Code Civ.Proc. § 437c.

5. Judgment ⇐185

In action to recover balance due on an account for goods sold, allegations of answer and defendant's affidavits submitted in opposition to plaintiff's motion for summary judgment of the existence of an agreement whereby defendant agreed to give security for payments on account and plaintiff agreed to accept payments in monthly installments, the first of which was not due when action was commenced, and that defendant had performed agreement presented triable "issues of fact", notwithstanding that some allegations in affidavits were in nature of conclusions, and hence it was error to grant the motion. Code Civ.Proc. § 437c

See Words and Phrases, Permanent Edition, for all other definitions of "Issue of Fact".

6. Judgment ⇐186

On plaintiff's motion to strike out the answer and for summary judgment under statute, defendant's pleadings were to be given a liberal construction. Code Civ.Proc. § 437c.

7. Judgment ⇐186

It is not the purpose of procedure under statute respecting a motion by plaintiff for summary judgment to test sufficiency of pleadings. Code Civ.Proc. § 437c.

8. Judgment ⇐186

Whether defendant's letter to plaintiff respecting an agreement relating to payments by defendant on an account showed that plaintiff did not regard a mortgage allegedly executed by defendant as being given to secure account could not be considered in determining whether a triable issue of fact was raised by defendant's affidavits submitted in opposition to plaintiff's motion for summary judgment in action to recover a balance allegedly due on account. Code Civ. Proc. § 437c.

9. Judgment ⇐185

Where defendant's affidavits submitted in opposition to plaintiff's motion for summary judgment in action to recover balance allegedly due on an account otherwise presented triable issues of fact and showed that an agreement was made and accepted by plaintiff whereby defendant was to pay account in monthly installments, plaintiff could not justify order granting motion on theory that defendant's affidavit alleging existence of agreement showed no more than an offer by defendant to give security for account in return for a right to pay it in installments. Code Civ.Proc. § 437c.

In Bank.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by the Eagle Oil and Refining Company, Incorporated, against B. H. Prentice and another to recover for goods sold and delivered. From a summary judgment for plaintiff, defendants appeal.

Reversed.

For prior opinion, see 114 P.2d 382.

B. H. Prentice in pro. per. for appellant.

Cobb, Campbell & Kelley, of Los Angeles, for respondent.

CARTER, Justice.

Defendant appeals from a summary judgment for the sum of $2,879.87, together with interest and costs entered against him pursuant to section 437c of the Code of Civil Procedure.

Plaintiff's complaint was in two counts, one a common count for goods sold and delivered of the value of $32,364.44, of which it was alleged $29,484.57 had been paid, and the other, the balance due on a book account. Both involved the same indebtedness. Defendant filed an unverified answer in which he denied the indebtedness averred in the first count and as to the second count pleaded: "Denies that defendant is indebted to plaintiff upon an open book account in the sum of $2,879.87. Furthermore, defendant denies that there is any sum now due, owing and unpaid which defendant has not offered to be paid." As a separate defense defendant pleaded that on May 13, 1939, plaintiff and defendant entered into an agreement whereby plaintiff accepted a mortgage which provided that it was security for products to be delivered by plaintiff to defendant not exceeding $3,000, and also a further agreement of July 13, 1939, between plaintiff and defendant that any obligation owed by the latter to the former was to be discharged at the rate of $200 per month.

Plaintiff made a motion to strike defendant's answer and for entry of judgment for $2,879.87 under section 437c of the Code of Civil Procedure. When the motion came on for hearing defendant filed a verified amended answer the same in substance as the original. The motion was granted and defendant appeals from the judgment thereupon entered.

Section 437c, prior to its amendment in 1939, provided that with respect to actions on certain claims as follows: "* * * if it is claimed that there is no defense to the action, on motion of the plaintiff, after notice of the time and place thereof in writing served on the answering defendant at least ten days before such motion, supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out and judgment may be entered, in the discretion of the court, unless the defendant, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend."

[1, 2] At the outset it should be observed that there are several pertinent fundamental principles which should be observed in the application of and procedure under section 437c. The issue to be determined by the trial court in consideration of a motion thereunder is whether or not defendant has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself, that is, the true facts in the case. Walsh v. Walsh, 18 Cal.2d 439, 116 P.2d 62; Security-First National Bank of Los Angeles v. Cryer, 39 Cal.App.2d 757, 104 P.2d 66; McComsey v. Leaf, 36 Cal.App. 2d 132, 97 P.2d 242; Kelly v. Liddicoat, 35 Cal.App.2d 559, 96 P.2d 186; Shea v. Leonis, 29 Cal.App.2d 184, 84 P.2d 277; Bank of America, etc., Ass'n v. Casady, 15 Cal.App.2d 163, 59 P.2d 444; Gardenswartz v. Equitable Life Assur. Society, 23 Cal. App.2d Supp. 745, 68 P.2d 322; Krieger v. Dennie, 123 Cal.App., Supp., 777, 10 P.2d 820; Cowan Oil & Refining Co. v. Miley Petroleum Corp., 112 Cal.App., Supp. 773, 295 P. 504. If that were not true controversial issues of fact would be tried upon affidavits by the court and not a jury. Because the procedure is summary and presented on affidavits without the benefit of cross-examination, a trial by jury and opportunity to observe the demeanor of witnesses in giving their testimony, the affidavits filed on behalf of the defendant should be liberally construed to the end that he will not be summarily deprived of the full hearing available at a trial of the action and the rights incident thereto.

[3] The procedure is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact. See Walsh v. Walsh, supra.

[4] For these reasons it may further be said that the affidavits of the moving party, the plaintiff in this case, should be strictly construed and those of his opponent liberally construed. McComsey v. Leaf, supra; Fuller v. General Acc. Fire & Life Assur. Corp., Ltd., of Perth, Scotland, 224 Wis. 603, 272 N.W. 839; see 13 So.Cal.Law Rev. 523. And in this connection it may be further observed that the better rule is that the facts alleged in the affidavits of the party against whom the motion is made must be accepted as true, and that such affidavits to be sufficient need not necessarily be composed wholly of strictly evidentiary facts. McComsey v. Leaf, supra.

With these rules in mind we turn to the facts here presented. It appears from

plaintiff's affidavit that on or about March 1, 1939, Nelson, an officer of plaintiff corporation, discussed an arrangement with defendant with reference to the purchase by defendant of the products sold by plaintiff, which plaintiff "agreed to sell at their established * * * prices with the agreement that said merchandise was to be paid for upon delivery." Defendant denies that the arrangement was for payment on delivery and alleges that a credit was agreed upon whereby payments were to be made on receipt of invoices by mail. Plaintiff commenced delivery of its products on March 9, 1939, and continued thereafter until July 13, 1939; and invoices were presented to defendant showing the products delivered and price charged; attached to plaintiff's affidavit is a copy of the account. Plaintiff states that defendant made no objection to the account of the transactions, and that the prices charged were the reasonable and agreed value of the products. Defendant denies those statements and avers "that objections were made to said account at various times, and particularly at a certain conference with said Nelson on or about July 13, 1939, and that plaintiff stated that affiant's objections were proper and well taken and that proper credit would be given affiant which credit never has been given to affiant's account." On June 17, 1939, plaintiff sent a letter to defendant advising him that the prices being charged for the gasoline purchased by him were not enough, that it could not continue to supply the product, that the quantity purchased by defendant was not sufficient, that the account must be paid in full at this time, and demanding payment of $3,163.81, the amount claimed due as of June 16, 1939. In reply defendant sent a letter to plaintiff on July 3, 1939, in which defendant referred to the plaintiff's letter and a conversation of June 27, 1939, and stated: "* * * it is with considerable regret that we must inform you that thus far we have been unable to assist you. In order that there might be no question as to what our situation is, we, after having gone over the matter quite thoroughly, do not believe that it would be possible to pay to you the entire sum of $3,000.00 in the next few days as requested by yourselves. We have, however, shown our good intentions by mailing you a check on account and presume that if your patience holds out that we will be continuing to do this from time to time until we have either wiped out the entire account in this matter, or until we have arranged with some other refinery to carry our gasoline purchase account for us on terms somewhat similar to that which we have with you. You may be assured that we will do all that can be reasonably expected of us to liquidate this account as soon as possible. We have no desire to pay interest to you on the sum involved." It is alleged in plaintiff's affidavit that in May, 1939, defendant requested plaintiff to accept as security for the payment of $2,000 of the account, a trust deed on Los Angeles County property, and that plaintiff returned the proffered note and trust deed; that also a mortgage in which it was recited that it was security for $3,000 instead of $2,000 was returned because not properly executed, and that plaintiff would not accept it as credit on the account; that a conference was had at the request of defendant to arrange a form of payment of the account; that plaintiff did not agree to accept the mortgage or to accept payment of the account in installments; that it made no agreement, such as alleged in defendant's answer to accept payments of $200 per month on the account. On the other hand with respect to the credit arrangement for the payment of the account, defendant states in his affidavit that he denies "that in May, 1939, he asked or requested plaintiff, or the said H. F. Nelson (president of plaintiff), to accept a trust deed upon the real property described in the affidavit of said H. F. Nelson, as security for a note of $2000.00 to be credited upon affiant's account with plaintiff:

"Affiant alleges said H. F. Nelson, during the said month of May, 1939, demanded of affiant that the said account be paid and at said time; pursuant to such demands, affiant did on or about May 13, 1939, pay to plaintiff the sum of $2889.73 in cash to apply on the account and agreed to and did pay to plaintiff within twenty days thereafter the entire balance of the amount of the account; that at that time a new agreement was entered into between affiant and plaintiff respecting future purchases and payment thereof, and by which agreement affiant was to execute and deliver to plaintiff a mortgage upon the above referred to real property, and containing the terms of said agreement, as security for future purchases of merchandise not exceeding the sum of $3000.00. * * *

"Affiant denies that the said sum of $3000.00, represented in said mortgage, was to be credited upon his account, but alleges that such sum was the maximum amount

for which it was to be security for future purchases. * * *

"Affiant alleges that on or about the 13th of July, 1939, he and plaintiff entered into another, separate and subsequent agreement in respect to the security for said account and the payments to be made thereon; that the terms of the latter agreement were that affiant was to make a minimum payment of $200.00 each month thereafter starting August 15, 1939, and continuing until the account, including interest on the unpaid monthly balances at the rate of six percent per annum was paid and that plaintiff agreed to prepare a trust deed upon said real property and in accordance with such agreement and this affiant agreed to execute the same, which trust deed was to be security for payments to be made under said agreement. * * *

"Affiant alleges that at the time when due and in strict compliance with the terms of payment of the last mentioned agreement he tendered to plaintiff the first installment of $200.00, but that plaintiff refused to accept same, as shown by the letter of Messrs. Cobb, Campbell and Kelley under date of August 22, 1939, a copy of which is attached hereto and by reference thereto made a part hereof;

"Affiant alleges that he has at all times herein mentioned, and is now ready, able and willing to comply with and carry out all of the terms of said last mentioned agreement, both as to the security and as to the payments to be made thereunder; and further alleges that said agreement is not in default insofar as he is concerned; affiant denies that he ever, at any time, asked or requested plaintiff or any of its officers for a conference to be had toward working out a form of payment of said account;

"Affiant alleges that plaintiff has not complied with the provisions of said agreement, or the last mentioned previous agreement, and that plaintiff has attempted to breach and repudiate the same, and has breached and repudiated the same."

As corroborative of the credit arrangement of July 13, 1939, defendant also filed the affidavit of N. Fisher who was present at the conference on that date. It also appears that on July 13, 1939, defendant wrote to plaintiff with reference to the agreement of that date. Defendant sent a check for $200 to plaintiff which plaintiff's counsel returned on August 22, 1939, for the reason "that you (defendant) make the same conditional upon the same being under some agreement which Eagle Oil & Refining Company, Inc. *dispute as having ever been entered into.*" (Emphasis added.)

Although it may well be argued that defendant's affidavits could have been more carefully drawn, we are satisfied that under the rule of liberal construction they establish the existence of factual issues existing between plaintiff and defendant which must be determined at a trial. It is not necessary on this appeal to discuss all of the factual issues that may have been shown to exist, inasmuch as it is clear that at least one was presented which would constitute a defense to plaintiff's action.

[5] Defendant asserts that an agreement was made on July 13, 1939, whereby the account between him and plaintiff would be discharged in monthly installments of $200 a month commencing on August 15, 1939, and that security would be given by the defendant for the payment thereof. Plaintiff commenced its action on July 25, 1939, three weeks before the first payment would become due. The consideration received by plaintiff for its agreement to accept payment on a time basis was the agreement by defendant to give security for the payments. Defendant suffered a detriment thereby inasmuch as he was not compelled to give such security. Defendant states in his affidavit that he has performed the agreement. It is obvious that such an agreement if established would be a defense to plaintiff's action as there would be no debt due when the action was commenced. There is therefore presented a triable issue of fact, a defense on the merits to plaintiff's action based upon the existence of that agreement.

[6, 7] Plaintiff refers to the defendant's pleadings as being insufficient to raise that agreement as a defense. In his verified answer defendant alleged: "Furthermore, that on July 13, 1939, plaintiff entered into a further agreement with defendant, respecting the payment of any sum owing plaintiff by defendant, that one of the requirements of said agreement was the payment to plaintiff by defendant of the minimum sum of Two Hundred ($200.00) Dollars per month. Furthermore defendant alleges that all such payment or payments which are now due to plaintiff on this agreement have been paid." In the procedure here involved a liberal construction must be given to the pleadings as well as

the affidavits of the party against whom the motion is made, both being given attention. Plaintiff did not demur to the answer. It is not the purpose of the procedure under section 437c to test the sufficiency of the pleadings. It is stated in Kelly v. Liddicoat, 35 Cal.App.2d 559, 562, 96 P.2d 186, 188:

"'* * * That section provides an entirely new procedure, as far as the Codes of our state are concerned, the purpose of which is to eliminate all issues which have no basis in fact, no matter how well they may be pleaded in form. Under it, an answer may be stricken out, even though a perfect defense may be stated therein, unless the defendant by his affidavits shows facts to substantiate the defense.' And in Perlman v. Perlman, 235 App.Div. 313, 257 N.Y.S. 48, 50, the court, expressing the same thought conversely, said with respect to summary judgments: 'Even though the pleading itself be deemed insufficient, the motion must be denied if the affidavits show facts sufficient to constitute a defense entitling the pleader to defend. Curry v. Mackenzie, 239 N.Y. 267, 146 N.E. 375. * * *'" The same remarks are true with respect to the asserted negative pregnant in defendant's denial of the indebtedness pleaded in the second count in plaintiff's complaint.

Plaintiff asserts that defendant's affidavits contain nothing but conclusions of fact and law and are thus insufficient. As we have seen it is not necessary that the averments be rigidly restricted to evidentiary matter. It may be that some of the allegations or statements are somewhat in the nature of conclusions, but we are satisfied that facts within the knowledge of the affiants and to which they are competent to testify, are set forth with sufficient particularity, and from which it appears that a bona fide defense to the action exists. This is especially true when we are mindful of the rule of liberal construction applicable to cases of this character.

[8] It is also suggested that the letter, to which reference has heretofore been made, written by defendant to plaintiff on July 3, 1939, shows that plaintiff did not regard the mortgage as being given to secure the account or that credit had been thereby extended, as no mention was made of those circumstances. But even if that were true, it still leaves a triable issue as to the existence of the later agreement of July 13, 1939. Furthermore, those matters are merely instances of a conflict in the evidence to be resolved in determining the issues, and not on the proposition of whether in truth an issue of fact exists.

[9] Plaintiff also claims that defendant's affidavit alleging the agreement of July 13, 1939, shows nothing more than an offer by defendant to give security for the account in return for the right to pay it in monthly installments, but it is apparent from defendant's affidavits that an agreement was entered into which was accepted by, and was therefore binding upon plaintiff. Since on the motion for a summary judgment the facts alleged in his affidavits must be accepted as true, it cannot be said that defendant has not interposed a meritorious defense to the action.

Unless the procedure under section 437c of the Code of Civil Procedure is given a much broader scope than is contemplated or justified, the circumstances here present do not furnish a proper case for the application of that section.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, HOUSER, and TRAYNOR, JJ., concurred.



19 Cal.2d 562

KUPFER v. BRAWNER et al.

L. A. 17766.

Supreme Court of California.

Feb. 19, 1942.

1. Judgment ⇐407(4)

In action to set aside a prior judgment rendered against plaintiff in joint debtor proceedings, plaintiff could not object that judgment was invalid because based on a cause of action different from that on which judgment against plaintiff's copartner was based, since if there was any error in the judgment rendered, it was an error committed in the exercise of the court's discretion, and could have been corrected only on appeal from the judgment or on other timely and direct attack thereon. Code Civ.Proc. § 989 et seq.; §§ 992–994.

2. Certiorari ⇐64(2)

Though "certiorari" is a direct attack it does not serve as a review of error committed in the exercise of jurisdiction, but opens to investigation only the evidence bearing on the fact of jurisdiction.

See Words and Phrases, Permanent Edition, for all other definitions of "Certiorari".

3. Judgment ⇐461(3)

In action to set aside a prior judgment rendered against plaintiff in joint debtor proceedings, wherein plaintiff claimed payment in full and discharge of former judgment against plaintiff's copartner prior to joint debtor proceedings, on ground that assignee of judgment, in purchasing judgment, was in fact acting for plaintiff's copartner, evidence sustained finding that assignee purchased the judgment with his own funds and on his own behalf. Code Civ.Proc. § 989 et seq.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by A. M. Kupfer against William H. Brawner and others to set aside a prior judgment rendered against the plaintiff in joint debtor proceedings. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment affirmed.

Baldwin Robertson and Russell Breckenridge, both of Los Angeles, for appellant.

Charles W. Fourl, of Los Angeles, in pro. per. and for respondent Eustace.

Caryl Warner, of Los Angeles, for respondent Brawner.

SHENK, Justice.

The plaintiff appealed from a judgment for the defendants in an action to set aside a prior judgment rendered against the plaintiff in joint debtor proceedings taken pursuant to section 989 et seq. of the Code of Civil Procedure.

The facts in this controversy are undisputed and present the question whether the trial court correctly concluded that the judgment entered against the plaintiff in said joint debtor proceedings was valid and enforceable.

In April, 1934, Oil Tool Exchange, Inc., obtained a judgment against Katie M. Eustace in the sum of $6,284 for rental of certain oil drilling equipment. In the action in which that judgment was rendered A. M. Kupfer, the plaintiff herein and copartner of Eustace, was also named as a defendant, but he was not served with summons. The action proceeded to judgment against Eustace alone. That judgment was assigned to Fourl, who assigned to Brawner. Subsequently joint debtor proceedings were commenced against Kupfer in which he appeared and interposed various defenses. Judgment was rendered against him on March 9, 1937, in the sum of $3,225. Kupfer did not appeal from that judgment and it became final. The present action to have said judgment set aside was commenced in January, 1939.

Section 989 of the Code of Civil Procedure provides: "When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in section 414 of this code, those who were not originally served with the summons, and did not appear in the action, may be summoned to appear before the court in which such judgment is entered to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons." After provision for the issuance and service of summons, it is provided in sections 992 and 993 of the Code of Civil Procedure that the defendant may answer and deny the judgment or set up any defense arising subsequently, or deny his liability on the obligation by reason of any defense existing at the commencement of the action in which the judgment was rendered. Section 994 provides that the issues may be tried as in other cases, but that if the defendant denies his liability on the obligation, any verdict against him must not exceed the amount remaining unsatisfied in the original judgment with interest.

[1] There was no contention in the trial of the present action, and none is now made that the court in the joint debtor proceedings did not have jurisdiction of the parties, including the plaintiff herein as defendant, and of the subject matter. As the first ground of alleged invalidity of the prior judgment the plaintiff contends that the court based its judgment on a cause of action different from that on which the judgment against Eustace was based, namely, on a cause of action for the reasonable rental value of the oil drilling equipment, rather than on the express contract rate of rental. The objection could

appropriately have been made by the plaintiff on an appeal from the judgment entered against him. But he took no appeal therefrom. The objections that he now raises are such as must be deemed to have been adjudicated in the joint debtor proceedings. If there was any error in the judgment rendered in those proceedings, it was an error committed in the exercise of the court's jurisdiction, which could have been corrected only on an appeal from the judgment or other timely and direct attack thereon; but the judgment, having become final, is not subject to review in another action for error committed in the exercise of the court's jurisdiction. Gray v. Hall, 203 Cal. 306, 265 P. 246; Tulare Irr. Dist. v. Superior Court, 197 Cal. 649, 670, 242 P. 725; Lake v. Bonynge, 161 Cal. 120, 118 P. 535; Le Mesnager v. Variel, 144 Cal. 463, 77 P. 988, 103 Am.St.Rep. 91; Crew v. Pratt, 119 Cal. 139, 51 P. 38; Blondeau v. Snyder, 95 Cal. 521, 31 P. 591; Crim v. Kessing, 89 Cal. 478, 26 P. 1074, 23 Am.St. Rep. 491; In re Gardiner's Estate, 45 Cal. App.2d 559, 114 P.2d 643.

In Gray v. Hall, supra, 203 Cal. at page 314, 265 P. at page 251, it was said: "The court having acquired jurisdiction of the subject-matter and of the parties, its judgment is not void for the mere erroneous decision on a question of law, however important that question may have been in contemplation of the rights of the parties in the original action. A judgment is never absolutely void if the court had jurisdiction of the subject-matter and the person of the defendant no matter how erroneous it may be." It was also there recognized that the judgment is not necessarily vulnerable even though the error appears in the judgment roll.

"There must be an end to litigation and the question as to the correctness of the rulings of the court upon matters within its jurisdiction are reviewable only by the appellate tribunal." Le Mesnager v. Variel, supra, 144 Cal. at page 465, 77 P. at page 989, 103 Am.St.Rep. 91. "In other words, it is not the result reached which determines whether or not the judgment is void, but the power or authority which we call 'jurisdiction,' and which lies behind the mere conclusion that determines the question." Crew v. Pratt, supra, 119 Cal. at page 151, 51 P. at page 43.

The plaintiff relies on cases where the question of the "validity" of the judgment was being considered in connection with an appeal from the judgment, such as Baar v. Smith, 201 Cal. 87, 255 P. 827; Stearns Ranchos Co. v. McDowell, 134 Cal. 562, 66 P. 724; Cooper v. Burch, 140 Cal. 548, 74 P. 37. None of these cases would justify a conclusion that the prior judgment must be declared void. Eichhoff v. Eichhoff, 107 Cal. 42, 47, 40 P. 24, 48 Am.St. Rep. 110; Le Mesnager v. Variel, supra, 144 Cal. at page 467, 77 P. 988, 103 Am. St.Rep. 91.

[2] The case of Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 5 Cal.2d 35, 53 P.2d 127, 131, does not aid the plaintiff. That decision recognizes that a judgment void on its face, "is simply a nullity and can be neither a basis nor evidence of any right whatever." In that case the court was considering the effect of a lease entered into pursuant to purported authority under an order which had been annulled in a prior action. Nor is the case of Mannix v. Superior Court, 133 Cal.App. 740, 24 P.2d 507, of any assistance to the plaintiff. That case involved a proceeding in certiorari to review the superior court's judgment for the plaintiff in an action originally brought in the justice's court. While certiorari is a direct attack (Great Western Power Co. v. Pillsbury, 170 Cal. 180, 185, 149 P. 35), it does not serve as a review of error committed in the exercise of jurisdiction, but opens to investigation only the evidence bearing on the fact of jurisdiction.

The court in the joint debtor proceedings had jurisdiction to try the issue of Kupfer's liability on the judgment and in the absence of any showing of fraud or mistake and none is here made, its determination thereon to the extent noted is conclusive in this action.

[3] By second and third causes of action the plaintiff alleged facts purporting to show payment in full and discharge of the former judgment prior to the joint debtor proceedings, and that if he was liable on said judgment it was for contribution only. The plaintiff's claim in this respect is that Fourl, as assignee of the judgment creditor, was in fact acting for Eustace and that Brawner was a dummy for Fourl, and the sum paid by Fourl as the purported purchase price of the judgment therefore constituted a satisfaction of the judgment.

Those defenses were within the issue of liability and were either interposed or were

available to Kupfer in the joint debtor proceedings. They were also tried in the present action and on sufficient evidence the court found that Fourl purchased the judgment with his own funds and on his own behalf. The record supports the findings and judgment.

The judgment is affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, HOUSER, and CARTER, JJ., concurred.



19 Cal.2d 566

KUPFER v. MACDONALD et al.

L. A. 17767.

Supreme Court of California.

Feb. 19, 1942.

1. Judgment ⇐405

In action to set aside an allegedly void judgment rendered against plaintiff in prior action against plaintiff and third person on labor claims, objection that some of the labor claims did not name plaintiff as well as third person as employer, could not be raised, where court in prior action had jurisdiction of subject matter and plaintiff who appeared and answered complaint, the judgment against plaintiff became final, and there was no showing that plaintiff was prevented either by fraud or mistake from making full and complete defense in prior action.

2. Judgment ⇐447(1)

A necessary condition to the allowance of relief from a judgment claimed to be void for extrinsic fraud was that plaintiff seeking such relief show that he had a defense on the merits to the action in which the judgment was rendered and where he failed to make such showing, he was not entitled to have judgment set aside on such ground.

3. Judgment ⇐461(3)

In action to set aside an allegedly void judgment rendered against plaintiff in prior action against plaintiff and third person on labor claims, wherein plaintiff contended that judgment in prior action was wholly satisfied by payment by third person of a lesser sum than the judgment, evidence supported finding that payment of the lesser sum did not operate as a satisfaction of the judgment, but that the sum was in fact paid by third person's assignee on the assignee's own account as the purchase price of the judgment.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by A. M. Kupfer against Frank C. MacDonald, as chief, etc., and others to set aside as void a judgment rendered against the plaintiff in another action. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment affirmed.

Baldwin Robertson and Russell Breckenridge, both of Los Angeles, for appellant.

Leo L. Schaumer and E. A. Lackmann, both of Los Angeles, for respondent Labor Com'r.

Charles W. Fourl, of Los Angeles, for respondents Eustace and Levinson.

SHENK, Justice.

The plaintiff brought this action to set aside as void a judgment rendered against him in another action wherein no appeal had been taken from the judgment and the same had become final. Judgment was entered for the defendants and the plaintiff has appealed.

The judgment in the former action was rendered in favor of the Labor Commissioner of the State of California in an action brought by him in 1933 as assignee of labor claimants against Kupfer and Eustace. The judgment was for $803.19 and represented the amounts found to be due from the defendants on wage claims of the several assignors of the plaintiff in that action plus interest thereon and costs. In the present action it is alleged that the judgment was wholly satisfied by the payment by Eustace of the sum of $400 to the labor claimants, and that after such payment an assignment of the judgment was taken by Fourl, but in behalf of Kupfer's co-judgment debtor, Eustace. The grounds of the plaintiff's right to relief are alleged to be, first, that there had been full satisfaction of the judgment by virtue of the payment of $400 to the Labor Commission for the claimants; second, that extrinsic fraud was committed in the action in which the judgment was rendered whereby Kupfer was prevented by the plaintiff therein from making a defense claimed to be available to him in that

action, based on alleged false representations to Kupfer by the Labor Commissioner that assignments of the labor claims to him included claims against Kupfer, as employer; third, that purported assignments successively to Fourl, Martin and Levinson of the judgment after satisfaction thereof as aforesaid were a nullity; and fourth, that Fourl was acting for Eustace in the purported purchase of the judgment for $400 and in such event, the liability of Kupfer was for contribution only and not for the full amount of the judgment.

The trial court found that the allegations of assignment of the labor claims to the Labor Commissioner in the action brought by him were not false; that no deception was practiced upon Kupfer; that he was not prevented from making a full defense in said action; that Eustace did not purchase the judgment in favor of the labor claimants, but that Fourl purchased their claims and the judgment with his own funds and for his own account for the sum of $400; and that Eustace did not satisfy the judgment by payment of any funds.

[1] The plaintiff on this appeal contends that the evidence shows, as a matter of law, that a case of extrinsic fraud or mistake was presented to the trial court which rendered the judgment for the labor claimants void. He bases that contention on some evidence that the assignments to the Labor Commissioner by the labor claimants did not name him as well as Eustace as an employer. Whether or not he was named as an employer in those assignments is not a question which can be litigated after the judgment in that action has become final. The court in that action had jurisdiction of the subject matter and of the defendant Kupfer, plaintiff herein. Kupfer appeared, answered the complaint and denied liability. Any question of the truth or falsity of the allegations of the assignment or otherwise as against him, or of the legal capacity of the Labor Commission to sue in the action, were issues which must be deemed to have been determined in that action and are concluded by the judgment therein. Kupfer v. Brawner, Cal.Sup., 122 P.2d 268. There was no evidence at the trial of the present action that the plaintiff (defendant in the prior action) was prevented either by fraud or mistake from making a full and complete defense to the claim of liability as against him.

[2] Furthermore, the plaintiff does not contend that he was not liable on the labor claims or that he had a meritorious defense in the prior action. It is a necessary condition to the allowance of relief from a judgment claimed to be void for extrinsic fraud that the party seeking such relief show that he had a defense to the action on the merits. Swallow v. Tungsten Products Co., 205 Cal. 207, 220, 270 P. 366. Pursuant to that rule the plaintiff should have alleged and proved facts establishing that he was not liable on the claims for wages which were assigned to the Labor Commissioner, even though he was not named as an employer in the assignments thereof. Having failed to make such a showing he was also on that ground in no position to insist that the prior judgment be declared void.

[3] The plaintiff contends that the evidence does not support the finding that the payment of $400 in satisfaction of the labor claims did not operate as a satisfaction of the judgment and that said sum was paid by Fourl on his own account and from his own funds as the purchase price of the judgment. He places his main reliance on a letter which was written by the attorney for the Labor Commissioner and addressed to the labor claimants setting forth an alleged offer by "Katie M. Eustace for the full settlement of the judgment obtained by this department against her—of which your claim is a part—in the sum of $400.00." The letter was admitted in evidence over the defendant's objection on the ground that it was hearsay. Whatever effect the letter might have it could not overcome the evidence supporting the finding.

There is nothing in the record to warrant the conclusion that the trial court's findings on the issues of satisfaction and ownership of the judgment were erroneous.

The judgment is affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

49 Cal.App.2d 639

DE HART et al. v. ALLEN.

Civ. 11653.

District Court of Appeal, First District, Division 2, California.

Feb. 10, 1942.

Hearing Denied April 9, 1942.

1. Landlord and tenant ⇐49(2)

Where defendant leased premises for bootlegging purposes for a term ending in 1936, and in November, 1933, after repeal of the prohibition amendment, gave notice that he would not continue longer and, with the lessor's consent, assigned the lease, and the assignee paid the full rent for only two months and vacated in February, 1934, the evidence, though weak, warranted the trial court in inferring that defendant intended to abandon the lease when he made the assignment to an irresponsible assignee, and therefore supported a finding that defendant rather than the assignee abandoned, but did not support the finding that the abandonment was in December, 1933, as regards the right to recover damages for breach of the lease.

2. Appeal and error ⇐882(5)

The lessor's heirs, suing for damages for breach of the lease, could not contend that a denial based only on lack of information and not also on lack of belief was insufficient to raise an issue under their allegation of notice of intention to relet for defendant's benefit, where the case was tried on the parties' understanding that the denials were sufficient and that the issue was raised, and evidence on that subject was taken without objection.

3. Landlord and tenant ⇐195(2)

Where the lessee assigned the lease in November and the assignee vacated in the following February, the institution of three successive actions against the lessee for rent due for February to May could not be deemed sufficient notice of intention to relet for the lessee's benefit, where the premises remained vacant until October, when the lessor's heirs leased them for one-half of the former monthly rental and for a term extending beyond the term of the original lease.

4. Landlord and tenant ⇐195(2)

A lease entitling the lessor to relet and hold the lessee for any deficiency if the lessee defaulted or abandoned the premises did not dispense with notice to the lessee of an intention to relet for his benefit if the lessor desired to hold the lessee liable for damages for breach of the lease.

5. Landlord and tenant ⇐194(2)

Evidence that premises were leased for bootlegging purposes for twice the reasonable rental and that the lessee, on repeal of the prohibition amendment, gave notice of intention to quit, whereupon the lessor or the lessor's heirs consented to an assignment of the lease and satisfied a chattel mortgage securing the rent, and, when the assignee vacated in February after having paid less than three months' rent, brought three successive actions against the lessee for rent due for February to May, *held* to show that the lessor's heirs intended to surrender the lease when ultimately taking possession in October without notice to either the lessee or assignee, and reletting at the reasonable rental value for a term extending beyond the original.

6. Landlord and tenant ⇐49(2)

The lessor's heirs were not precluded from suing the lessee for damages for breach of the lease, on the theory that they had elected to keep the original lease alive, after abandonment by the assignee, by bringing three successive actions against the lessee for monthly rentals, before the heirs took possession and relet the premises.

7. Landlord and tenant ⇐49(2), 227

An action by the lessor against the lessee for damages for breach of the lease by abandoning the premises can not accrue until the term expires, though actions for rent may be maintained previously.

8. Election of remedies ⇐1

The doctrine of election of remedies rests on the principle of estoppel, and there can be no estoppel unless the two remedies are inconsistent and repugnant, and unless unfair or unjust detriment would result from the exercise of both.

9. Judgment ⇐713(2)

In an action against the lessee for damages for breach of a lease of premises for bootlegging purposes, the legality of the lease, and the claim that the lessee was relieved of liability by satisfaction of a chattel mortgage which he had given as security for rent, were res judicata by virtue of judgments recovered in the municipal court in actions for rent, since such defenses,

whether actually presented or not, could have been raised therein.

Appeal from Superior Court, City and County of San Francisco; I. M. Golden, Judge.

Action by Rosemond T. De Hart and others against Joe Allen for damages for breach of a lease. Judgment for plaintiffs, and defendant appeals.

Reversed.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

Ernest Spagnoli and Walter F. Lynch, both of San Francisco, for appellant.

Carl E. Day and Abraham Setzer, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

In an action for damages for breach of a lease plaintiffs had judgment from which the defendant has appealed.

Prior to July 3, 1931, the defendant leased premises from the predecessor in interest of these plaintiffs for the purpose of conducting a "bootleg place" for the unlawful sale of intoxicating liquor. On that date he offered to renew the lease for the same purpose and the then owner agreed to these terms and entered into a written lease with the defendant whereby she let the premises for a period of five years ending August 1, 1936, at a monthly rental of $250. In November, 1933, following the repeal of the constitutional amendment prohibiting the sale of intoxicating liquor, defendant informed the lessor that he would abandon the business in which he was engaged and, with the written consent of the lessor, he assigned the lease to one Gammons and took from the lessor a satisfaction of a chattel mortgage which defendant had given as security for the payment of rentals due under the lease. The full rent for December, 1933, and January 1934, was paid, but Gammons paid but $50 for February, 1934, and vacated the premises during that month. At sometime during this period the lessor deceased and the plaintiffs herein succeeded as heirs to the interest. We therefore refer to them interchangeably as plaintiffs, lessors and landlords. After the default of Gammons the plaintiffs sued defendant in three separate actions in the municipal court for the rents due for February to May inclusive and secured judgments, which have been paid except that for the month of May. The premises remained vacant until October, 1934, when the plaintiffs re-entered and executed a new lease to a third party at a monthly rental of $125 for a term of years extending beyond the term of the lease to defendant.

The present action was commenced after the termination of the original lease and sought recovery for the loss of rents for the months of June to September, 1934, inclusive, at the charge fixed in the lease, and for the remainder of the term at $125 a month. Judgment went for plaintiffs on this basis for the months of August and September, 1934, and for the sum of $125 for the following months of the unexpired term.

[1] The appellant urges five separate grounds for a reversal of this judgment, some of which are divided into separate points of attack. We will endeavor to treat them in the manner stated. It is argued that there is a failure of proof of the allegations of the complaint because the appellant is charged with abandonment and the evidence shows that the assignee of the lessee abandoned. The appellant relies upon the evidence that the lessor gave her written consent to the assignment of the lease and that he had retired by agreement long prior to the actual abandonment of the lease; also that the full rental was paid for at least two months by the assignee and accepted by the lessor. But the respondents answer that the appellant in fact abandoned the lease prior to the assignment when he gave notice that he would not continue longer, but was going into the brewery business. They argued that consent to the assignment was forced upon them by these circumstances and was not freely and voluntarily given. The trial court found that the allegations of the complaint were true —that in December, 1933, the appellant "repudiated said lease and abandoned said premises." Though respondents' evidence is extremely weak, we are not able to say that the trial court could not draw the inference from all the facts and circumstances that appellant did in fact intend to abandon the lease when he made the assignment to an irresponsible assignee, and that such assignment was but a subterfuge to enable appellant to withdraw from the premises. But the undisputed evidence is that the premises were not abandoned at the time found by the trial court, either by the lessee or by the assignee, that the assignee was then in possession with the consent of the lessor who received the

full rent called for under the lease for two months after the alleged date of abandonment.

It is argued that there was a surrender of the original lease because of respondents' failure to give notice to the assignee or to the original lessee of their intention to relet the premises for their benefit. The complaint alleged that the respondents notified appellant in writing, on July 18, 1934, that they would relet the premises for the benefit of appellant and hold him for any deficiency in rent. The trial court found the allegation true. Appellant contends that the finding finds no support in the evidence. He points to the testimony of one of the respondents when asked if she gave such notice to appellant. She answered, "No." When asked if she gave such notice to the assignee of appellant she answered, "You will have to take that up with * * *" (her agents). When the agent was called and asked the same question he answered, "I personally did not." He was instructed to examine the books of the agency and to report back to the court if they disclosed that such notices were given. He failed to report to the court, and no other witness testified that any such notice was given to the appellant, or to his assignee in possession, and no evidence of such notice was produced. Respondents apparently concede that this is a correct statement of the record because they do not pretend that any evidence was taken in support of the finding. Their answer is broken into several heads in the nature of excuses for failure to prove the facts alleged which follow the direct statement that such proof was not necessary.

[2] First it is argued that, since the denial of the allegation was in this form: "not having any information sufficient wherewith to answer" the allegation must be deemed admitted, because the denial was not based upon lack of belief as well as lack of information. Cases are cited holding that such a denial is insufficient, but they are not applicable here because the case was tried on the understanding of the parties that the denials were sufficient to raise the issue; that the issue was in fact raised; and the evidence on that subject was taken without objection.

[3] Next it is argued that the institution of the three successive suits for rent against Allen in the municipal court was sufficient notice. These suits were brought to recover rent for the months of February, April and May, 1934. The only record of any of these actions which appears in the transcript is the reporter's transcript in case No. 63,309 which discloses that a trial was had in March, 1934. It does not appear when the other actions were tried, but the parties agree that they were brought to recover rents due for April and May of that year. The premises were relet in October 1, 1934, and that, presumably, is the date when the respondents took possession and asserted the right to hold appellant in damages. We are unable to follow respondents' argument that these actions were proof of the notice alleged in paragraph 5 of their complaint. To the contrary they would appear to be notice to appellant that respondents still held him to be primarily liable under the lease and that they had no intention of retaking the premises or of releasing him from any of the obligations under the lease.

[4] Finally it is argued that under the specific terms of the lease no notice was necessary. Portions of the lease are cited providing that if the lessee should default or abandon the premises "it shall be optional with the lessor to relet the said premises" and hold the lessee for any deficiency. Cases are then cited to the general purport that, when the lease specifically so provides, the lessor may take possession upon the default and abandonment of the lessee and maintain an action for the difference between the rent fixed in the lease and the sum received from a reletting. There is no quarrel with respondents on this score. The rule of these cases is freely admitted, but none has any application to the point at issue which is the failure to give notice.

Before discussing the cases cited by appellant on this point it is well to restate these pertinent facts: In December, 1933, the respondents gave their consent in writing to the assignment of the lease to Gammons: thereafter they accepted rents for three months paid either by Gammons, or in his behalf; they then sued appellant for three succeeding months' rent on his primary liability; in October, 1934, they reentered, without demand or notice to either Allen or Gammons, and relet the premises to a third party for a period beyond the term of the original lease. The case of Welcome v. Hess, 90 Cal. 507, 27 P. 369, 25 Am.St.Rep. 145, is closely related in its facts. There the plaintiff leased to defendants for five years, defendants took posses-

sion and paid rent for eight months, when they abandoned. Two months later, without notice, plaintiff took possession and relet for a new term of five years, which ran beyond the original term. In the action for damages because of the abandonment it was held that these acts of the lessor constituted an acceptance of the surrender of the lease. At page 514 of 90 Cal., at page 371 of 27 P., 25 Am.St.Rep. 145, the court says: "In taking possession, the landlord did not announce his intention to continue to hold the tenants. He relet without notifying the defendants that he should do so on their account. He relet for a period longer than the remainder of their term, thus showing plainly that he was acting in his own right, and not as their self-constituted agent. Under such circumstances, he cannot say that he did not accept the surrender."

The rule of the case is followed in Rehkopf v. Wirz, 31 Cal.App. 695, 696, 161 P. 285, 286, where it is said: "But a lessor who chooses to follow that course must in some manner give the lessee information that he is accepting such possession for the benefit of the tenant and not in his own right and for his own benefit. If the lessor takes possession of property delivered to him by his tenant and does so unqualifiedly, he thereby releases the tenant." These cases are cited with approval in Bernard v. Renard, 175 Cal. 230, 233, 165 P. 694, 3 A.L.R. 1076, and we have been directed to no authority holding to the contrary.

[5] A close examination of the record here shows that the respondents fully intended to surrender the lease when they took possession in October, 1934. The undisputed evidence is that the premises were leased at an excessive rental for the purpose of conducting a place for the sale of "bootleg" liquor; that the reasonable rental for the premises was $125 a month, or just one-half of that called for in the lease; that, when the prohibition amendment was repealed and "bootlegging" was no longer profitable, appellant told the lessors that he would have to quit; that the lessors thereupon voluntarily accepted a new tenant, and released appellant's chattel mortgage which was their only security for payment of the rent; that, when the new tenant failed to pay the rent, the lessors were forced to sue the appellant for three successive months. With these difficulties confronting them the lessors, in October, 1934, relet the premises for a rental of $125 a month, which was the reasonable rental value of the premises, and gave no indication of an intention to hold appellant to his liability under the lease until this action was filed in January, 1940. The respondents do not controvert any of these facts, nor do they deny that, after accepting the rent for the first three months following the assignment to Gammons, they no longer treated him as a party to the lease, gave him no notice of their reentry and reletting, and have not joined him as a party in this proceeding.

Because of these facts, and under the rule of the cases cited, the judgment must be reversed, and, as a new trial must follow, it becomes necessary to refer to some of the other questions raised in order that the trial may be confined to the proper limits.

[6-8] The lessors were not precluded from maintaining this action because they "elected to keep the original lease alive by having sued for rents after the assignee, not the lessee, abandoned." The three actions brought for rent were all commenced before the lessors took possession and relet the premises. They were the only form of action which could have been maintained at that time. This action for damages could not accrue until the term of the lease expired. Phillips-Hollman, Inc., v. Peerless Stages, Inc., 210 Cal. 253, 258, 291 P. 178; Dickinson v. Electric Corporation, 10 Cal.App.2d 207, 210, 51 P.2d 205. There can be no election of remedies when there is but one remedy available. This doctrine rests upon the principle of estoppel, and unless the two remedies are inconsistent and repugnant, and unless unfair or unjust detriment would result from the exercise of both, there can be no estoppel. Baumann v. Harrison, 46 Cal.App.2d 84, 115 P.2d 530.

[9] The question of the legality of the lease because its consideration was for an illegal purpose and against law and public policy is foreclosed by the judgments in the municipal court. Those actions rested upon the lease and the defense of its invalidity was a proper defense. Even though it does not appear that the defense was raised, it could have been, and the issue must here be deemed as res judicata. Price v. Sixth Dist. Agricultural Ass'n, 201 Cal. 502, 511, 258 P. 387; Andrews v. Reidy, 7 Cal.2d 366, 371, 60 P.2d 832; 15 Cal.Jur. p. 144. English v. English, 9 Cal.

2d 358, 70 P.2d 625, 128 A.L.R. 467; upon which appellant so strongly relies, is explained in Sutphin v. Speik, 15 Cal.2d 195, 99 P.2d 652, 101 P.2d 497, as an exception to the general rule and limited to default judgments. It has no application here because the former judgments were all actions upon the same contract, or primary liability, which forms the basis of the cause of action in this proceeding.

All that is said on this point applies equally to the defense now raised that the appellant was relieved of all liability under the lease by respondents' satisfaction of the chattel mortgage which he had given as security for payment of the rent charges.

The question of the bar of the statute of limitations as to the sum of $500 representing rent due for the months of August and September, 1934, does not need to be decided. The argument of respondents rests upon the claimed defect in the answer which pleaded section 337 of the Code of Civil Procedure as a bar, without designating the particular subdivision of the section applicable. This may be cleared by proper amendment of the answer if the appellant should then deem the issue to possess merit.

Other questions raised do not require discussion.

The judgment is reversed.

STURTEVANT and SPENCE, JJ., concurred.



49 Cal.App.2d 664

BALESTREIRI v. ARQUES.

Civ. 11852.

District Court of Appeal, First District, Division 2, California.

Feb. 11, 1942.

1. Maritime liens ⚖40

Where defendant had made repairs on a vessel for which he had not been paid and owner in defendant's presence told plaintiff, who was buying an interest in the vessel, that there were no liens on the vessel, and defendant remained silent and knowingly permitted plaintiff to act in reliance upon such representation, defendant was "estopped" to assert possessory lien for such repairs against plaintiff. Civ.Code, § 3051; Code Civ.Proc. § 1962, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

2. Judgment ⚖476

Where owner of vessel took vessel from lien claimant and on complaint of lien claimant was convicted of grand theft, sentence for which was suspended and probation granted, owner's subsequent action for declaratory relief to determine whether such lien existed was not barred as a "collateral attack" upon a judgment which had become final by reason of failure to appeal, since upon suspension of sentence and granting of probation there could be no "final judgment" and an appeal was precluded.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack" and "Final Judgment".

3. Judgment ⚖648

A party to a criminal proceeding is not precluded from raising in a subsequent civil case an issue raised and determined in the criminal proceeding and from having the court in such civil case render an independent judgment upon such issue.

4. Judgment ⚖648

Where owner of vessel was convicted of grand theft because he took vessel from one who claimed possessory lien against it, in owner's subsequent civil suit for declaratory relief to determine existence of lien, the issue of the existence of the lien was not "res judicata", since there were different parties to each proceeding.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

5. Appeal and error ⚖173(2)

Where existence of a lien claimed by defendant on a vessel was the issue at the trial in suit for declaratory relief, defendant could not, on appeal, for the first time urge the existence of another lien as a basis for reversal of a judgment against him.

Appeal from Superior Court, City and County of San Francisco; Warren V. Tryon, Judge Assigned.

Suit by G. Balestreiri against D. J. Arques for declaratory relief to determine whether a lien existed on a vessel, wherein defendant asserted a lien for repairs. From a judgment that no lien existed, defendant appeals.

Affirmed.

Erwin C. Easton and George Olshausen, both of San Francisco, for appellant.

William B. Acton, Charles H. Brennan, and O'Brien, Dibert & Acton, all of San Francisco, for respondent.

SPENCE, Justice.

In this action for declaratory relief, judgment was entered decreeing that defendant Arques had no possessory lien on the vessel "St. Mary" at the time that plaintiff took possession thereof on September 23, 1935. Defendant Arques alone appeals from said judgment and he will be hereinafter referred to as "defendant."

The parties dwell at length upon the background of this litigation but the essential facts may be briefly stated. The vessel in question was originally a towboat which belonged to one Coughlin and was named the "Oregon." In 1933, she ran upon a submerged pile in the Oakland Estuary and stove a hole in her bottom. She was patched and towed to the mud flats in Richardson Bay where she lay for some time. In 1934 she was taken to the shipyard of defendant in Sausalito and was repaired. The repairs were completed and a bill was presented but Coughlin was unable to make payment. Some time passed and in the spring of 1935, Coughlin and defendant agreed that the vessel should be sold. Plaintiff learned that the vessel was for sale and he inspected it with the thought that it might be converted into a purse seiner. Discussions took place between plaintiff, defendant, Coughlin and others at defendant's shipyard. Defendant represented that the vessel could be made into a purse seiner and Coughlin told plaintiff that if plaintiff could finance the necessary work he would transfer to plaintiff a half interest in the vessel. Plaintiff brought a representative of a marine engine company to the shipyard. Further discussions were had and said representative recommended that an engine costing about $18,000 should be installed. During said discussions, neither defendant nor Coughlin made any mention of the repairs which had been made by defendant for Coughlin in 1934 below the water line of said vessel. At one point in the discussions plaintiff asked Coughlin and defendant if Coughlin owed any money on the boat and Coughlin answered "that he didn't owe a dime on the boat—there was no lien." Defendant made no reply. Thereafter plaintiff entered into an agreement with Coughlin and the latter transferred to plaintiff a half interest in the boat with the knowledge of defendant.

In June, 1935, plaintiff, defendant and Coughlin met at the shipyard and a written agreement was entered into by the three men by which defendant agreed to do certain work on the hull of the boat for $4,300, of which $1,000 was to be paid on the execution of the agreement, $1,000 on July 1, and the balance was to be paid by notes over a period of time. The work was to be completed within thirty days after delivery of the engine. The engine was delivered on August 16. The two $1,000 payments were made as agreed. While the work was progressing plaintiff and Coughlin incorporated the Sardine Fishing Company and transferred the vessel to said corporation.

On September 20, 1935, and after the time agreed upon for the completion of the work had expired, a dispute arose when defendant made a claim for certain alleged "extras". The agreed work had not then been fully completed. Plaintiff was advised that the vessel could not leave the shipyard and that defendant would not complete the agreed work until the bill for extras had been approved. Plaintiff had arranged for other work to be done on the boat in San Francisco and was anxious to get all work completed as the fishing season had begun on August 15. Plaintiff offered to arbitrate the matter and to put up a bond to protect defendant against any valid claim but plaintiff refused to approve the bill for the alleged extras.

On September 23, 1935, plaintiff advised defendant that he was coming over to take the vessel to San Francisco on the afternoon high tide. A heated discussion followed plaintiff's arrival at the shipyard, but plaintiff finally took the boat during defendant's temporary absence. Thereupon defendant's counsel filed a libel in admiralty covering all claims for the 1935 repairs. Plaintiff filed a bond for the

release of the vessel and at the time of the approval thereof, mention was first made to plaintiff of an alleged claim for 1934 repairs.

Defendant then caused the arrest of plaintiff on a charge of grand theft upon the theory that plaintiff had wrongfully taken the vessel from the possession of defendant in violation of defendant's alleged possessory lien. People v. Cain, 7 Cal.App. 163, 93 P. 1037. Plaintiff was held to answer and was subsequently tried by a jury in the Superior Court of Marin County. The jury found him guilty but recommended leniency. The trial court granted probation upon condition that plaintiff give a bond securing defendant "against any detriment or loss for or on account of any valid claim of possessory lien which Donlon J. Arques may have had for money due him on the day the 'St. Mary' was taken from his possession, for work done or materials furnished said vessel." At the suggestion of the trial judge in the criminal proceeding, this action for declaratory relief was commenced by plaintiff shortly thereafter.

Plaintiff alleged the essential facts above set forth. He further alleged that the money alleged to be due to defendant was owing by Coughlin and not by plaintiff; that he did not know and could not ascertain "what lien, if any, said Arques had against said vessel on said September 23rd, 1935, nor the amount of any such lien"; that Coughlin, in the presence of defendant and with the knowledge and acquiescence of defendant, had represented to plaintiff that there were no liens of any kind against said vessel; and that plaintiff had acted in reliance upon said representation. Plaintiff prayed that the court enter a judgment "consistent with the rights of the parties hereto and determine amongst other things what liens, if any, existed in favor of said Arques against said vessel, on said 23rd of September, 1935."

Upon the trial, the only claim of lien asserted by defendant was the claim of lien arising out of the 1934 repairs. In his reply brief defendant states that "Coughlin was the sole debtor on that claim; that was the only claim involved in the criminal proceeding." In this action, the trial court found among other things that any money due defendant for repairs made in 1934 when said vessel was known as the "Oregon" was due from Coughlin and not from plaintiff; that Coughlin, in the presence of defendant and with the knowledge and acquiescence of defendant, had represented to plaintiff that there were no liens of any kind against said vessel in June, 1935; and that plaintiff had acted in reliance upon said representation. The trial court thereupon decreed, "That on said September 23, 1935, defendant, D. J. Arques, had no possessory lien on the vessel 'St. Mary' for work done thereon prior to July 1, 1934, and when defendant, J. H. Coughlin, was the sole owner thereof and said vessel was known as the 'Oregon';" and that plaintiff was not liable for said 1934 repairs.

[1] Defendant contends that the judgment is "contrary to law, and the evidence and the facts found." He points to the evidence and findings showing that defendant had made the 1934 repairs and had not been paid therefor. He therefore claims that he was entitled to a possessory lien on the vessel citing Civil Code, section 3051, and United States of Mexico v. Rask, 118 Cal.App. 21, at page 45 and following, 4 P.2d 981. It appears unnecessary to discuss plaintiff's contention that no possessory lien could have resulted from the making of the repairs to the vessel under the circumstances. Assuming, without deciding, that such possessory lien did result from the making of the 1934 repairs, it appears entirely clear under the evidence and findings that defendant was estopped to assert such lien against plaintiff by reason of his conduct in knowingly permitting plaintiff to act in reliance upon the representation that no such lien existed at the time that plaintiff entered into his agreement with Coughlin and entered into his agreement for the 1935 repairs with defendant. Code of Civ.Proc. sec. 1962, subd. 3; Jaekle v. Halton, 25 Cal. App.2d 706, 78 P.2d 441; Shull v. Doerr, 110 Cal.App. 613, 294 P. 464; 19 Am.Jur. 667; 10 Cal.Jur. 625, et seq.

[2-4] Defendant further contends that "The trial court violated the uniform law of this state herein, to-wit: It collaterally attacked and set aside a final judgment." The so-called "final judgment" to which defendant refers is the order granting probation to plaintiff in the criminal proceedings. Defendant points to the fact that plaintiff took no appeal therefrom and he claims that said "final judgment" was necessarily based upon and conclu-

sively established the existence of a possessory lien and that the judgment herein is a "collateral attack" upon said judgment of the Superior Court of Marin County. We find no merit in defendant's contention. The Superior Court of Marin County suspended the imposition of sentence and granted probation to plaintiff. There was therefore no "final judgment" of conviction and plaintiff had no right of appeal. In re Phillips, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644. But even assuming that there had been a "final judgment" of conviction in the criminal proceeding, we know of no rule of law which would have prevented plaintiff from again raising, in a subsequent civil action between himself and defendant, any issues previously presented and passed upon in the criminal proceeding and having the court, in the subsequent civil action, render its independent judgment upon such issue. The issues previously determined in the criminal proceeding were not res judicata because the parties to the civil action were different from the parties to the criminal proceeding (15 Cal.Jur. 114, sec. 178; 30 Am.Jur. 1002, sec. 290) and no question of collateral attack was involved. People v. Majado, 22 Cal.App. 2d 323, 70 P.2d 1015, cited by defendant, involved a second criminal prosecution of the defendant for failure to provide for his minor child and the same parties were involved on both prosecutions.

Finally, defendant contends that plaintiff "was liable whether he has been convicted of a felony or not or whether he knew of appellant's rights or not." Defendant cites and relies upon the rules relating to conversion as stated in Byer v. Canadian Bank of Commerce, 8 Cal.2d 297, at page 300, 65 P.2d 67. But here plaintiff was not defending his act of taking possession of the vessel merely upon the ground of his ignorance of defendant's alleged rights. Plaintiff was claiming that his ignorance of defendant's alleged rights was the result of conduct on the part of defendant which estopped defendant from asserting said alleged rights against plaintiff. The rules stated in the cited case are therefore not in point here.

[5] In conclusion, it should be stated that it is suggested in defendant's briefs that, in any event, defendant had a possessory lien on September 23, 1935, by reason of the 1935 repairs. This claim was admittedly not presented in the criminal proceeding nor was it presented in the trial of this action. The parties proceeded upon the theory that the only issue to be determined by the trial court was what possessory lien, if any, defendant had on September 23, 1935, by reason of the 1934 repairs. This is made clear by the opening statement of defendant's counsel where he stated to the trial court that defendant claimed a possessory lien on September 23, 1935, by reason of the 1934 repairs as set forth in paragraph two of the complaint and "that is all we claim under." Perhaps defendant's failure to assert a claim of possessory lien by reason of the 1935 repairs may be explained by the fact that he had previously filed a libel in admiralty based upon said 1935 repairs or by the fact that all cash payments provided for in the written agreement for said 1935 repairs had been made by plaintiff to defendant and the balance of the agreed price was to be paid over a period of time, or by the fact that defendant had failed to complete the work within the time provided in the written agreement. At any rate, defendant may not now change the theory upon which the cause was presented to the trial court in order to obtain a reversal of the judgment on this appeal. Ernst v. Searle, 218 Cal. 233, 235, 240, 22 P.2d 715; 2 Cal. Jur. 237, sec. 68.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem., concurred.

49 Cal.App.2d 694

DARCY v. MOORE et al.

Civ. 11961.

District Court of Appeal, First District, Division 1, California.

Feb. 13, 1942.

1. Criminal law ⇐1075

Under statute, no duty is imposed on controller and assistant controller to authorize payment of the reporter's transcript until ordered to do so by the trial court, and no such order can properly be made until the reporter has performed his services. Code Civ.Proc. § 274.

2. Criminal law ⇐1104(7)

Special demand for additional transcript and order made pursuant thereto were ineffectual, where demand was not filed within five days after giving notice of appeal, as required by court rule, but that fact did not excuse reporter's refusal to furnish additional transcript under original and timely demand for additional transcript. Rules of the Supreme Court and District Courts of Appeal, rule 2, § 7.

3. Criminal law ⇐1104(3)

Proceedings on voir dire examination of prospective jurors in perjury prosecution furnish a legal basis for assignment of error, and court's rulings are within scope of statute dealing with duties of phonographic reporters for superior courts, and defendant is entitled to a transcript thereof, for purposes of appeal, provided the correctness of any ruling might serve as a proper ground of appeal. Code Civ.Proc. § 269; Pen.Code, § 1059.

4. Jury ⇐79(3)

The right of a defendant in a criminal prosecution to a fair and impartial jury does not give the defendant the right to have any particular juror or jurors sit in his case.

5. Criminal law ⇐1166½(8)

The erroneous disallowance of a challenge to jury panel for cause in a criminal prosecution is harmless, if it does not appear that an objectionable juror was forced on the defendant.

6. Criminal law ⇐1035(5)

If a defendant in a criminal prosecution did not exhaust his peremptory challenges to jury panel, he cannot complain of error in disallowance of a challenge for cause.

7. Criminal law ⇐1166½(8)

The single fact that erroneous denial of challenges to jury panel for cause may compel defendant to exercise peremptory challenges on such jurors, thereby reducing his peremptory challenges to that extent, does not constitute ground for reversal.

8. Criminal law ⇐1104(3)

Defendant in perjury prosecution was not prejudiced by exclusion of veniremen excused on stipulation after examination on voir dire, those eliminated on challenges for cause by the people and by defendant, and those excused peremptorily by the people, some of them after being unsuccessfully challenged for cause, and hence was not entitled to a transcript of the voir dire examination of any of such veniremen. Code Civ. Proc. § 269; Pen.Code, § 1059.

9. Criminal law ⇐1104(3)

Where defendant in perjury prosecution requested and was denied additional peremptory challenges on voir dire examination, he was entitled to urge on appeal the disallowance of challenge for cause to juror who was forced on defendant after defendant had exhausted his peremptory challenges and to that end was entitled to a transcript of that juror's voir dire examination, and also a transcript of the voir dire examination of two veniremen who defendant subsequently excused peremptorily. Code Civ.Proc. § 269; Pen.Code, § 1059.

Mandamus proceeding by Sam Darcy against Charles Moore, phonographic reporter, Harold J. Boyd, controller, and Harry Ross, assistant controller, to compel Charles Moore to furnish additional portions of transcript and to compel Harold J. Boyd and Harry Ross to pay for the additional portions of the transcript. On demurrer by Harold J. Boyd and Harry Ross.

Demurrer sustained, and peremptory writ issued against Charles Moore.

Andersen & Resner, of San Francisco, for petitioner.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for respondents Boyd and Ross.

KNIGHT, Justice.

The petitioner, Sam Darcy, was found guilty by a jury in the Superior Court in and for the City and County of San Francisco of the crime of perjury; and after the denial of motions for arrest of judgment and new trial pronouncement of judgment was suspended and he was released on probation. Thereupon he gave notice of appeal, and certified transcripts on appeal have been filed by the clerk and the phonographic reporter. The clerk's transcript was filed herein on October 15, 1941, and the reporter's transcript on November 4, 1941. The latter contains approximately 900 pages and covers the trial court proceedings, including the testimony, had and taken subsequent to the impanelment of the jury. The transcript was served on counsel for petitioner on October 29, 1941, and certified by the trial judge on November 4, 1941. On the following day petitioner filed this proceeding in mandamus. The question presented thereby is whether petitioner is entitled to have transcribed also and made part of the reporter's transcript the proceedings relating to his challenge to the panel of jurors, and the voir dire examination of "all prospective jurors and jurors," together with all objections thereto and rulings of the court thereon. The relief sought by the petition for the writ is that the respondent Charles Moore, phonographic reporter of the trial court, be compelled to furnish the additional portions of the transcript above mentioned, and that the respondents Harold J. Boyd and Harry Ross, controller and assistant controller, respectively, of said city and county, be compelled to pay the reporter for said additional portions of the transcript.

[1] The respondents Boyd and Ross filed a demurrer to the petition for the writ, one of the grounds thereof being that as to them the petition fails to state facts sufficient to constitute a cause of action. It is apparent that upon that ground the demurrer should be sustained without leave to amend, for as shown by section 274 of the Code of Civil Procedure there is no duty imposed upon them to authorize the payment of a reporter's transcript until ordered so to do by the trial court, and obviously no such order can properly be made until the reporter has performed his services.

The respondent Moore has not appeared in person or by attorney; nor has he filed any sort of a pleading in opposition to the granting of the peremptory writ; consequently, in order to determine whether legal justification exists for his failure to furnish the additional transcript, or any portion thereof, it has been necessary to examine the state of the record as it is disclosed by the transcripts on file, as well as to consider the uncontroverted allegations of the petition for the writ.

It appears therefrom that the controversy arises out of the following situation: The challenge to the panel and the exceptions thereto were in writing. The issues raised thereby were heard on July 14, 1941, and the challenge was denied on July 15th. The impanelment of the jury began on July 16th, continued up to and including July 25th, on which date the jury was completed and sworn to try the cause. The introduction of testimony began on July 26th and the verdict finding the petitioner guilty was returned on August 6th. Section 7 of rule II of the Rules of the Supreme Court and District Courts of Appeal provides in part that within five days after the giving of notice of appeal an appellant must file an application to the trial court stating the general grounds of appeal, the points on which he relies and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon; that within two days thereafter the court shall make an order directing the reporter to transcribe such portions of his notes as in the court's opinion are necessary to fairly and fully present the points relied upon; and that if within the two days the court fails to make the order, the notes requested shall be transcribed without such order.

The notice of appeal herein was given on September 18, 1941, and on the same day petitioner filed a statement of grounds of appeal and a request for a transcript. Among the fifteen grounds of appeal stated were that the trial court committed error in overruling petitioner's challenge to the panel and in overruling his challenges for cause to individual jurors; and he demanded a transcription of the phonographic notes covering "the entire record," including "all testimony taken on the challenge to the entire panel, together with the voir dire examination. * * *" The trial court failed to make any order in response to such demand; and on October 8th, which it will be noted was twenty days after the filing of the notice of appeal, pe-

titioner filed a "Special Demand for Phonographic Transcript on Voir Dire of Jury" wherein he demanded "a full and complete copy of the phonographic transcript of all the proceedings in the above entitled cause having to do with the examination of prospective jurors and jurors, together with all the objections and rulings of the court thereon; and also for a transcript of the proceedings on the matter of challenges to the entire jury panel." Thereupon and on the same day Judge George W. Schonfeld, the trial judge, made and signed an order "* * * that said matters described in said Special Demand be transcribed and written up by * * * the shorthand reporter * * * as demanded by defendant."

The petition for the writ of mandamus is based entirely upon said "Special Demand" and the order made pursuant thereto, no reference being made to the original demand filed on September 18th; and in this connection the petition goes on to allege that subsequent to the making of said order of October 8th "Hon. Frank Deasy, the Presiding Judge of said Superior Court, ex parte, countermanded and cancelled said order for said transcription"; and that thereupon the phonographic reporter refused to comply with said order for the reason that on account of Judge Deasy's ex parte order the controller and the assistant controller refused to authorize the payment of the additional transcript. Neither a copy of Judge Deasy's order, nor the substance of any portion of it, is set forth in the record, nor does it anywhere appear whether said order was in writing, nor under what circumstances it was made.

[2] It is evident that the second or so-called "Special Demand" for transcript and the order made pursuant thereto are ineffectual for any purpose, because said demand was not filed within five days after the giving of the notice of appeal. People v. Estrada, 24 Cal.App.2d 341, 74 P.2d 1084; People v. Lewis, 219 Cal. 410, 27 P.2d 73; People v. Nichols, 114 Cal.App. 136, 299 P. 752; People v. Schroeder, 112 Cal. App. 550, 297 P. 105. But such fact does not serve as legal excuse for refusing to furnish the additional transcript for the reason that the original statement of the grounds of appeal and demand for transcript filed September 18th are legally sufficient to comply with the requirements of said rule, and include the subject matter at issue.

[3] At the oral argument the point was made in opposition to the issuance of the writ that a transcription of the additional portions of the record demanded would cover "matter or material other than that reported by said reporter as prescribed in paragraph one of section 269" of the Code of Civil Procedure, and that therefore in no event would the cost of the transcription constitute a legal charge against the city and county. Code Civ. Proc., § 274. Section 269 provides, however, that among the matters required to be reported are "the rulings of the court"; and since the proceedings relating to challenges to the panel and to individual jurors take place, and the trial court's rulings thereon are made, after the commencement of and during the course of the trial, it would seem clear that such proceedings and rulings fall within the scope of the provisions of said section 269; and that therefore an appellant is entitled to a transcript thereof, provided the correctness of any such ruling may serve as a proper ground of appeal.

An adverse ruling on a challenge to the panel doubtless constitutes legal basis for an assignment of error, for if the assignment be sustained it may call for reversal of the judgment. It follows that petitioner is entitled to a transcript of the proceedings relating to the denial of his challenge to the panel. However, such a challenge "can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury in civil actions, or on the intentional omission of the sheriff to summon one or more of the jurors drawn", Penal Code, § 1059; and the clerk's transcript filed herein contains a copy of the written challenge interposed by petitioner, the affidavit in support thereof, and the objections to the challenge filed by the district attorney; also the trial court's rulings thereon. Consequently the reporter's transcript should include only such evidence and proceedings as are not set forth in the clerk's transcript.

[4-7] As to the demand for a transcription of the voir dire examination of "all prospective jurors and jurors," it is well settled that the right of a defendant to a fair and impartial jury does not give him the right to have any particular juror or jurors sit in his case (15 Cal.Jur. 324; 8 Cal.Jur. 608; People v. Howard, 211 Cal.

322, 295 P. 333, 71 A.L.R. 1385; People v. Shannon, 203 Cal. 139, 263 P. 522; People v. Rambaud, 78 Cal.App. 685, 248 P. 954); and that the erroneous disallowance of a challenge for cause is harmless if it does not appear that an objectionable juror was forced upon the defendant. People v. Schafer, 161 Cal. 573, 119 P. 920. If he had not exhausted his peremptory challenges he cannot complain of the error, for, if he afterwards peremptorily challenged the objectionable juror he is not prejudiced; and if he did not do so, he cannot complain of an error, the injurious effects of which he has suffered, if at all, only by reason of his acquiescence in or failure to avoid it when he had the means and opportunity to do so. 8 Cal.Jur. 609. Nor does the single fact that the denial of challenges for cause may compel the defendant to exercise his peremptory challenges upon such jurors, thereby reducing his peremptory challenges to that extent, constitute ground for reversal. People v. Craig, 196 Cal. 19, 235 P. 721. As stated, in order to constitute legal basis for assignment of prejudicial error it must appear that an objectionable juror was forced upon the defendant; that is to say, it must appear that he has not only exhausted all of his peremptory challenges, but that he has in some appropriate manner manifested his dissatisfaction with the jury as completed. People v. Schafer, supra; People v. Kromphold, 172 Cal. 512, 157 P. 599; People v. Craig, supra; People v. Rambaud, supra.

[8] The clerk's transcript filed herein discloses the following situation: Numerous veniremen were excused on stipulation after examination on voir dire; others were eliminated on challenges for cause by the People and by the petitioner; and ten were excused peremptorily by the People, some of them after being unsuccessfully challenged for cause. Obviously petitioner is not entitled to a transcription of the voir dire examination of any of the above-mentioned veniremen, because he was in no manner prejudiced by their exclusion. The clerk's transcript further shows that the trial court held disqualified and excused all but three of the veniremen challenged for cause by petitioner, and that petitioner exercised eight of the ten peremptory challenges allowed him by law against veniremen who had not been challenged by him for cause. The three veniremen unsuccessfully challenged by him for cause were Joseph F. Hart, Mrs. Louise Cook, and Miss Elsie Burnett; and subsequently Mr. Hart and Mrs. Cook were excused by petitioner peremptorily. His tenth peremptory challenge was exercised against Mrs. Cook; whereupon he requested the allowance of additional peremptory challenges, but his request was denied. Thereafter but one additional venireman was examined on voir dire, and he was passed by both sides without any objections being made as to his qualifications. "Thereupon," so the clerk's transcript recites, "the following twelve talesmen having been favorably passed by respective counsel, and no objections or further challenges made thereto, were sworn and impanelled as the jury to try the said cause. * * *"

[9] Since petitioner requested and was denied additional peremptory challenges, he is entitled to urge on appeal the point of the alleged erroneous disallowance of his challenge for cause to the single juror who was forced upon him after he had exhausted his peremptory challenges, namely, Miss Burnett, and to that end is entitled to a transcript of her voir dire examination. But whether in any event the denial of his challenges for cause to veniremen Joseph F. Hart and Mrs. Cook, whom he subsequently excused peremptorily, could have operated to his prejudice presents a question which should be considered and determined on the hearing of the merits of the appeal; therefore in order that the point may be fairly and fully presented, it would seem that a transcription of the voir dire examination of those two veniremen should also be included in the reporter's transcript.

In accordance with the views above expressed, it is ordered that the demurrer of the respondents Boyd and Ross be and the same is hereby sustained without leave to amend, and that a peremptory writ of mandate issue against the respondent Moore directing him to furnish an additional transcript containing (1) all testimony and proceedings had or taken in the trial court (not included in the clerk's transcript) relating to the hearing and determination of the challenge to the panel; (2) the voir dire examination of Miss Elsie Burnett, Joseph F. Hart, and Mrs. Louise Cook.

PETERS, P. J., and WARD, J., concurred.

JOHNSTON et al. v. LANDUCCI.

Civ. 2689.

District Court of Appeal, Fourth District, California.

Feb. 17, 1942.

Rehearing Denied March 18, 1942.

Hearing Granted April 16, 1942.

1. Vendor and purchaser ⇐214(4)

In determining whether an assignment of purchaser's interest in a contract to purchase land, which was expressly made subject to approval of original vendors, was effective to pass any interest in the contract without vendors' approval so as to constitute consideration for a note given by assignee to assignor secured by an assignment of assignee's land contract interest in other land, the language of the assignment must be considered in connection with contract provision forbidding an assignment without consent of the vendors.

2. Vendor and purchaser ⇐214(2)

Contract to purchase land may be assigned in the absence of any agreement to the contrary, but where contract expressly provides otherwise, the intention of the parties will be enforced by the court.

3. Vendor and purchaser ⇐214(2)

A provision of contract to purchase land, prohibiting the assignment of contract, may be waived by the express agreement or by the conduct of the parties.

4. Landlord and tenant ⇐76(3), 104

Where a lease of realty contains a covenant not to assign, a breach of such covenant renders the assignment voidable and not void, the lessor having an option to forfeit the lease which must be exercised according to law.

5. Landlord and tenant ⇐112(1)

Where lessor fails to exercise his option to forfeit lease for breach of covenant therein contained not to assign the lease, and permits the assignee to act to his prejudice, lessor is "estopped" from forfeiting the lease, but where lessor does not in any manner consent to assignment, the assignment is not effective.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

6. Vendor and purchaser ⇐214(2)

Assignment by purchaser of his interest in contract to purchase land, which expressly prohibited assignment without vendor's consent, conveyed nothing to assignee in the absence of vendor's consent, but all the interest of the purchaser under such contract remained the property of purchaser, since requirement of the approval of original vendor constituted a restriction as to when and under what circumstances the assignment should take effect and operate as a transfer.

7. Vendor and purchaser ⇐214(4)

Where assignment of purchaser's interest in contract to purchase land, which expressly prohibited assignment thereof without the consent of vendor, was ineffective to convey any interest to assignee because made without original vendor's consent, such assignment constituted no "consideration" for note given by assignee to assignor secured by an assignment of assignee's land contract interest in other land.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by E. E. Johnston and others against Olive Landucci to quiet title to realty, wherein the defendant filed a cross-complaint claiming an equitable lien upon a portion of the realty. From a judgment quieting plaintiff's title subject to defendant's lien upon a portion of the realty and foreclosing the lien, plaintiffs appeal.

Judgment reversed.

David E. Peckinpah and L. N. Barber, both of Fresno, for appellants.

G. L. Aynesworth and Samuel F. Hollins, both of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title to certain land in Fresno County. The defendant filed a cross-complaint claiming an equitable lien upon a portion of the property through an assignment from Arthur F. Johnston as security for a note for $9,000 given by Arthur F. Johnston to A. E. Landucci. Want of consideration for the note and assignment was set up as a defense to the cross-complaint. The court found that this note was executed and delivered in consideration of an assignment from Landucci to Arthur F. Johnston of another contract for the purchase of certain lands in Merced Coun-

ty. A judgment was entered quieting the plaintiff's title but subject to defendant and cross-complainant's lien upon a portion of the property and foreclosing that lien. From this judgment the plaintiffs have appealed.

The appellants are husband and wife, and Arthur F. Johnston is their adult son. In 1928, E. E. Johnston and Arthur F. Johnston purchased on contract from Miller & Lux certain real property in Fresno County, of which the land here involved and ordered to be sold is the east one-half. In 1931, these vendees, by written agreement, divided their interests in the land thus being purchased and agreed that E. E. Johnston should take the west half and Arthur F. Johnston the east half. In 1938, the purchase payments having been completed, Miller & Lux deeded the entire property to E. E. Johnston and Arthur F. Johnston. On February 27, 1939, Arthur F. Johnston quitclaimed his interest in the property to his mother, Viola Johnston.

In the meantime, and on February 2, 1931, A. E. Landucci purchased on an instalment contract from Miller & Lux certain land in Merced County. On that same day, Landucci entered into a written contract to sell that land on somewhat different terms to Arthur F. Johnston, who took possession and farmed the land that year.

In November, 1931, Arthur F. Johnston found himself unable to finance the farming of the Merced land and to make the payments called for by his contract with Landucci for the purchase of that land. About that time he entered into an escrow for the purpose of trading his interest in the Merced land for a building in the city of Fresno, owned by one Imperatrice. That deal finally fell through and that trade was never completed. For the purposes of that trade, however, Arthur F. Johnston desired to obtain an assignment from Landucci to himself of the contract under which Landucci was purchasing the Merced property. To this end he made an arrangement with Landucci in November, 1931, whereby Landucci delivered to him the contract under which Landucci was purchasing the Merced land from Miller & Lux together with a form of assignment thereof, as hereinafter described, and Arthur F. Johnston executed and delivered to Landucci a note for $9,000 and, as security therefor, an assignment of Johnston's interest in the land in Fresno County.

The contract under which Landucci was purchasing the Merced land from Miller & Lux contained this provision: "Neither this contract nor any interest therein shall be assignable without the written consent of the seller." Attached to this contract is a form of assignment which was signed by Landucci and acknowledged by him on November 25, 1931. It purports to assign all of Landucci's right, title and interest in the contract, including the right to demand and receive a deed, to Arthur F. Johnston, followed by the words "This assignment is subject to the approval of Miller & Lux, Incorporated." It appears that this contract and this assignment were delivered to Arthur F. Johnston on November 25, 1931, and at the same time the note and assignment of the other contract, as security therefor, were delivered by Arthur F. Johnston to Landucci's attorney. The consent of Miller & Lux to the assignment from Landucci to Arthur F. Johnston, which is attached to the contract for the Merced land, was never obtained and, so far as the record here shows, nothing further was done toward performing or completing the terms of that contract. Landucci died on May 9, 1932, and his widow, the respondent herein, has succeeded to his interest so far as material here. While the $9,000 note was payable in five annual instalments, the first of which came due on December 1, 1932, no attempt to collect any part thereof was made prior to the filing of the cross-complaint in this action, which action was filed on March 24, 1939.

[1] The appellants' sole contention is that there was no consideration for the $9,000 note and the security therefor, and that the court's finding to the effect that a good consideration for said note existed in the execution and delivery by Landucci to Arthur F. Johnston of an assignment of the contract under which Landucci was purchasing the Merced land from Miller & Lux is without support in the evidence or in law. The respondent contends, on the other hand, that this assignment, although made "subject to the approval of" the original vendor, was not a conditional assignment and did not create a condition precedent or subsequent, or constitute a covenant on the part of Landucci to procure the approval of the vendor to such a transfer; that this was a completed and effective assignment which, with the delivery of the instruments, transferred Landucci's interest

in the land to Johnston; and that the qualifying words in the assignment did not make it ineffective, but merely imposed a burden which was assumed by the assignee. There is no evidence of any consideration for this note other than the execution and delivery of the purported assignment to Johnston of Landucci's interest in this contract, and no other consideration was found by the trial court. The question is squarely presented, therefore, as to the legal effect of the language used in that assignment and as to whether the same became effective or passed any interest to Johnston. If that assignment did not become effective, Johnston neither received anything nor assumed the burden of obtaining the approval of the vendor. The language of this assignment must, moreover, be considered in connection with the provision of the contract itself, forbidding an assignment without the consent of the seller.

[2-5] While contracts of this nature may be assigned in the absence of any agreement to the contrary it has long been recognized that this is not true where the contract expressly provides otherwise, in which case the intention of the parties will be enforced by the courts. La Rue v. Groezinger, 84 Cal. 281, 24 P. 42, 18 Am. St.Rep. 179. Of course such a provision may be waived by the express agreement or by the conduct of the parties. Davis v. Rawhide Gold Min. Co., 15 Cal.App. 108, 113 P. 898. With respect to leases of real property it is well settled that a breach of a covenant not to assign the lease makes an assignment voidable and not void, the lessor having an option as to whether he will forfeit the lease, which option he must exercise according to law. Buchanan v. Banta, 204 Cal. 73, 266 P. 547. Where the lessor fails to exercise this option and permits the assignee to act to his prejudice the lessor is estopped from forfeiting the lease. Standard Oil Co. v. Woolner, 113 Cal.App. 66, 298 P. 77. However, where the landlord does not in any manner consent, the assignment is not effective. Farnum v. Hefner, 92 Cal. 542, 28 P. 602.

[6] In contracts for the sale and purchase of real estate the validity of a covenant forbidding an assignment without the consent of the seller has been generally recognized. Shively v. Semi-Tropic L. & W. Co., 99 Cal. 259, 33 P. 848; Stevinson v. Joy, 164 Cal. 279, 128 P. 751; Laguna Land, etc., Co. v. Greenwood, 92 Cal.App. 570, 268 P. 699. It logically follows that the attempted assignment of such a contract is ineffective and conveys nothing to the assignee in the absence of the consent of the vendor, or of matters of estoppel by reason of which his formal consent becomes unnecessary. This has been recognized in at least two cases in this state. In Los Angeles, etc., Bank v. Northrup, 120 Cal.App. 677, 8 P.2d 528, where a vendor had attempted to sell his interest in a contract which provided that no assignment thereof should be valid in the absence of the written consent of the vendor, and where such consent had not been obtained, it was held that the purported assignment was not valid and that the assignee had acquired no rights thereunder. The effect of the holding there made is that the assignment was ineffective for any purpose and conveyed nothing to the assignee. The case of Whitten v. Young, 14 Cal.App.2d 299, 58 P.2d 167, involving a lease and option to purchase, is to the same effect, it being pointed out that the record disclosed no rights which had accrued to the claimant in the absence of the consent which was required. Where a contract is assigned in violation of a clause forbidding such assignment the contract still remains the property of the assignor. Burck v. Taylor, 152 U.S. 634, 14 S.Ct. 696, 38 L.Ed. 578.

[7] Applying these rules to the instant case it must be held that the contract under which Landucci was purchasing the Merced County Land, and all interests of the vendee under such contract, remained the property of Landucci, and that Johnston received nothing by virtue of the purported assignment. Similarly, Landucci suffered no detriment because he still owned the contract and all rights thereunder. The assignment was never completed. This would have been the legal effect if Landucci had executed an absolute assignment. Instead of doing this, he made his assignment "subject to the approval" of the vendor. This rather clearly indicates an attempt to comply with the requirement of the contract rather than an intention to make a complete assignment in disregard thereof. In other words, the wording of the assignment, reasonably construed, constitutes a limitation upon when the assignment shall become effective rather than a mere exception as to the amount of interest which is to be conveyed, or the setting forth of a burden which is to be assumed by the assignee. It is not a condition or covenant as to something that is immediately assumed by the assignee, but it is a restriction or limitation as to when and

under what circumstances the assignment itself shall take effect and shall operate as a transfer. Under the circumstances here appearing this assignment was incomplete and never became effective. It follows that the court's findings to the effect that the assignment of this contract was valid, and that it constituted a good consideration for the note in question, are not supported by the evidence.

For the reasons given, the judgment is reversed.

MARKS and GRIFFIN, JJ., concurred.



49 Cal.App.2d 720

PEOPLE v. SMITH.

Cr. 3529.

District Court of Appeal, Second District, Division 1, California.

Feb. 17, 1942.

Hearing Denied March 19, 1942.

1. Criminal law ⇐1159(4)

In prosecution for violating the statute regarding crimes against children, testimony of eight-year-old prosecuting witness regarding time consumed in walking to place where crime took place was not so highly improbable as to be unbelievable so as to render it insufficient to support the conviction, where it did not appear from the record that the witness made more than an estimate of time. Pen.Code, § 288.

2. Criminal law ⇐1159(2)

Verdict of jury supported by evidence must prevail in absence of prejudicial error.

3. Infants ⇐20

Evidence supported conviction for violation of statute penalizing crimes against children. Pen.Code, § 288.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Alexander Smith was convicted of violating the statute regarding crimes against children, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was found guilty by a jury of two counts of violating section 288 of the Penal Code and appeals from the judgment that followed.

[1] The alleged victim was a girl of the age of eight years. The sole contention on appeal is, in the words of appellant, that the girl's story is "so highly improbable as to be unbelievable" and hence is insufficient as a matter of law to support the judgment.

Defendant, who, it appears from the record, had been injured, had not completely recovered and according to one of the arguments relied on was "sick and crippled." The record reveals that appellant was a neighbor of the victim and on the day in question met her in a nearby store where he bought her some ice cream. According to the child, they walked down the road and eventually stopped in a ravine where the alleged acts took place.

It is appellant's contention that the story is untrue principally because the distance over a country road was too far and too difficult to have been traveled by a man in a "sick and crippled" condition; that is, according to appellant's argument 2½ miles in 1½ hours. Appellant arrives at these figures by a process of calculation, the details of which need not be recited. It is sufficient to note that it does not appear from the record that the little girl made more than an estimate of time.

[2, 3] The defendant testified at the trial and the jury, which had the advantages incident to its opportunity, heard and saw all of the witnesses. That its verdict must prevail in the absence of prejudicial error, is too well settled to require citation of authority. There are no such errors in the record. Moreover, from an unprejudiced standpoint, the record refutes appellant's contention that the testimony of the prosecutrix is "so inherently improbable as to amount to no evidence of guilt whatsoever."

The judgment is affirmed.

YORK, P. J., and WHITE, J., concurred.

49 Cal.App.2d 722

KNICKERBOCKER v. REDLANDS HIGH SCHOOL DIST. et al.

Civ. 2941.

District Court of Appeal, Fourth District, California.

Feb. 17, 1942.

Hearing Denied April 16, 1942.

1. Schools and school districts ⇐141(5)

Written notice of dismissal of probationary school teacher provided for by statute is "mandatory". School Code, § 5.681.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

2. Schools and school districts ⇐141(5)

The serving of written notice of dismissal of probationary school teacher is purely "ministerial". School Code, § 5.681.

See Words and Phrases, Permanent Edition, for all other definitions of "Ministerial".

3. Schools and school districts ⇐141(5)

Board of trustees of school district had a right to decide not to re-employ probationary school teacher without giving her an opportunity to be heard.

4. Schools and school districts ⇐20

The fundamental purpose of legislation regulating education is based on the consideration of the welfare and best interests of the child and must not be lost sight of by court in construing statutes dealing with the educational system.

5. Schools and school districts ⇐141(5)

A deliberate decision of board of trustees of school district not to re-employ probationary school teacher would not be set aside by a construction of statute providing for the giving of notice of dismissal which construction was not required by language of statute. School Code, § 5.681.

6. Schools and school districts ⇐141(5)

Where board of trustees unanimously adopted resolution not to re-employ probationary school teacher and authorized superintendent of high school district who was the chief executive officer of the board to send notice of termination to the teacher and superintendent wrote a letter to the teacher advising her of the action taken by the board, superintendent's letter was sufficient "notice in writing" under the Code by the governing board to the probationary school teacher that her services would not be required for the ensuing year. School Code, §§ 5.500, 5.681.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice in Writing".

7. Schools and school districts ⇐57

Generally notice of a special meeting of board of trustees of school district may be "waived" by the persons entitled to receive it, since notice is for benefit of members of board rather than public and where all members of board are present and participate in a special meeting they may take official action notwithstanding irregularity or insufficiency of notice of special meeting.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

8. Schools and school districts ⇐57

Where there were two vacancies in board of trustees of school district and notice of special meeting of board of trustees was not given as required by statute but three trustees attended special meeting and unanimously adopted resolution not to re-employ probationary school teacher, meeting was not invalid because of failure to give notice or because of fact that there were only three trustees in office at time of meeting and resolution adopted by the board was effective to terminate the employment of the probationary teacher. School Code §§ 2.1092, 5.681.

Appeal from Superior Court, San Bernardino County; Frank A. Leonard, Judge.

Proceeding for writ of mandate by Lulu Knickerbocker against Redlands High School District and others. From a judgment for the defendant, plaintiff appeals.

Affirmed.

Fred A. Wilson, of San Bernardino, for appellant.

Jerome B. Kavanaugh, of San Bernardino, for respondents.

SCHOTTKY, Justice pro tem.

Petitioner and appellant filed a petition for a writ of mandate ordering the respondent Board of Trustees of Redlands High School District to restore petitioner to the position of an employee of said district as a teacher of commercial subjects

in said high school, and to permit her to perform her duties as such employee for the school year of 1940-1941, and also to pay petitioner the salary accrued for the school year 1940-1941.

The respondent board of trustees filed an answer setting forth that petitioner was served with a notice of termination of employment in the manner provided by the School Code of California and that she ceased to be an employee of respondent district prior to the school year 1940-1941.

The trial court found substantially that until the first day of July, 1940, respondents Cope, Hentschke and Cole constituted the Board of Trustees of Redlands High School District; that on April 30, 1940, at a meeting of said board of trustees, all members of said board being present, and having been notified of said meeting, the purpose for which said meeting was called being known and acquiesced in by all members of said board, a resolution was adopted by the unanimous vote of said board that the services of appellant as a teacher for said Redlands High School District would not be required for the ensuing school year 1940-1941; that said board of trustees at said meeting authorized and directed John Branigan, Superintendent of Redlands High School District, to send said notice of termination of employment of appellant and that the same was sent to appellant by registered mail and was received by her prior to the 15th day of May, 1940. The trial court further found that appellant was not and never had been a permanent employee of the Redlands High School District and that said district was not indebted to appellant in any amount. From said findings of fact the trial court concluded that a writ of mandate should be denied, and judgment in favor of respondent was entered in accordance with said findings and this appeal is from said judgment.

Appellant makes two points upon this appeal: (1) that the governing board of respondent district did not give notice in writing to appellant as provided in section 5.681 of the School Code and hence the attempted dismissal of appellant was ineffectual; (2) that the meeting of respondent board at which the action to dismiss appellant was taken was not a legal meeting of said board.

Under section 5.500 of the School Code, a probationary teacher will acquire the status of a permanent teacher at the end of three years unless, as provided in section 5.681 of the same code, on or before the 15th day of May in any year the governing board gives notice in writing to the probationary employee that his or her services will not be required for the ensuing year.

The full text of said section 5.681 is as follows:

"Time to give notice of dismissal: Manner of service. On or before the fifteenth day of May in any year the governing board may give notice in writing to a probationary employee that his services will not be required for the ensuing year.

"Such notice shall be deemed sufficient and complete when delivered in person to such employee by the clerk or secretary of the governing board of the school district or deposited in the United States registered mail with postage prepaid, addressed to such employee at his last known place of address."

[1] It may be taken as settled by our courts that the written notice provided for in said section 5.681 is mandatory. Darby v. Biggs School District, 15 Cal.App.2d 218, 59 P.2d 167, and cases therein cited.

[2] It is likewise settled that the serving of the notice provided for in the second paragraph of section 5.681 is purely ministerial. Steele v. Board of Trustees, 121 Cal.App. 419, 9 P.2d 217. In the case at bar the only writing received by petitioner was a letter from the superintendent of the Redlands High School District, reading as follows:

"Redlands Public Schools.
"John Branigan, Superintendent.
"Redlands, California, April 30th, 1940.

"Mrs. Lulu Knickerbocker,
"105 Center Street,
"Redlands, California.
"Dear Mrs. Knickerbocker:

"At a special meeting of the Board of Trustees of the Redlands High School District, with all members present, held this 30th day of April, 1940, at 11:00 A. M., at its regular meeting place, the High School Auditorium Building of Redlands High School, the Board this day pursuant to Section 5.681 of Article 4 of Chapter 7, page 305, School Code of the State of California, of the year 1937, did unanimously pass a motion to the effect that they give you this notice in writing that your services for the school year 1940-1941 and subsequent years will no longer be needed.

"This notice according to the foregoing section shall be deemed sufficient and complete when deposited in the United States registered mail with postage prepaid, addressed to you at your last known place of residence, viz. 105 Center Street, Redlands, California.

"Very sincerely yours,
"John Branigan,
Superintendent of Schools."

Counsel for appellant and petitioner contends that inasmuch as this letter to petitioner was written on the letterhead of "John Branigan, Superintendent," was sent by registered mail in an envelope returnable to "John Branigan, Superintendent of Schools," and was signed "John Branigan, Superintendent of Schools," it is a letter from the superintendent and is not a notice by the board.

The trial court found that the board "authorized and directed John Branigan, Superintendent of Redlands High School District, to send said notice of termination of employment" and that "said notice of termination of employment of petitioner herein by the Board of Trustees of the Redlands High School District" was mailed to and received by petitioner prior to May 15, 1940.

Appellant contends further that even if it should be held that the board of trustees intended to authorize the superintendent to give the notice, it still fails to meet the requirement of the statute that the board shall give the notice.

Appellant cites section 4319 of the Political Code, which provides that "'Notice' includes all papers and orders (except process) required to be served in any proceeding before any court, board, or officer, or when required by law to be served independently of such proceeding."

Appellant also quotes the following language from Williams v. Bergin, 108 Cal. 166, at page 171, 41 P. 287, at page 288:

"Notice, when required by a statute, is not the equivalent of knowledge, and the supervisors gain jurisdiction to act upon the appeal only by giving the notice that the statute requires, and in the manner that is required, and not by the fact that the parties interested may have knowledge of their intended action. The term 'notice' of itself imports that the information given thereby comes from an authentic source, and is to be directed to some one who is to act or refrain from acting in consequence of the information contained in the notice. See Fry v. Bennett, 7 Abb.Prac. [352], 355; Minard v. Douglas County, 9 Ore. [206], 210. A notice which, by its terms, is directed to A is ineffectual as a notice to B, even though it is delivered to B and he is thereby informed of its contents."

Appellant also cites In re Central Irrigation District, 117 Cal. 382, 49 P. 354, and a number of cases from other states holding to the same effect as Williams v. Bergin, supra. These cases deal with the formation of street improvement districts and other proceedings wherein the statutory notice required was a necessary step in the proceedings in order to acquire jurisdiction.

These authorities, so strongly relied upon by appellant, are not applicable to the case at bar, where the notice required is merely notice of an act that has already taken place and not a notice of a meeting at which action was to be taken.

[3-5] Appellant argues further that the statute in question must be strictly construed because, to quote the language of appellant, "the tenure of a teacher—the continuance of her employment—constitutes a valuable personal right, the forfeiture of which is effected only when the governing board has given written notice of dismissal." However, in the case at bar appellant was only a probationary teacher and the board of trustees had the right to decide not to reemploy her without giving her an opportunity to be heard. Section 5.681 was enacted no more for the protection of teachers than for the maintenance of the efficiency of our school system. The whole system of legislation regulating the educational machinery is based upon the consideration of the welfare and best interests of the children. The proper regulation of tenure in office and other rights of teachers were also properly considered and regulated, but the fundamental purpose and primary object of the legislature was the consideration of the welfare of the children. This fundamental purpose must not be lost sight of by courts in the construction of legislation dealing with our educational system. In the case at bar, appellant had no more right to acquire permanent tenure than the board of trustees had to decide that she should not be reemployed, and in the construction of section 5.681 the deliberate decision of the school board not to reemploy appellant should not be set aside by a construction of section 5.681 that is not required by its language.

[6] In the case at bar the court found that the board of trustees unanimously adopted a resolution not to reemploy appellant and authorized the superintendent of said high school district to send notice of termination of employment to appellant, and the court further found that notice of termination was sent by registered mail to appellant and received by her prior to May 15, 1940. The text of the letter sent to appellant is herein set forth and we are of the opinion that the court below correctly concluded that said letter, so sent by the superintendent of Redlands High School District, who, under section 2.95 of the School Code, was the chief executive officer of the board, was a sufficient notice in writing by the governing board to appellant, probationary employee, that her services would not be required for the ensuing year.

In the case of Steele v. Board of Trustees of Pittsburg Public Schools, 121 Cal. App. 419, at page 422, 9 P.2d 217 at page 218, the court said:

"The clerk of a board of trustees of a school district is an officer. See School Code, §§ 2.20 to 2.94. Spreckels v. Graham, 194 Cal. 516, 529, 228 P. 1040. The act of serving a notice is purely ministerial. Couthway v. Berghaus, 25 Ala. 393; Eldridge v. Holway, 18 Ill. 446; 46 C.J. 927. Whether the clerk is an officer or merely an agent, he has the right to delegate the performance of that ministerial act. 46 C. J. 1033; Civ.Code, § 2349. It follows that the service of the notice met every call of the statute.

"The petitioners contend that, as the statute named the clerk as the person to serve the notice and as the statute is mandatory, no one else could legally perform the act. That contention is too narrow even under rules of strict construction. By virtue of article 1, § 22, of the Constitution of California, all the provisions of that instrument are mandatory. But no one would contend that the governor must in person take his messages to the Legislature (article 5, § 10), or in person take a vetoed bill to the house in which it originated (article 4, § 16). Nor would it be claimed that an owner must in person file a notice of completion or a mechanic must in person file for record his claim of lien (Code Civ.Proc. § 1187); nor that the plaintiff must in person file his notice of pendency of action (Code Civ.Proc. § 409). But all of these statutes are to be strictly followed. A more stringent rule was hardly intended to apply to school trustees, the great majority of whom are horny-handed sons of toil." See also, Salmon v. Allen, 1 Cal.App.2d 115, 36 P.2d 153; Fleming v. Board of Trustees, 112 Cal.App. 225, 296 P. 925.

The remaining point raised by appellant is that the meeting of the respondent board of trustees, at which the action not to reemploy appellant was taken, was not a legal meeting of said board, and that, therefore, the resolution adopted was ineffective.

The court below found that at the time of said meeting there were only three members of the board of trustees, there being two vacancies, and that "on the 30th day of April, 1940, * * * all members of said Board of Trustees being present and having been notified of said meeting, the purposes for which said meeting was called being known and acquiesced in by all members of the Board of Trustees" the resolution in question was unanimously adopted. It is not claimed that this finding is not supported by the record, but the appellant contends that said meeting was a special meeting and was not called in compliance with section 2.1092 of the School Code, which reads as follows:

"Special meetings may be held at the call of the president of the board. Upon the request, in writing, signed by a majority of any board, the president of the board shall call a meeting thereof. Of all special meetings of any board, the members thereof shall have at least two days notice, issued and served by the clerk thereof. At special meetings no business shall be transacted other than that specified in the call therefor."

Respondents, in reply, admit that the action was taken at a special meeting but contend that the unanimous action of the board of trustees at a special meeting, regardless of the type of notice given, is valid and binding. Respondents admit that the notice as required by said section 2.1092 of the School Code was not given to the members of the board of trustees, but respondents contend that any irregularity in reference to the giving of notice of the special meeting was waived by the fact that all of the board members were present, and particularly inasmuch as all of the board members discussed the question of the termination of employment of petitioner.

We have been unable to find any California decision upon this precise point but the contention of respondents seems to be supported by the great weight of authority, and appellant has cited no case holding to the contrary.

[7] The general rule regarding the waiving of notice of a special meeting of a board of trustees of a school district, where all members are present and participate, is found in 56 Corpus Juris, at page 337, section 210, wherein it is stated:

"Such notice is, however, for the benefit of the members of the board rather than that of the public, and so, even where it is required by statute to be given, it may be waived by the persons entitled to receive it; and where all the members of a board are present and participate in a meeting thereof they may take official action, and the fact that no notice of such meeting was given, or no formal call was issued, or that the notice or call was irregular or insufficient, is immaterial to the validity of the proceedings."

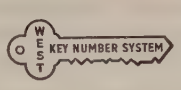
The above-quoted text is supported by the following cases: Center Hill School District v. Hunt, 194 Ark. 1145, 110 S.W. 2d 523; State v. Tucker, 39 N.D. 106, 166 N.W. 820; Rice v. Bradley County School District, 109 Ark. 125, 159 S.W. 29; Decker v. School District No. 2, 101 Mo.App. 115, 74 S.W. 390; Wysong v. Board of Education, 86 W.Va. 57, 102 S.E. 733; Hlavka v. Common School District, 192 Minn. 169, 255 N.W. 820

[8] We do not regard as serious the fact that there were only three trustees in office at the time of the meeting, whereas the law provides for a board of five members. The action taken was unanimous and would have constituted the action of a majority of the board even if there had been five members in office at the time. If a special meeting of the board could not be held in this case, it would mean that a special meeting of the board of trustees of a school district could never be held if there was a vacancy on the board. Such a construction is, in our opinion, neither reasonable nor sound, and it is only fair to state that it is not urged seriously by appellant.

From the foregoing we conclude that the court below correctly decided that at a legal meeting of the Board of Trustees of Redlands High School District said board adopted a resolution that the services of appellant would be no longer required, and that notice to that effect was given in writing to appellant in conformity with section 5.681 of the School Code.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.



49 Cal.App.2d 647

JONES et al. v. BAYLEY et al.

Civ. 11740.

District Court of Appeal, First District, Division 2, California.

Feb. 10, 1942.

1. Automobiles ⇐246(60)

Where defendant motorist testified fully concerning the accident involved in action by pedestrian for personal injuries, requested instructions on presumption that automobile was driven in a lawful and proper manner were properly refused.

2. Automobiles ⇐246(58)

In action by pedestrian for injuries resulting from being struck by automobile where the evidence would not support a finding that pedestrian's eyesight was not normal when wearing his glasses as he admittedly was at the time of the accident and would support a finding that the hearing in pedestrian's right ear was to some indefinite extent impaired but there was no impairment of hearing in the other ear and no evidence which would support a finding that pedestrian's ability to hear was substantially or at all impaired, refusal of requested instruction concerning the degree of care to be exercised by one whose faculties are impaired was proper.

3. Automobiles ⇐222, 246(34)

In action by pedestrian for injuries sustained when struck by automobile requested instruction that one whose faculties are impaired is required to exercise care sufficient to make good the defects and that one whose hearing is defective is for that reason required to exercise greater care and caution for his own protection than would be re-

quired of one whose hearing is normal was properly refused as not accurately stating the law and as tending to mislead or confuse the jury.

4. Automobiles ⇐246(4)

In action by pedestrian for injuries sustained when struck by an automobile the jury were properly instructed that "negligence" is failure to use ordinary care and that "ordinary care" is that care which persons of ordinary prudence exercise in the management of their own affairs.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence" and "Ordinary Care".

5. Negligence ⇐86, 141(4)

A person with faculties impaired is held to the same degree of care and no higher than the degree of care required of ordinary person and hence is bound to use that care which a person of ordinary prudence with faculties so impaired would use in the same circumstances, which may require a more alert use of his other faculties to reach the standard of ordinary care and the jury might well be so instructed in the proper case, but after defining ordinary care to the jury it would be misleading to instruct them without explanation or qualification that a person with impaired faculties is required to exercise greater care which the jury might reasonably understand to mean greater than ordinary care as defined in the instructions.

6. Automobiles ⇐246(60)
Trial ⇐261

In action by pedestrian for injuries sustained when struck by automobile, requested instructions that place where accident happened was to be conclusively presumed to be outside of the business or residence district unless otherwise proved and that the prima facie speed limit on a highway outside of a residence or business district was 45 miles an hour and that at the place where the accident occurred the speed limit was 45 miles an hour, were properly refused as incomplete and as tending to confuse or mislead the jury. Vehicle Code §§ 511, 513, St. 1935, pp. 176, 177.

7. Trial ⇐261

An appellant cannot complain of the failure to give a proposed instruction which is incomplete, meaningless or misleading, and no duty is imposed on the court to reframe or recast such proposed instruction to correctly state law.

8. Appeal and error ⇐1046(5)

Where police report was properly excluded from evidence, court's criticism of police department's insistence upon not leaving original reports with court was not prejudicial, particularly where court stated to officer in presence of jury that nothing detrimental to the officer was intended and instructed the jury to disregard in arriving at their verdict any comments court had made in the course of the trial which might seem to indicate any opinion as to the weight of any testimony or the credibility of any witness.

9. Appeal and error ⇐201(2), 719(1)

Where there was no objection made to remarks of court, nor assignment of error, nor request to admonish jury to disregard court's remarks, error, if any, was not available on appeal.

10. Appeal and error ⇐1032(1)

The fact of prejudice must be clear to warrant an appellate court in overruling trial judge's conclusion that no prejudice resulted from trial court's remark in presence of jury.

11. Appeal and error ⇐201(2), 719(1), 1046(5)

Where court in excluding alleged admission by defendant stated that counsel's belief that defendant would not have admitted liability unless she really felt liable might possibly be true, the statement was not prejudicial and was not saved for review where no objection or assignment of error was made and there was no request for admonition of jury.

12. Appeal and error ⇐1060(1)

Prejudice may result from any reference to insurance in an action for damages but a litigant is entitled to a fair and impartial jury and the rule permitting counsel to ask in good faith whether a prospective juror is interested in a particular insurance company or in any insurance company has been established as a rule of necessity, but counsel must take pains to propound such questions in such a manner as not to convey unnecessarily the impression that the defendant is in fact so insured.

13. Trial ⇐108½

It is "misconduct" on part of counsel for plaintiff in personal injury action to frame questions that go beyond what is reasonably necessary to serve the legitimate purpose of eliciting facts he is entitled to

adduce in order to secure a jury free from bias or prejudice, if it is also apparent that the questions may fairly be said to have the effect of serving the illegitimate purpose of prejudicing the jury by fixing in their minds the idea that defendant is protected by insurance against liability for negligence.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

14. Trial ⇐108½

In pedestrian's action for injuries sustained when struck by automobile driven by army officer's wife, questions asked of prospective jurors who were or had been engaged in insurance business or who were wives of persons so engaged relative to writing of insurance covering army officers and questions whether defendants' attorneys had handled any litigation arising out of such insurance business did not unreasonably bring subject matter of insurance before jury.

15. Appeal and error ⇐230

An attorney cannot ordinarily without objection secretly nurse an unspecified error through the trial with the idea that it will constitute insurance against a possible defeat, and it is only where error is aggravated and incurable that the point may be saved where it is not timely made in the trial court.

16. Witnesses ⇐387

It is always proper for the purpose of discrediting a witness by his own admissions to interrogate him on cross-examination as to prior inconsistent statements without calling attention to time, place, circumstances and persons present.

17. Trial ⇐127

Cross-examination of defendant concerning alleged admission to person asking for report of accident and failure to have such person testify could not be said to have been in "bad faith" for sole purpose of insinuating to jury that defendant was insured where it was proved on motion for a new trial that certain person was in fact an insurance adjuster and had told counsel for plaintiff of such admission and failure to call the adjuster was readily explained by reason of his adverse interest and position.

See Words and Phrases, Permanent Edition, for all other definitions of "Bad Faith".

Appeal from Superior Court, San Mateo County; Warren V. Tryon, Judge Assigned.

Action by Eugene Jones, a minor, etc., and another against Ada Bayley and another for injuries received when struck by an automobile driven by the named defendant. From a judgment for plaintiffs, the defendants appeal.

Judgment affirmed.

Cooley, Crowley & Supple, Leighton M. Bledsoe, and Norman S. Menifee, all of San Francisco, for appellants.

John J. Taheny, of San Francisco, and Edmund Scott, of Redwood City, for respondents.

DOOLING, Justice pro tem.

Defendants, husband and wife, appeal from a judgment for plaintiffs after a jury verdict allowing damages for personal injuries received by plaintiff Eugene Jones as a result of being struck by an automobile driven by defendant wife. Appellants make no claim that the damages allowed were excessive and concede that the evidence supports the verdict. Their claim on appeal is that the evidence was sharply conflicting and indeed preponderated in their favor, and that for this reason the alleged errors which they specify as grounds of appeal must be held to have been prejudicial. It will suffice to show the sharp conflict in the evidence that plaintiffs' theory was that young Jones was struck while crossing the street in a legally established cross-walk and defendants' theory was that he suddenly "lunged" in front of the automobile at a point 60 feet away from the cross-walk, and that either theory finds ample support in the testimony.

Appellants claim that the court was in error in refusing to give certain instructions requested by them. These instructions cover three separate subjects:

[1] 1. Appellants requested certain instructions on the presumption that the automobile of the defendants was driven in a lawful and proper manner. They rely largely in support of their claim that it was error to refuse these instructions upon Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590. The case on this point is against their contention. Mrs. Bayley, the driver of the automobile, was a witness in her own behalf and testified fully to her version of the accident. In Westberg v. Willde, supra,

the court said at page 367 of 14 Cal.2d, at page 594 of 94 P.2d:

"We think it well to state here that in our opinion there is a substantial difference in the situation before a court where the question of the plaintiff's negligence is in issue, and both plaintiff and his witnesses testified to all his acts and conduct at the time of his alleged negligence, from a situation where the acts and conduct of a decedent are the issues before the court. In the first instance, all possible facts both in favor of and against the alleged negligence of the plaintiff are before the court, and it is difficult for us to perceive how any presumption as to his conduct can add to or detract from this evidence. Surely if this evidence conclusively supports the claim that he was negligent, then, according to our decisions cited above, the presumption as to his conduct has been dispelled. On the other hand, if the plaintiff has testified respecting his acts and conduct, and his testimony and that of his witnesses showed that he used ordinary care for his safety, an instruction to that effect would not be of any assistance to him; but if such evidence did not clearly and unmistakably clear him of the charge of negligence, then an instruction which would place his testimony in a more favorable light than it would be without such instruction would seem to be uncalled for, if not improper. In such a case the giving of any instruction as to the presumption of plaintiff's conduct would seem to be of doubtful propriety."

Upon the authority of Westberg v. Willde the District Court of Appeal, Fourth District, said in Stevenson v. Fleming, 47 Cal.App.2d 225, at page 233, 117 P.2d 717, at page 721:

"Defendant's instruction number eighteen, wherein the jury was told that each party was entitled to the presumption that every person takes ordinary care of his own concerns and that he obeys the law, § 1963, subd. 4, Code Civ.Proc., should not have been given. Such an instruction may be proper under given circumstances in a death case but should not be given in a case where all the parties are alive and testify and all facts are placed before the jury by the testimony of the parties and the witnesses."

The question which has troubled our courts so long as to when it is proper and when improper to give the jury an instruction covering this presumption is definitely settled in Westberg v. Willde, supra, and the dividing line clearly marked and pointed out. It is to be hoped, for the benefit of trial courts and counsel, that the opinion of our Supreme Court in that case has laid for all time the ghost of doubt that for so long has haunted this particular question.

2. Appellant proposed the following instruction which was refused by the court:

"One whose faculties are impaired is required to exercise care sufficient to make good the defects and one whose hearing is defective is for that reason required to exercise greater care and caution for his own protection than would be required of one whose hearing is normal."

The only evidence in the entire case to which this instruction could have been directed is here quoted:

"Q. Were you wearing glasses at the time of the accident? A. Yes.

"Q. They were not in thicker rims? A. No.

"Q. How long have you worn glasses? A. Oh, I would say roughly twelve years.

"Q. Are you near-sighted? A. Yes, sir.

"Q. Are those thick lenses you are wearing there? A. Pretty thick.

"Q. They are not bi-focals, are they? A. No, sir.

"Q. How long before this accident happened had it been since you had had your eyes examined? A. I couldn't say; within a month before.

"Q. Had you had new glasses a month before the accident? A. No, just a check up.

"Q. They made no change in your glasses at that time? A. No.

"Q. Was it recommended that you make a change? A. No, sir.

"Q. Before this accident happened, you had an impediment of hearing in your right ear, had you not? A. Yes.

"Q. How long had you had that? A. For quite a while, ever since I had mastoid.

"Q. You had a mastoid operation, did you? A. Yes.

"Q. How long ago? A. About thirteen years.

"Q. So the hearing in your right ear is bad, is it? A. Not as bad as it was.

"Q. Now, your left ear, how is the hearing in that? A. Good. * * *

"Q. At the time of this accident, was your hearing as good as it has been in the

courtroom here; at the time of the accident, was it as good as it has been in the courtroom here? A. My hearing is all right.

"Q. I say at the time of the accident, could you hear noises as well as you have been able to hear people talk in the courtroom here? A. Yes."

[2] This evidence is quoted in full to show how insubstantial is the claim of error in this regard. The evidence would not support a finding that the injured plaintiff's eyesight was not normal when wearing his glasses, as, he admittedly was at the time of this accident; and while it would support a finding that the hearing in his right ear was to some indefinite extent impaired, there was no impairment of hearing in the other ear, and no evidence which would support a finding that his ability to hear was substantially or at all impaired by whatever indeterminate impairment may have existed in the one ear.

[3] These observations sufficiently dispose of this specification, but it may be well to add that if the facts had justified the giving of an instruction on the quantum of care required of a person with impaired faculties the instruction as proposed did not accurately state the law and might well have misled or confused the jury.

[4, 5] The jury was properly instructed that negligence is failure to use ordinary care and that ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs. A person with faculties impaired is held to the same degree of care and no higher. He is bound to use that care which a person of ordinary prudence with faculties so impaired would use in the same circumstances. 45 C.J. 996–7; 5 Am.Jur. 765; Keith v. Worcester & B. V. St. R. Co., 196 Mass. 478, 82 N.E. 680, 14 L.R.A.,N.S., 648. This may require a more alert use of his other faculties to reach the standard of ordinary care, and the jury might well be so instructed in a proper case, but after defining ordinary care to the jury it would be misleading to instruct them without explanation or qualification that a person with impaired faculties "is required to exercise greater care," which the jury might reasonably understand to mean greater than "ordinary care" as defined in the instructions.

There is nothing in Armstrong v. Day, 103 Cal.App. 465, 284 P. 1083, in conflict with this conclusion. There the instructions on the subject were held properly refused and the court did not pass upon their form. While some of the language of the proposed instruction is taken from the opinion of the court in Armstrong v. Day, and some from other language appearing in Furtado v. Bird, 26 Cal.App. 152, 160, 146 P. 58, it has been often pointed out "that the text of a decision is not necessarily sound as an instruction to be given to the jury." McGeorge v. Charles Nelson Co., 107 Cal.App. 148, 290 P. 75, 77; Rosander v. Market St. R. Co., 89 Cal.App. 710, 718, 265 P. 536; People v. Russell, 80 Cal.App. 243, 245, 251 P. 699; Lincoln v. Williams, 119 Cal.App. 498, 502, 6 P.2d 563; Soares v. Barson, 12 Cal.App.2d 582, 585, 55 P.2d 1283.

3. Appellants proposed an instruction that the place where the accident happened was to be conclusively presumed to be outside of a business or residence district unless otherwise proved, together with two instructions in the following language:

"The prima facie speed limit on a highway outside of a residence or business district is forty-five (45) miles an hour."

"You are instructed that at the place where this accident occurred the speed limit was forty-five (45) miles an hour."

[6] As proposed, the instructions were incomplete and might well have been either confusing or misleading to the jury. The pertinent statutory law is found in sections 511 and 513 of the Vehicle Code, St.1935, pp. 176, 177. The provisions applicable to a civil case are:

"511. The speed of any vehicle upon a highway not in excess of the limits specified in this section is lawful unless clearly proved to be in violation of the basic rule declared in section 510 hereof. * * *

"The prima facie limits referred to above are as follows [followed by specifications in miles per hour for different situations]."

"513. In any civil action proof of speed in excess of any prima facie limit declared in section 511 hereof at a particular time and place shall not establish negligence as a matter of law but in all such actions it shall be necessary to establish as a fact that the operation of a vehicle at such excess speed constituted negligence."

To tell the jury that the "speed limit" or the "prima facie speed limit" at the time and place of the accident is forty-five miles an hour gives them no legal guide for use in their deliberations. Such an instruction

is meaningless standing alone. The legal effect of driving within the speed limit is explained in the first sentence of section 511 quoted above. The legal effect of exceeding the speed limit is explained in section 513. No instruction given by the court and none requested by appellants embodied or included the provisions of either. From the bald and unexplained instructions proposed the jury might well have erroneously concluded that if appellants' car was being operated at less than forty-five miles per hour, i. e., within the "speed limit" or the "prima facie speed limit," the driving of the car at that speed could not be found to be negligence.

[7] It is axiomatic that an appellant cannot complain of the failure to give a proposed instruction which is incomplete, meaningless or misleading, and no duty is imposed on the court to reframe or recast such a proposed instruction to correctly state the law. Nelson v. Southern Pacific Co., 8 Cal.2d 648, 653, 67 P.2d 682.

A number of cases have been cited to us by appellants on this subject. In none of them was it held error to refuse to give a proposed instruction on the speed limit which did not embody an explanation of the legal effect to be given to the speed limit under the pertinent provisions of the Vehicle Code. In some of the cases the giving of an instruction on the speed limit was held proper, but in no case has it been expressly held proper to give such an instruction in the absence of an explanation of the legal effect of driving within or in excess of the limit prescribed.

As an example, in Cavalli v. Luckett, 40 Cal.App.2d 250, at page 256, 104 P.2d 708 at page 711, one of the cases chiefly relied on by appellants, the court says:

"The provisions of the basic speed law and the first paragraph of section 511 were sufficiently covered by other instructions. * * *"

The case therefore cannot be considered as authority for the giving of an instruction on the prima facie speed limit without explaining its effect under the first sentence of section 511.

Appellants argue that the trial judge was guilty of prejudicial misconduct in certain remarks made by him when a police officer was on the stand. The officer stated that his captain had instructed him not to leave the report of the accident in court, whereupon the following colloquy occurred:

"The Court. It's a funny thing, you may never leave anything in the Superior Court, and yet the first time one of you police get hurt you run for the Judge of the Superior Court. I don't know whether to keep this report or not. You know I have threatened some time to take them, and either put you in jail or hold it and see where I get. This might be a good time to do it. If one of you counsel will side with me I will.

"A. This has to come back by me.

"The Court. The point I am making is this, that every time the bank or anyone else comes in here with documents, they do not want to leave them, but they go down and file a will downstairs or leave deeds, but these police reports, I don't know, I think it is sometimes the smaller things in life that receive the greatest amount of attention and sometimes people lose the greatest things by looking at the smaller things.

"A. I will try to bring a copy next time, Judge.

"The Court. Well, we will have to have the original. In other words, that's one of the difficulties we have in our form of government; one department thinks it's a little superior to the other, and if you want to get anything from one department you have to bring suit to get it. * * *

"Mr. Bledsoe. This report is a public record, isn't it? * * *

"The Court. No, I don't think it is."

As the officer was leaving the stand the trial judge said:

"Thank you very much. I don't want you to think, officer, that I think anything detrimental of you or anything of that sort. I did not mean to say that at all."

[8] In so far as any of the quoted remarks of the court might have been considered as casting any reflection on the weight or importance of the police report as evidence, if they could bear such a construction, it would seem to be sufficient to point out that the police report was not admitted in evidence and appellants do not claim that it was admissible. In so far as it is claimed that the remarks might be construed as a reflection on the character of the witness or the weight to be given to his testimony we do not think that anything said by the court can be so construed. His remarks were directed to a system and to the orders of the witness' superior and not at all to the

witness' own conduct. Some of them might better have been left unsaid but we do not believe that they could in any respect have prejudiced appellants with the jury.

[9, 10] It is to be noted further: 1. That there was no objection, assignment of error or request to the court to admonish the jury to disregard the remarks. The error, if any, is therefore not available to appellants on appeal. In re Estate of Golden, 4 Cal.2d 300, 310, 311, 48 P.2d 962; Hughes v. Hartman, 206 Cal. 199, 206, 273 P. 560. 2. The trial court in effect did admonish the jury in his remark addressed to the witness as he was leaving the stand that the court did not think or mean anything detrimental to the witness. 3. The trial court fully instructed the jury to disregard in arriving at their verdict any comments that he had made in the course of the trial which might seem to them to indicate any opinion as to the weight of any testimony or the credibility of any witness. 4. The trial court in denying a new trial again passed upon the question of prejudice and the fact of prejudice must be clear to warrant an appellate court in overruling his conclusion that no prejudice resulted. Lafargue v. United Railroads, 183 Cal. 720, 192 P. 538; Levens v. Stocco, 5 Cal.App.2d 693, 695, 43 P.2d 357. 5. The lack of any objection, specification of error, request for admonition or even comment by counsel lends credibility to respondents' claim that the court's remarks were made in a jocular way, which of course the cold record cannot show, and regarded by all as a mere pleasantry. Dawson v. San Diego Elec. Ry. Co., 82 Cal.App. 141, 153, 255 P. 215.

[11] Upon cross-examination appellant Ada Bayley was asked, if she did not state in a conversation with the injured boy's mother "that you were very sorry and hoped that they collected $10,000 from you?" Objection was made and in the course of a running argument counsel for respondent said:

"I do not think she would express a desire unless she really felt liable."

The trial judge replied:

"Incidentally, that might be true, possibly later on."

The matter was then dropped and counsel proceeded to examine on another question. No objection, assignment of error or request for admonition was asked and everything said of the colloquy between the court and the police officer applies equally to this remark of the court. In addition the court's remark was trivial, in the course of a running argument, and if evidence on the subject had been introduced, which it was not, the court's remark in our judgment was correct. Such a statement if made by a defendant might well be construed by the jury as an admission of liability.

Finally the appellants argue that the matter of insurance was unnecessarily and prejudicially brought before the jury on voir dire examination of the jurors and in cross-examination of Mrs. Bayley.

The only claimed prejudicial questions asked on voir dire were asked of prospective jurors who were or had been engaged in the insurance business or of women whose husbands were or had been so engaged.

[12, 13] We may take the following statement from Robinson v. Wada, 10 Cal. App.2d 5, 51 P.2d 171, 172, a case relied upon by appellants, as fairly stating the limits of proper examination on the subject of insurance on voir dire:

"While the probable prejudice resulting from any reference to insurance in an action for damages is universally recognized, it is likewise recognized that a plaintiff is entitled to a fair and impartial jury. Therefore the rule permitting counsel to ask in good faith whether a prospective juror is interested in a particular insurance company or in any insurance company has been established as a rule of necessity. The authorities, however, have quite definitely limited the scope of the examination along this line. * * * [Then quoting from Arnold v. California Portland Cement Co., 41 Cal.App. 420, 183 P. 171]. 'But counsel must take pains to propound such questions in such a manner as not unnecessarily to convey the impression that the defendant is in fact so insured. It is misconduct on the part of counsel for plaintiff in such actions so to frame his question that it goes beyond what is reasonably necessary to serve the legitimate purpose of eliciting the facts he is entitled to adduce in order to secure a jury free from bias or prejudice, if it is also apparent that the question may fairly be said to have the effect of serving the illegitimate purpose of prejudicing the jury by fixing in their minds the idea that the defendant is protected by insurance against liability for negligence.'"

[14] It was stated by counsel for appellants on the voir dire examination of some of the prospective jurors that appellant Alvin J. Bayley, who was not present in court, was a colonel in the army. Of the first prospective juror who stated that he was an insurance broker counsel for respondents asked:

"Did you ever place any insurance for a company insuring military men, I believe it is United Service Insurance Company of Texas?"

If the description "Insuring military men" was unnecessarily injected into the question it would at least come dangerously close to an infringement of the rule announced in Robinson v. Wada, supra. On the question of the good faith and necessity of this description "insuring military men" the trial court had before it on motion for new trial an affidavit of one Fred West from which it appears that the true name of the company was not "United Service Insurance Company of Texas" but "United Service Automobile Association." If, as we must assume the trial court decided on motion for new trial, counsel for respondents were not certain of the correct name of the company and in good faith added the description "insuring military men" to make the designation of the company more certain we cannot say that the question in the form put was not reasonably necessary or unnecessarily suggested that the defendants were insured.

A prospective woman juror whose husband was in the insurance business was asked of her husband, "Do you know whether he handles insurance or places insurance for army officers?" The question seems to us proper and not unnecessarily to suggest that defendants were insured. A grocer's wife might properly be asked: "Does your husband sell groceries to army officers?" where one of the defendants was an army officer. The reasonable necessity of the question being the test it seems that an insurance broker might equally be asked if he sells insurance to army officers.

Several prospective jurors in the insurance business were asked whether the firm of Cooley, Crowley and Supple had handled any litigation arising out of their insurance business. Other questions were asked as to whether the prospective jurors had done any investigating or adjusting of claims. The first line of questions were properly addressed to the possible business relations or relation of attorney and client between the prospective jurors and defendants' attorneys. It is stretching an inference too far to argue that the inquiry whether the attorneys might have represented prospective jurors in litigation arising from their insurance business suggests that they must be representing an insurance company in the pending litigation. The propriety of the second line of questions is readily apparent. A man who had investigated and adjusted insurance claims might easily be biased in favor of defendants.

[15] It is to be remarked that during the entire voir dire examination counsel for appellants sat by without interposing a single objection to any question now complained of. Ordinarily an attorney cannot without objection secretly nurse an unspecified error through the trial with the idea that it will constitute insurance against a possible defeat. It is only where error is aggravated and incurable that the point may be saved where it is not timely made in the trial court. Gray v. Robinson, 33 Cal.App.2d 177, 183, 91 P.2d 194; Kershaw v. Tilbury, 214 Cal. 679, 691, 8 P.2d 109.

On cross-examination appellant Ada Bayley was asked:

"Q. Do you remember that a man named Fred West came down to see you, who had his office at 114 Sansome Street in San Francisco, and he asked you for a report of the accident? A. Yes, he did.

"Q. Didn't you tell him that the boy ran or came from behind an automobile going in the opposite direction?"

Thereupon there was objection and argument and the witness finally gave a negative answer. It is now claimed that this examination was not in good faith because West was not called as an impeaching witness and that the sole purpose was to insinuate to the jury that defendants were insured.

[16] "It is always proper, for the purpose of discrediting a witness by his own admissions, to interrogate him, on cross-examination, as to prior inconsistent statements without calling attention to time, place, circumstances and persons present." People v. Campos, 10 Cal.App.2d 310, 317, 52 P.2d 251, 254; 27 Cal.Jur. 159, 160.

[17] On the question of good faith respondents' counsel filed an affidavit on motion for new trial which recited that Fred West, who is an insurance adjuster, had

told affiant that he had interviewed Mrs. Bayley and could show that plaintiff came from behind a car going in the opposite direction. With these facts in mind it was proper for respondents' counsel to put the question to Mrs. Bayley if she had not made such a statement to West in an effort to get an admission for her to that effect. His failure to call West is readily explained by West's adverse interest and position. It is straying far afield to argue that reference in a question to a man named West "who had his office at 114 Sansome Street" and asked "for a report of the accident" was calculated to inform the jury that defendants were insured. The question was a proper preliminary question for the inquiry about the alleged contradictory statement.

In this opinion, we have carefully considered every claim of error made by appellants. Finding no error the judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



49 Cal.App.2d 633

GHIGLIONE v. AMERICAN TRUST CO.

Civ. 11630.

District Court of Appeal, First District, Division 2, California.

Feb. 10, 1942.

Rehearing Denied March 12, 1942.

Hearing Denied April 9, 1942.

1. Banks and banking ⇐227(3)

Evidence sustained judgment against bank in favor of its depositor on ground that bank's branch manager fraudulently induced depositor to sign withdrawal slips on representation that secured loans were being made in behalf of the depositor.

2. Banks and banking ⇐227(2)

In action for damages resulting from alleged action of bank's branch manager in fraudulently inducing depositor to sign withdrawal slips, testimony of the depositor explaining the purported withdrawals was admissible for that purpose.

3. Principal and agent ⇐124(1)

Whether an agent is acting under actual or ostensible authority of his principal is a "question of fact" which may be covered by direct evidence or by reasonable inferences drawn from facts proved.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

4. Principal and agent ⇐158

A principal who puts an agent in a position which enables the agent while apparently acting within his authority to commit a fraud on third persons is subject to liability to such third persons for the fraud.

5. Banks and banking ⇐112

In determining liability of bank for alleged fraud of its branch manager in inducing depositor to sign withdrawal slips, the depositor was not foreclosed by any secret or undisclosed instructions which the bank might have given to the manager.

6. Banks and banking ⇐228

Whether bank's branch manager had apparent authority to accept withdrawal slips from depositor, to pay depositor's bills and prepare documents for depositor's signature so as to render the bank liable for any fraudulent action by the manager was for jury.

7. Banks and banking ⇐112

Where suggestions of bank's branch manager concerning making of personal loans by bank's depositor were made as friendly gestures of good will and business accommodations and no fee was charged for them, the depositor was not charged with "notice" that acts of manager were beyond the scope of his authority, so as to be precluded from recovering from bank for alleged fraud of the manager on ground that the suggestions would put the bank in the loan brokerage business contrary to law.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

8. Appeal and error ⇐971(3)
Witnesses ⇐267

Cross-examination of a witness is within discretion of the trial court and the reviewing court will not interfere except upon a showing that the discretion has been abused to the prejudice of the appellant.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Angelo Ghiglione against the American Trust Company for damages allegedly resulting from fraud of defendant's branch manager in inducing plaintiff to sign withdrawal slips. From an adverse judgment, the defendant appeals.

Affirmed.

Brobeck, Phleger & Harrison, of San Francisco, for appellant.

Pierce & Sherwin, of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for the recovery of money upon a complaint containing three counts and had judgment on a verdict based upon the second and third counts, which sounded in fraud.

The defendant is a banking corporation maintaining a branch office in the city of Alameda where it has carried on the ordinary commercial and savings bank activities, including the drafting of documents and collecting notes for its customers and crediting the collections to the accounts of its clients. The plaintiff was the owner of considerable real property and was in the habit of dealing in real property and making loans thereon. For a number of years before the acts hereafter mentioned he maintained a savings account with the Alameda branch, but did not carry a commercial account. He is an Italian by birth, who had retired after a successful experience as a vegetable grower. He could read English a little, but could not write, except to sign his name.

Sometime before 1931 the plaintiff met Lloyd Smith, the manager of the branch bank, and the two became very close friends. The plaintiff went to Italy in 1930 for a visit and, before leaving, gave Smith a general power of attorney under which the latter withdrew $3,000 from the plaintiff's account which he loaned to his own mother. This sum was in large part repaid, and plaintiff did not learn of the transaction until some years later. During all the time plaintiff was dealing with Smith he placed full confidence in him in his relation with the bank, signed the power of attorney, withdrawal slips, and other papers, without question, and permitted the bank to draw cashier's checks and withdrawal slips for him with which the bank paid his taxes and other bills. As to the power of attorney given to Smith the plaintiff testified he thought he had "signed a paper for the bank to take care of everything when I am gone."

The second cause of action pleaded rests upon the alleged fraud of defendant's agent in inducing the plaintiff to consent to the withdrawal of $4,700 from his account for the purpose of making a loan to an unidentified person. The plaintiff testified that Smith came to his house on the morning of January 6, 1936, and told plaintiff that he knew of a woman who desired to borrow $4,700 to be secured by good bonds worth about $10,000. Smith stated that the bank could not make the loan because the woman wanted to borrow the money for a period in excess of one year and hence he was bringing it to plaintiff as a good client of the bank. Smith further stated that plaintiff would be able to obtain 6 per cent interest instead of the 2 per cent which the bank paid; he further remarked that if any bond depreciated in value "we sell it before they go too low" and that "he" would have all the papers prepared. Plaintiff testified that he agreed to the transaction, signed a withdrawal slip for $4,700, left it with Smith, and the withdrawal was made on January 8, 1936. Smith later told plaintiff that "everything was O. K." but plaintiff did not ask the name of the borrower and did not see the note. Plaintiff testified that he relied on these representations and did not discover their falsity until November, 1938, when Smith was arrested for certain defalcations.

The second transaction is pleaded as the third cause of action in the complaint in which plaintiff sought recovery of $3,250 representing $2,000 noted as withdrawn from his account on December 5, 1936, and $1,250 noted as withdrawn on February 24, 1938. Plaintiff testified that, about seven or eight months after the transaction alleged in the previous count, Smith came to his house and stated that he knew of a person who desired to make a $3,750 real estate loan; Smith made approximately the same representations as he had previously made regarding the security, interest and safety of the loan. Plaintiff testified that in reliance on such representations he signed a withdrawal slip for $3,750 which he handed to Smith, but defendant's records showed that such withdrawal was not made at any time near that date. Plaintiff relies on the withdrawal of $2,000 on December 5, 1936, and the charge against his account of $1,250 on February 24, 1938, which money he testified

was not received by him. The defendant introduced testimony showing that a $2,000 deposit and a $3,250 withdrawal was made on February 24, 1938, for which it held plaintiff's receipt but the latter testified that he had not consummated such a transaction. Testimony of defendant's employees was offered to the effect that the bank did not make loans for others. Defendant's motions for nonsuit and a directed verdict were denied, and the jury returned a verdict in favor of plaintiff in the sum of $8,546.94. The court denied defendant's motions for a judgment notwithstanding the verdict and for a new trial. Defendant appeals from the judgment entered upon the verdict in favor of plaintiff.

[1, 2] The grounds of the appeal rest upon the claim that the evidence is insufficient to support the verdict, and that the trial court erred in limiting the cross-examination of respondent. The first point is based upon the statement that appellant's records, respondent's passbook, and the receipts make a prima facie case of payment of the two items questioned in the third count, and upon the statement that respondent produced no evidence that Smith received the money for the purpose of making a loan for respondent, or that the withdrawals were connected with Smith's representations regarding the proposed loan of $3,750. If this were a correct statement of the record there would be no difficulty in accepting appellant's position as sound. But the appellant has overlooked certain essential facts and circumstances which are of sufficient weight to support the inference which we must assume the jury drew in reaching its verdict. Thus the respondent testified that seven or eight months after the bond transaction Smith approached him with the same representations theretofore made and suggested that he loan $3,750 from his account upon certain real property. Smith volunteered to make up the necessary papers, and later told respondent at the bank that everything was "O. K." Respondent testified that he had no recollection of signing the withdrawal slip for $2,000 on December 5, 1936, that no cashier's check was drawn for that amount, that he did not receive that sum then or at any other time, that, since January, 1936, he did not at any time withdraw more than $300 in cash. The records of appellant show that, on February 24, 1938, respondent's balance was $2,866, that he then withdrew $3,250 and on the same day deposited $2,000. Respondent denied that he made either the withdrawal or the deposit at that time. The appellant did not call Smith or any other witness to explain these obvious discrepancies in its records, and did not controvert in any particular the plain and simple story of respondent. His testimony explaining these receipts, or purported withdrawals was of course admissible for that purpose. 10 Cal. Jur. 923 et seq. From all these circumstances the jury might have inferred that the books and records being under Smith's direct control and management did not present a full and true picture of these transactions.

Appellant does not seriously contend that the evidence is insufficient to prove the transaction alleged in the second count. It cites the evidence of the receipt for $4,700 signed by respondent, but his testimony clearly explains that. There was no evidence of any character which would tend to controvert respondent's direct testimony that he did not at any time while a depositor with appellant personally withdraw such large sum from the bank.

[3] The real issue urged by the appellant is that the respondent failed to show that the bank was liable for the fraudulent act of its employee. The argument is that, as matter of law, the acts complained of were outside of the actual and ostensible authority of the employee. The question whether an agent is acting under the actual or ostensible authority of his principal is one of fact which may be covered by direct evidence of the fact or by reasonable inferences drawn from the facts proved. Here it may be conceded that there is no evidence of actual authority. The respondent contends that he has met the requirements by proof of an apparent or ostensible authority.

[4] The liability of the principal under such circumstances is well stated in section 261 of the Restatement of the Law of Agency, which reads, in part: "A principal who puts an agent in a position that enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud."

In support of his contention that the bank had clothed its manager with authority to conduct for its customers business transactions including loans to third parties, the respondent relies upon the evidence showing that, in accord with the usual custom,

the manager was authorized to take money and documents from a depositor for the purpose of starting an escrow or trust, to receive and carry out the escrow instructions. It was shown that for a period of years the bank manager had carried out respondent's instructions for the payment of his taxes and other obligations for which service the bank had accepted a nominal fee. The bank supplied its manager with printed forms and prepared notes to assist its manager in rendering a service to its customers in drafting notes given in connection with transactions between its customers. The appellant relies upon the testimony of some of its employees that it was no part of the bank's business to make loans for others. But it does not controvert the showing of the well-established custom and practice of the appellant to permit the manager to accept withdrawal slips for money deposited in the savings accounts and to transmit funds to another upon the instructions of the depositor.

[5, 6] In a matter of this kind the customer of the bank is not foreclosed by the secret or undisclosed instructions which the principal might have given its agent. The question whether the authority was apparent is one of fact to be determined by all the circumstances, and, upon the facts here presented, the jury was fully justified in concluding that the local manager was acting for his principal when he accepted the withdrawal slips, paid respondent's bills, and prepared the numerous documents for respondent's signature. The case thus comes squarely within the rule cited and is supported by National Bank, etc., v. Whitney, 40 Cal.App. 276, 283, 180 P. 845; Lange v. Curtin, 11 Cal.App.2d 161, 169, 53 P.2d 185; National Bank, etc., v. Whitney, 181 Cal. 202, 205, 183 P. 789, 8 A.L.R. 298; Rutherford v. Rideout Bank, 11 Cal.2d 479, 484, 80 P.2d 978, 117 A.L.R. 383.

[7] We cannot follow appellant's theory that the respondent should be charged with notice that the acts of the agent were beyond the scope of his authority because they would put the bank in the loan brokerage business, contrary to law. We find no evidence that respondent was charged a fee for the suggestions that loans be made. To the contrary it appears that these suggestions were made as friendly gestures of good will and business accommodations, and that they were accepted as such by respondent.

[8] The argument that the appellant was unduly limited in its cross-examination of the respondent is not impressive. It is said that this examination was conducted to show that the respondent had a bad memory, and thus cast doubt upon his direct testimony. It has been said frequently that the conduct of the cross-examination of a witness is within the discretion of the trial court, and that the appellate court will not interfere except upon a showing that such discretion has been abused to the prejudice of the appellant. Grimbley v. Harrold, 125 Cal. 24, 32, 57 P. 558, 73 Am.St.Rep. 19; 27 Cal.Jur. "Witnesses," sec. 76.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.



49 Cal.App.2d 702

JONES et al. v. HEINRICH.

Civ. 6449.

District Court of Appeal, Third District, California.

Feb. 13, 1942.

1. Appeal and error ⇐867(2)

On defendant's appeal from an order granting plaintiffs' motion for a new trial, where the order was general in form and did not specify insufficiency of the evidence as one of the grounds thereof, the Court of Appeal would limit its consideration to the errors in law allegedly committed in granting the motion. Code Civ.Proc. § 657.

2. Automobiles ⇐245(43, 72)

In an action for the death of a pedestrian crossing a three-lane highway from west to east and struck by a northbound automobile which had allegedly turned into the middle lane to pass behind the pedestrian who, after entering the easterly lane, stepped backward into the middle lane, where there was testimony that skid marks measured 87½ feet, and evidence as to the speed of the automobile was conflicting, the questions of negligence and contributory negligence were for the jury.

3. Appeal and error ⇐1066

In an action for the death of a pedestrian, an instruction as to the care required of the defendant motorist if suddenly confronted with unexpected and imminent danger was prejudicially erroneous in omitting the qualification that defendant must not have been placed in a position of such danger through any fault or negligence on his part.

4. Appeal and error ⇐1064(1)
Automobiles ⇐246(60)

In an action for the death of a pedestrian, a requested instruction that at the outset each party was entitled to the presumptions that every person takes ordinary care of his own concerns and obeys the law should not have extended the presumption to the defendant motorist, who testified as to his actions, though the giving of such an instruction is not necessarily prejudicial error.

5. Automobiles ⇐246(60)

Plaintiffs suing for the death of a pedestrian were entitled to an instruction giving the pedestrian the benefit of a presumption that she exercised ordinary care and obeyed the law, especially where the only eyewitnesses were the defendant motorist and his relatives, who testified as to the pedestrian's conduct; such presumption being in itself a species of evidence and the only available evidence tending to refute the claim of contributory negligence.

6. Automobiles ⇐246(58)

An instruction on the last clear chance doctrine was properly refused, where it did not appear that the deceased pedestrian was in a position of peril when first observed by the defendant motorist or that defendant knew or should have known that the pedestrian would not continue on her way across the highway; the pedestrian not being in a position of peril until she stepped backward into the path of defendant's automobile, who then applied his brakes with full force.

7. Appeal and error ⇐978(1)

In determining whether the giving or refusal of certain instructions has operated prejudicially, much is committed to the discretion of the trial court, whose conclusion will not be disturbed unless abuse of discretion appears.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Elizabeth Francis Jones and others against Fred C. Heinrich, for wrongful death of a pedestrian struck by defendant's automobile. From an order granting plaintiffs' motion for a new trial after verdict and judgment for defendant, defendant appeals.

Affirmed.

Honey & Mayall, of Stockton, for appellant.

Neumiller & Ditz and Dudley W. Sheppard, all of Stockton, for respondents.

STEEL, Justice pro tem.

This is an appeal by the defendant from an order granting plaintiffs' motion for a new trial after judgment entered, upon the verdict of the jury, in favor of the defendant.

[1] The order granting a new trial was general in form and did not specify insufficiency of the evidence as one of the grounds upon which it was based (Code of Civil Procedure, section 657), therefore we will limit our consideration to the errors in law alleged to have been committed by the trial court in granting the motion.

[2] While appellant urged that the evidence shows contributory negligence upon the part of plaintiffs' decedent, as a matter of law, and is insufficient as a matter of law, to show any negligent act upon the part of defendant which would sustain a finding of negligence against him, we are satisfied from an examination of the record that the evidence presents questions of fact rather than law. The principal question presented upon this appeal involves the giving and the refusal to give certain instructions, it being the contention of the respondents that such alleged error was sufficient to warrant the court in granting a new trial. Preliminary to considering this question we will set forth so much of the evidence as is necessary to an understanding and discussion of the factual situation.

The action here arises out of an automobile-pedestrian accident occuring on McKinley Avenue, a few blocks south of the city limits of the city of Stockton, and in which plaintiffs' decedent Mrs. James Francis was struck and killed by an automobile driven by the defendant Fred C. Heinrich.

McKinley Avenue runs north and south, and is intersected near the scene of the

accident by Eighth and Ninth Streets running easterly and westerly at right angles to McKinley Avenue, which streets do not continue directly across McKinley Avenue but have a defined jog or offset between their entrance to and their departure from McKinley Avenue. The decedent with her daughter and son-in-law had arrived from Reno, and were stopping in an auto court on the easterly side of McKinley Avenue, and on the evening of their arrival shortly after eight o'clock, the decedent left the auto camp, crossed McKinley Avenue to a fruit stand, made a purchase, and after returning to the cabin decided she wanted some oranges, so again crossed the street to the fruit stand, and it was on this second trip that the accident occurred. The highway is what may be referred to as a three-lane highway, approximately 78 feet in width with two white lines marking the center lane used for passing. The defendant Heinrich, accompanied by his wife, son, father-in-law, mother-in-law and nephew were traveling north on the highway; it appears that there were no vehicles approaching within a quarter of a mile or more, and that shortly prior to the accident the defendant had slowed down to 25 or 30 miles per hour according to his testimony, they having then entered the residential district, the speed limit of which, according to the posted signs, was 25 miles per hour. It is the testimony of the defendant that he was traveling at this speed when he first saw Mrs. Francis, that his lights were on low, and that he could see from 75 to 100 feet ahead, and that when he first saw the decedent she was walking east or from his left, and was stepping across the most easterly white line into his lane of traffic; that she was then about 45 or 50 feet from him; that he put on his brakes slowly, not with the intention of stopping, and turned to his left into the center lane to pass behind her, and when about ten feet from her put on his brakes hard as she stepped backwards into his new lane of travel. At this time he was traveling about 15 miles per hour. He struck the decedent with the right front of his car between the fender and the light, the car coming to rest with the right front wheel on her body. He then released his brakes and moved forward to the north about 8 feet and stopped his car. The defendant, his son and father-in-law, seated in the front seat of defendant's car, were the only eye witnesses to what occurred.

The highway patrol officers who arrived at the scene very shortly after the accident were called as witnesses by the plaintiffs, and testified that the defendant had stated he was traveling between 30 and 35 miles per hour at the time of the accident; that they had measured the skid marks of the defendant's car and found them to be 87 feet 6 inches in length, and that the point where the car came to a stop on the body of decedent was 34 feet beyond the end of the skid marks. The officers placed the point of impact in the southerly unmarked crosswalk of Ninth Street and the point where the body came to rest at a point in the intersection of Ninth Street and the highway or McKinley Avenue. There is evidence also that the Auto Court lights on one side of the highway and the fruit store lights on the other side spread out over the highway where the accident happened.

[3] The foregoing is a summary of the evidence relating to the happening of the accident. The defendant requested and the court gave the following instruction on the doctrine of imminent peril, which the respondents urged as error in support of their motion for a new trial: "If you find from the evidence in this case that the defendant Fred C. Heinrich was suddenly confronted with unexpected and imminent danger, either to himself or to another, then he was not expected nor required to use the same judgment and prudence that would have been required of him in the exercise of ordinary care in calmer and more deliberate moments. His duty was to exercise only that amount of care which an ordinarily prudent person would exercise if confronted with the same unexpected danger under the same circumstances."

It will be observed that the instruction omits the qualification that the defendant Heinrich must not have been placed in a position of unexpected and imminent danger through any fault or negligence on his part. Plaintiffs requested and the court gave an instruction with reference to the imminent peril doctrine as applied to the decedent which contained the limitation "without fault or negligence on her part." Thus it will be seen that the instruction complained of was doubly prejudicial to the plaintiffs as the defendant was given the benefit of the rule, if confronted with sudden danger, while the plaintiffs were not. Appellant contends that other given instructions on the question of negligence

cure the error, if any, in the instruction complained of, citing authorities in support thereof. However, under the facts in the instant case, which disclose the main issue to be the question of negligence and contributory negligence, and to which the instruction was particularly applicable, the omission of the limitation was prejudicially erroneous to the plaintiffs' case. Gootar v. Levin, 109 Cal.App. 703, 293 P. 706; Howard v. Worthington, 50 Cal.App. 556, 195 P. 709; Stealey v. Chessum, 123 Cal.App. 446, 449, 11 P.2d 428.

[4, 5] Plaintiffs requested and the court refused to give the following instruction on the question of due care, and in support of their motion for a new trial urged such refusal as error: "At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption (and any evidence that may support the presumption), to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof."

While the offered instruction should not have extended the presumption to the defendant who was present in court and testified with reference to his actions, the giving of it under such circumstances is generally held not to constitute prejudicial error. Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884; Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128.

Plaintiffs were entitled to an instruction giving the decedent the benefit of such presumption, especially so in a situation such as in the instant case where the plaintiffs could produce no eye witnesses as to what occurred, and there were none other than the defendant and his relatives who occupied the car with him and who testified to the facts with reference to the conduct of decedent in crossing the street. Under the circumstances, this presumption which is in itself a species of evidence and the only bit of evidence available to the plaintiffs which would tend to refute the claim of the defendant that the deceased was guilty of contributory negligence, should have been before the jury in their deliberations. We conclude it was error not to have given it. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Ellison v. Lang Transportation Co., 12 Cal.2d 355, 84 P.2d 510; Stealey v. Chessum, supra.

[6] The plaintiffs and respondents contend that the court erred in refusing to give an instruction upon the doctrine of "last clear chance" which they requested. An examination of the evidence indicates that it does not include all of the elements necessary to an application of the doctrine, —for instance it does not appear that when the decedent was first observed by the defendant she was in a position of peril or that he knew, or should have known by the exercise of ordinary care, that she would not continue on her way across the highway. Until the moment she stepped back she was not in a position of peril, and it was then defendant applied his brakes full force. We think the court properly refused to instruct the jury on this doctrine.

[7] The rule has long been established that much is committed to the discretion of the trial court in determining whether the giving or refusal to give certain instructions has operated prejudicially and its conclusion will not be disturbed unless it appears that such discretion has been abused.

The order granting a new trial is affirmed.

TUTTLE, J., and THOMPSON, Acting P. J. concurred.

50 Cal.App.2d 15

DAZEY v. DAZEY et al.

Civ. 13265.

District Court of Appeal, Second District, Division 1, California.

Feb. 17, 1942.

Hearing Denied April 16, 1942.

1. Bastards ⇐3

At common law, the child of a married woman was conclusively presumed to be legitimate if begot while her husband, unless impotent, was "within the four seas;" that is, within the jurisdiction of the kingdom of England.

See Words and Phrases, Permanent Edition, for all other definitions of "Within the Four Seas".

2. Bastards ⇐3

The presumption that a child born of a married woman is legitimate is not rebutted by circumstances which only create doubt, but it may be wholly removed by sufficient evidence showing that husband was incompetent, entirely absent, so as to have no intercourse with the mother, entirely absent at period during which child must, in the course of nature, have been begotten, or only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Civ.Code, § 193; Code Civ.Proc. §§ 1962, 1963.

3. Bastards ⇐5

The rule permitting presumption of legitimacy to be rebutted by proper and sufficient evidence, does not allow either parent to testify to the fact of nonaccess during cohabitation. Civ.Code, § 193; Code Civ.Proc. §§ 1962, 1963.

4. Bastards ⇐3

A fully developed child which was born 225 days after date of marriage would be deemed a legitimate child of the marriage, in view of policy of law to declare a child legitimate when it can fairly be done. Civ. Code, § 193; Code Civ.Proc. §§ 1962, 1963.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Suit by Walter Kendall Dazey, a minor, etc., against George K. Dazey and another, to determine which of two individuals was the father of the minor. From the judgment, the minor appeals.

Judgment affirmed.

Joseph Scott and Leo B. Ward, both of Los Angeles, for appellant.

Jerry Giesler, of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

The complaint was filed by a guardian ad litem, the grandfather of a five year old child, and upon the subsequent death of said guardian ad litem, his wife was appointed by the court to succeed him. Facts are alleged upon which the plaintiff prays that the court determine which of two individuals is the father of the child. These two individuals we will refer to as husband No. 1 and husband No. 2.

Husband No. 1 lived with the mother of the child for several years, until the marriage was terminated by a final decree of divorce September 14, 1933. October 11, 1934, the mother and husband No. 2 were married. May 24, 1935, the child was born —225 days or seven months and fifteen days after the date of the second marriage. October 3, 1935, the mother died.

The complaint alleges that when born the child was mature; that husband No. 2 has since remarried and that he and his present wife have instituted proceedings in the juvenile court with a view toward adopting the child. The complaint also contains allegations on information and belief; that husband No. 1 is the father of the child and that husband No. 2 is not; that the mother stated to the grandfather before she died that husband No. 2 was not the father of the child; and allegations of cohabitation between husband No. 1 and the mother within a period of 264 days before the child was born.

Our codes (Civil Code, section 193; Code of Civil Procedure, sections 1962, 1963) set forth an indisputable presumption that a child born in lawful wedlock of a wife cohabiting with her husband is legitimate. In construing these code sections our courts have held that there are certain exceptions manifestly proper to be made.

[1] The common law rule was that the child of a married woman was conclusively presumed to be legitimate if begotten while her husband was within four seas—that is, within the jurisdiction of the kingdom of England—unless the husband was impotent. Estate of Mills, 1902, 137 Cal. 298, at page 304, 70 P. 91, 92 Am.St.Rep. 175.

[2, 3] In the concluding paragraph of the case just cited our Supreme Court has

stated the modern exceptions to the rule of conclusive presumption as follows: "The modern rule was stated by Lord Langsdale in Hargrave v. Hargrave, 9 Beav. 552, as follows: 'A child born of a married woman is in the first instance presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by proper and sufficient evidence showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse.' And the same rule is supported by the authorities in this country. Shuman v. Shuman, 83 Wis. 250, 254, 53 N.W. 455; Thayer on Evidence, appendix A, p. 540; 2 Lewis's Greenleaf on Evidence, section 150. But the above rule does not allow either of the parents to testify to the fact of non-access during cohabitation. Nor is the rule inconsistent with the conclusive presumption that a child begotten and born while the husband and wife are living together as such, and the husband not impotent, is legitimate."

This rule is repeated and approved and applied in Estate of Walker, 1917, 176 Cal. 402, 168 P. 689, 691. In that case the court in its opinion quotes, in part, the language of Lord Langsdale in the Hargrave case, supra, as follows: "'It is, however, very difficult to conclude against the legitimacy in cases where there is no disability and where some society or communication is continued between husband and wife during the time in question, so as to have afforded opportunities for sexual intercourse; and in cases where such opportunities have occurred and in which any one of two or more men may have been the father, whatever probabilities may exist, no evidence can be admitted to show that any man other than the husband may have been or probably was the father of the wife's child.'"

Again, in Estate of Walker, 1919, 180 Cal. 478, 181 P. 792, the Hargrave case is referred to, and on page 491 of the reported decision in 180 Cal., page 797 of 181 P., the Supreme Court states the California rule applied to the facts in that case as follows: "* * * the true rule in America, as well as England, is, we believe, that if it is possible by the laws of nature for the husband to be the father (that is, if there was coition and no impotency), no inquiry will be permitted into the probabilities of the case one way or the other, but the presumption of legitimacy is conclusive."

In Estate of McNamara, 1919, 181 Cal. 82, 183 P. 552, 7 A.L.R. 313, the Supreme Court affirmed the rule as stated; but in applying it held that a period of gestation of 304 days was greater than is usual or normal, and that, therefore, the presumption which we are discussing was not applicable.

In Anderson v. Anderson, 1931, 214 Cal. 414, 5 P.2d 881, the court held that a mature child born at the end of a period of gestation of 3½ months (105 days) was not within the usual or normal period of gestation, and that the presumption did not apply.

To apply the facts alleged in the complaint in this case becomes much more difficult than to ascertain and to state the rule involved. In the mysteries of birth, and of life, and of death, Mother Nature follows no exact pattern. In dealing with man's length of life, the Bible speaks of three score years and ten as but an approximate average; our life expectancy tables are but averages. Living men and women and children are, within limitations, each different from the other. Indeed, no two of us are, or ever have been, exactly alike. When we deal with mankind, there is no fixed standard of height or weight or conduct, or time. And so, in dealing with the mystery of the beginning of mortal life, we find no fixed number of days from conception to birth.

In California it was held in the McNamara case that 304 days was too long to be within the usual and normal period of gestation, and it was held in the Anderson case that 3½ months (105 days) was too short.

What is meant by the words "period of gestation"? Here we have an apparent misnomer. The word "gestation" is defined by the dictionary as being the period of time in which a woman carries a fetus in her womb, from conception to birth. But, as used in all medical authorities this phrase does not mean the actual number of days from conception to birth. One cannot take the date of birth as a starting point and count backwards so many days and say that a child was conceived on any particular date, even within limitations of as much as sixty days. The average period of gesta-

tion which the medical term connotes is from 270 to 290 days from the last menstrual period of the mother. As a medico-legal term this phrase does not mean now, nor has it ever meant, that "length of gestation" is from 270 to 290 days from the date of conception to the date of birth of a child.

"The actual duration of pregnancy is not yet known, but ordinarily two hundred and eighty days, or ten lunar months, elapse between the commencement of the last menstrual flow and the onset of labor, though a considerable number of children are born shortly before or after the expiration of that period." Williams' Obstetrics, Sixth Edition, page 163.

In the case at bar, in considering the possible natural length of gestation of this child, we must take the 225 days alleged in the complaint as elapsing from the date of marriage to the date of birth, and we must add an additional 25 days at least, making a total possible and natural period of gestation of 250 days. This is so because we must assume that conception of the child took place on the night of the marriage (Estate of McNamara, supra, 181 Cal. at page 88, 183 P. 552, 7 A.L.R. 313); we must also assume that this child was conceived just before the end of the mother's recurrent monthly menstrual period of 28 days. "But," says someone, "you are computing from a time 25 days before marriage of this mother. How can that be?" The answer is that we are applying an empirical measure of time, and it is the measure which we are using which extends the possible and natural number of days, to a time before the date of the marriage. To illustrate: If this lady, believing she was pregnant, had gone to her doctor to inquire the probable date of birth of the child, the doctor would have used 280 days from her last menstrual period, regardless of the date of the marriage, and he would (if it were 25 days before the marriage) have computed from that earlier date. The whole matter is discussed in DeLee's Principles and Practice of Obstetrics, Fourth Edition, page 25:

"It is important to know the time pregnancy begins, but, unfortunately, we are in a position as yet only to guess at the exact date. The knowledge is wanted in order to determine the day of confinement and the actual length of human gestation for practical reasons, for the scientific study of the development of the ovum in the uterus, and for medico-legal processes in the question of legitimacy of a child or its paternity. All the points on which such a determination could rest are uncertain, as: (1) The date of the fruitful coitus (the woman's word must be accepted); (2) the date the ovum left the ovary, and whether it was fertilizable or not; (3) how long it takes the ovum to reach the tube and uterus; (4) how long it takes the spermatozoids to reach the ovum; (5) how long the fertilized ovum rests before it begins to germinate—all unknown factors. * * *

"It is customary to reckon the length of pregnancy as nine calendar months, or ten lunar months, two hundred and eighty days' duration, dating from the first day of the last menstruation. Clinical experience shows that most labors occur at this time. If Reichert's theory is true for the majority of cases, one will have to conclude that the normal length of pregnancy is two hundred and fifty-two days, and this is contradicted by the length of time occurring from the date of a single insemination to labor, i. e., two hundred and seventy-two days, which is the average of a large number of authentic cases. Further, if the theory that the ovum from the first menses missed is fertilized is the true theory, the majority of women ought to have a period of amenorrhea of three hundred and eight days instead of two hundred and eighty days, during which time they considered themselves pregnant. But we know that in the great majority of cases the period of amenorrhea is of only two hundred and eighty days' duration. Therefore unless we are willing to admit that pregnancy lasts only two hundred and fifty-two days, we must concede that the majority of conceptions occur at the time around the last menses present."

This author also plainly states that if we compute the period from fruitful coition to birth, it varies from 220 days to 330 days ("Principles and Practice of Obstetrics," Sixth Edition, chapter 5, page 120, by Joseph B. DeLee, A.M., M.D., Professor of Obstetrics and Gynecology, Emeritus, University of Chicago, Consultant in Obstetrics, Chicago Lying-In Hospital and Dispensary; Consultant in Obstetrics, Chicago Maternity Center): "The most reliable datum from which to estimate the beginning is the date of fruitful coition, and, reckoning from this day, pregnancy has been found to vary from two hundred and twenty to three hundred and thirty days, the average being two hundred and seventy days. * * * From time immemorial women have reckoned two hundred and

eighty days, ten lunar months, or nine calendar months, from the first day of the last period as the length of normal gestation, and for practical purposes this may be accepted, because in the majority of cases it holds true, but one must remember and admit the exceptions. No doubt some children require a longer time in the uterus for full development than others. Some seeds in favorable soil grow faster than others. The writer has delivered children that were carried eight months that were as matured as full-term infants, and also in one case, he delivered a child weighing three and one-half pounds which was fully three weeks over term. Heyn had a case of two hundred and twenty-nine days' pregnancy, with child of 2980 gm. and 50 cm. length." [About 6½ pounds.]

There is an allegation in the complaint that this child was a mature child when born. This, however, is entirely consistent with the usual and normal period of pregnancy which we have been discussing, subject to natural variants always present. In construing the application of section 194, Civil Code, in paternity cases, our Supreme Court held in the McNamara case, supra, that a reasonable construction of the word "month" meant a period of thirty days. Using thirty days as one month for the purpose of computing length of gestation in this case, we find that a period of 250 days is the equivalent of eight months and ten days. All medical writers agree that it is not at all unusual for a mature child to be born at eight months.

[4] Having discussed two methods of computing the period of gestation, we conclude that, using either method, the fact that 225 days elapsed from the date of marriage to the birth of the child does not require us to hold, as a matter of law, that in this case the time of gestation was so short as to be abnormal, or contrary to the usual operation of the laws of nature. Therefore, the trial court properly applied the indisputable presumption prescribed by our code to the facts alleged in the complaint, and the demurrer to the complaint was properly sustained without leave to amend. This conclusion is made easier for us because it is the policy of the law to declare children legitimate when it can be fairly done. Unless the law plainly points to that end, a conclusion in favor of illegitimacy will not be declared. Estate of Wood, 137 Cal. 129, 69 P. 900.

There is no necessity of discussing the arguments in the brief relative to whether the guardian ad litem has the power to bring the action, or whether there was abuse of discretion on the part of the trial court in not giving the plaintiff an opportunity to amend his complaint.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.



AZEVEDO et al. v. AZEVEDO et al.

Civ. 6622.

District Court of Appeal, Third District, California.

Feb. 13, 1942.

Rehearing Granted March 13, 1942.

1. Limitation of actions ⇐24(4)

Where defendants bought livestock, farming machinery, etc., under written conditional sales contract which was to be performed within three years and agreed to credit amount received from any sales of the property by defendants, on the conditional sales contract, an action for an accounting for failure to credit amounts received for sales made by defendants was an "action on the contract" and, when brought more than four years after defendants made the sales and more than four years after date when the conditional sales contract was required to be performed, was barred by the four-year statute of limitation. Code Civ.Proc. § 337, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Action on the Contract".

2. Limitation of actions ⇐102(2)

Where defendants bought livestock, farming machinery, etc., under conditional sales contract and agreed to credit any amounts received from sales of any of the property by the defendants, the alleged existence of confidential and fiduciary relationship between the defendants and the conditional seller, who was defendant's father, did not establish existence of a "voluntary trust" as claimed by plaintiffs, who contended that limitation on action for accounting for their failure to credit amounts re-

ceived for sales of the property made by them did not commence to run until time of repudiation of the alleged trust. Code Civ. Proc. § 337, subd. 1; Civ.Code, §§ 2216, 2219, 2221, 2222.

See Words and Phrases, Permanent Edition, for all other definitions of "Voluntary Trust".

3. Trusts ⇐1, 21(2), 38

The essential elements of a "voluntary trust" are intention to create trust, subject matter of the trust, the purpose of the trust, the beneficiary of the trust, and the acceptance of the trust by the trustee, and the instrument containing trust must indicate with reasonable certainty each of the essential elements. Civ.Code §§ 2221, 2222.

4. Limitation of actions ⇐102(8)

In the case of an involuntary trust, limitation begins to run on the doing of the wrongful act by which the trust was created. Civ.Code, § 2223.

CURLER, Justice pro tem., dissenting.

Appeal from Superior Court, San Mateo County; Aylette R. Cotton, Judge.

Action by Howard Azevedo, as administrator, etc., and another, against Antone Azevedo, Jr., and another, for an accounting for an amount due pursuant to provisions of a contract. From judgment of nonsuit, plaintiffs appeal.

Affirmed.

Cross & Brandt, of San Francisco, for appellants.

J. E. McCurdy, of San Mateo, and J. W. Coleberd, of South San Francisco, for respondents.

TUTTLE, Justice.

This action was commenced to compel an accounting arising out of a written contract. At the close of plaintiffs' case the court granted a motion for nonsuit upon the following grounds:

1. That plaintiffs had failed to prove sufficient facts to entitle them to a judgment;

2. That the action was barred by section 337, subdivision 1; section 338, subdivision 4; section 339, subdivision 1; and section 343 of the Code of Civil Procedure;

3. That recovery was barred by laches.

The appeal is from a judgment of nonsuit.

The facts proven may be summarized as follows: Prior to February 8, 1926, the Azevedo family lived near Half Moon Bay. Antone V. Azevedo was the father. The mother was named Anna. The two sons are the defendants in this action. They were all engaged in extensive farming activities. Evidently with an intention to retire from active management, the father, on said date, executed with his sons an instrument which was a conditional sales contract. By the terms of the agreement Antone V. Azevedo agreed to sell to Antone Azevedo, Jr., and Frank Azevedo, and they agreed to buy, 90 head of cattle, more or less, 12 horses and colts, certain hogs and other livestock, dairying and farming machinery, implements, tools and utensils, dairying business, interests in the leaseholds belonging or appertaining to the ranches upon which the personal property was located, for the sum of $8400. Title to all of the property was retained by the vendor, Antone V. Azevedo, until such time as all of the property had been paid for in full by the vendees. Payment in full for the property was to be made within three years after the date of the agreement. In addition to the usual provisions contained in a conditional sales agreement, there were the clauses which read as follows:

"That all net profits made and received from the operation and conducting of the same are to be paid annually and on or before the first day of November of each year, to said party of the first part, and be applied on account of the purchase price of said personal property. * * *

"It is further understood and agreed that title to all of said personal property shall remain in the party of the first part until he has been paid the full purchase price thereof, and that should it be to the interest of the parties hereto, that some of said personal property, such as cattle and hogs, should be sold, that the same may be sold, but that the entire sale price thereof shall be paid to the party of the first part and apply on account of the balance due under this agreement."

In the complaint which was filed on March 31, 1938, it is alleged that after the making of the agreement, Antone V. Azevedo assigned to his wife Annie Azevedo, (also known as Anna Azevedo), all of his right, title and interest in and to said agree-

ment and the personal property therein described, together with all moneys due, or to become due, by virtue of said agreement; that on the 4th day of July 1937, Annie Azevedo died; that the plaintiffs are the duly appointed, qualified and acting administrator and administratrix, respectively, of the estate of Annie Azevedo; that Antone V. Azevedo and Annie Azevedo were the father and mother, respectively of the defendants; that in pursuance of the agreement, the property mentioned therein was delivered to, and accepted by defendants on or about the date of the agreement; and that ever since, they have been, and now are, in possession of the same, except what they have sold; that defendants have sold various articles of property mentioned in the agreement, and have been paid therefor, amounting in all to approximately $8,400; that they have paid on account of this sum only $2,765; that a demand has been made on defendants for an accounting, which they have refused to make; and it is prayed that defendants be ordered to account to plaintiffs, and that defendants be ordered to pay over to plaintiffs the amount ascertained to be due by said accounting. Defendants admitted in their answer, the execution of the agreement; the death of Annie Azevedo, the appointment and qualification of plaintiffs as administrator and administratrix, respectively, of her estate; that Antone V. Azevedo and Annie Azevedo were the father and mother, respectively, of defendants; the delivery to defendants by Antone V. Azevedo of the property mentioned in the agreement, the demand for the accounting, and that they had refused to give the same. The remaining allegations of the complaint were denied. Defendants set up as defenses the statute of limitations, alleging that the action was barred by subdivision 1 of section 337, by subdivision 4 of section 338, by subdivision 1 of section 339, and by the provisions of section 343, all of the Code of Civil Procedure. In addition, they set up the defense of laches.

Evidence produced by plaintiffs showed that respondents had, in 1926, sold a number of head of livestock, and some equipment, for which no credit had been given the vendor upon the purchase price, and no account had ever been rendered. Except for the bar of the statute of limitations, plaintiffs established a prima facie case.

[1] As we view the action, it is brought to recover upon the contract. Respondents agreed therein to credit the amount received from such sales upon the purchase price, and failed to do so. Judgment is prayed for the amount which may be found due. Section 337, subdivision 1 of the Code of Civil Procedure, which fixed a four year limitation upon actions founded upon instruments in writing, is therefore applicable and bars recovery. This would be true whether or not the Statute began to run when such sales were made, or at the end of the three years allowed in the contract for performance. More than four years elapsed before the action was commenced, whichever starting-point is adopted.

It is earnestly contended by appellants that the action is brought to enforce a voluntary trust, and that the action is not barred because it did not commence to run until the time of the repudiation. They rely upon the following sections of the Civil Code:

"2216. A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another."

"2219. Everyone who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control."

[2] They urge, in attempting to establish a trust, that the relations between father and sons were proven to have been both confidential and fiduciary. Assuming that the existence of such relations may be inferred from the evidence, such proof does not make out a voluntary trust. Parties under such circumstances may contract in the same manner, and under the same legal principles, as others who have no relationship of the character mentioned, and the statute of limitations relating to written instruments, is applicable. The failure to apply the proceeds from the sale upon the purchase price was, nevertheless, nothing more than a breach of contract. If the question of fraud, deceit, or undue influence were involved, the contention would have some merit. No such issues are involved. Furthermore, section 2221 of the Civil Code provides: "Subject to the provisions of section eight hundred and fifty-

two, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty: 1. An intention on the part of the trustor to create a trust, and, 2. The subject, purpose and beneficiary of the trust."

[3] In Dingwell v. Seymour, 91 Cal. App. 483, at page 508, 267 P. 327, at page 337, it is said: "The five essential elements of every valid, voluntary trust are: (1) The intention to create the trust; (2) the subject-matter of the trust; (3) the purpose of the trust; (4) the beneficiary of the trust; and (5) the acceptance of the trust by the trustee. The deed or instrument containing the trust must indicate with reasonable certainty each and every one of these essential elements. Sections 2221 and 2222, Civ.Code."

We think that the proofs fail to establish a voluntary trust. If any trust relation appears at all in the proof, it would be an involuntary one. As stated in section 2223 of the Civil Code: "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."

[4] In that event, the action would be barred because "the period of limitation begins to run upon the doing of the wrongful act by which the trust was created." 25 Cal.Jur. 274, sec. 135. The wrong, if any, consisted in failing to account for sales of property described in the contract.

In view of what we have said, we deem it unnecessary to discuss the question of laches.

The court did not err in granting the motion for nonsuit, and accordingly, the judgment is affirmed.

THOMPSON, Acting P. J., concurred.

CURLER, Justice pro tem. (dissenting). I dissent. The prevailing opinion is based on the theory that this action is brought to recover on a contract—that respondents had agreed to pay the amount received from sales to the vendor, and had failed to do so. In other words, when respondents sold something, possession of which had been turned over to them under the conditional sales contract, and received the money therefor, the vendor accepted their credit in place of the article sold. With this I am unable to agree. It is my view that in making sales, respondents were acting as agents of the vendor. They had no title, the same being reserved in the vendor. Therefore, they could only have been acting as agents in conveying title of the vendor to the purchasers—and this they were authorized to do by the terms of the contract. Had it been the intention of the parties, that when respondents made a sale, the amount received from same was simply a debt due from them to the vendor, there would have been no meaning to the provision in the contract that title was retained in the vendor. Title retention was the vendor's security, and if he had been willing to accept the credit of the respondents without security, he would not have bothered with a conditional sales agreement, but would have sold them the articles unconditionally and accepted their credit. If the intention of the agreement was that respondents, in making sales, were the agents of the vendor and were to hold the money received in trust, to be delivered to him, then respondents were trustees of a voluntary trust, and the statute of limitations would not commence to run until a repudiation of the trust was brought to the notice of the equitable owner. 25 Cal.Jur. 271, 272, and cases cited therein. There was no repudiation here until a demand for an accounting was refused by respondents just shortly before the action was commenced.

Sections 2216, 2219, and 2221 of the Civil Code, quoted in the prevailing opinion, set out the requirements of a voluntary trust. In brief, section 2219, supra, provides that "Everyone who voluntarily assumes a relation of personal confidence with another is deemed a trustee * * *". Section 2216, supra, provides that: "A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another"; and section 2221, supra, provides that: "* * * a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty: 1. An intention on the part of the trustor to create a trust, and, 2. The subject, purpose and beneficiary of the trust." Applying these sections to the present case, it appears that by section 2219 of the Civil Code, when respondents undertook to act as agent in selling the personal property, said sales being authorized by the agree-

ment, they became trustees of the money which they were authorized to receive, but which the agreement provided belonged to Antone V. Azevedo. By the provisions of section 2216 of the Civil Code, this was a voluntary trust because it arose out of a personal confidence reposed in respondents, both by reason of their being the sons of Antone V. Azevedo, and also by reason of the relation of principal and agent. The agreement gave respondents the right to make sales but imposed upon them the duty of turning the money over to Antone V. Azevedo, and by signing this agreement and making the sales therein authorized, respondents voluntarily accepted the relation of principal and agent. Under the provisions of section 2221 of the Civil Code, Antone V. Azevedo became trustor of the trust by placing his personal property in the possession of the respondents, with title reserved in himself, but permitting sales to be made, and indicating in the agreement that any moneys collected from sales should be held for his account. The subject of the trust was the money to be received from sales; the purpose of the trust was to permit respondents to sell personal property which, through obsolescence or old age, would have been to their detriment to retain; and the beneficiary of the trust was Antone V. Azevedo, his heirs, executors, administrators and assigns. (The contract expressly states that it shall bind and inure the heirs, executors, administrators and assigns of the respective parties.)

The prevailing opinion cites the case of Dingwell v. Seymour, 91 Cal.App. 483, at page 508, 267 P. 327, at page 337, as laying down the test of a voluntary trust. That case states: "The five essential elements of every valid, voluntary trust are: (1) The intention to create the trust; (2) the subject matter of the trust; (3) the purpose of the trust; (4) the beneficiary of the trust; and (5) the acceptance of the trust by the trustee. The deed or instrument containing the trust must indicate with reasonable certainty each and every one of these essential elements. Sections 2221 and 2222, Civ. Code."

The use of the words "deed or instrument" in the case might indicate that it was the court's opinion that a voluntary trust could only be created by a written instrument. The court was there dealing with a trust created by a written instrument, and unquestionably had that in mind, but the court, unfortunately, did not limit the language to voluntary trusts created by an instrument in writing and those dealing with realty, which must be created by an instrument in writing. Voluntary or express trusts concerning anything except realty may be created by an oral agreement. 25 Cal.Jur. 154, and cases therein cited. In the case of Dingwell v. Seymour, supra, the court, in stating that all five elements must appear in the deed or instrument, cites sections 2221 and 2222 of the Civil Code, as its only authority for that statement. However, each of those sections expressly provides that a voluntary trust is created by any words or acts indicating the requisite elements of the trust. Hence, the statute anticipates and provides that at least some of the elements of the trust may be found in the acts of the parties.

In conclusion, it is my opinion that the true rule in cases of the type now before the court is set forth in the case of Allsopp v. Joshua Hendy Machine Works, 5 Cal. App. 228, at page 234, 90 P. 39 at page 42, where the court quotes with approval the following: "As long as the relation of principal and agent continues there is a privity between the parties, and there is nothing to set the statute in operation as to claims and accounts between them. The position of the agent is that of a trustee, and claims against him are governed by a rule similar to that controlling trustees. The assertion by the agent of an adverse right, or his failure to discharge a duty to his principal arising out of his agency, does not set the statute in motion until called to the attention of the principal, or until he knows, or with reasonable diligence might have known, thereof."

BANK OF AMERICA NAT. TRUST & SAV. ASS'N v. SUPERIOR COURT OF LOS ANGELES COUNTY.

Civ. 13207.

District Court of Appeal, Second District, Division 1, California.

Feb. 18, 1942.

Rehearing Denied March 10, 1942.

Hearing Granted April 16, 1942.

1. Appeal and error ⇐870(2)

Trial court's action in granting plaintiffs leave to amend their first two causes of action after appellate court had upheld sustaining of a demurrer without leave to amend as to first two causes of action but had reversed judgment of dismissal upon ground that other counts of complaint stated a cause of action, could be reviewed on appeal from a final judgment ending action although of itself the order was not appealable under statute. Code Civ.Proc. § 963.

2. Certiorari ⇐5(1)

Generally, even if an order is not appealable, certiorari will not lie if the effect of the order can be reviewed and nullified by an appeal from the final judgment. Code Civ.Proc. § 963.

3. Certiorari ⇐4, 5(1), 28(1)

The conditions on which a certiorari can be granted are separate and concurrent and there must be an excess of jurisdiction by an inferior tribunal, no appeal and no other plain, speedy, and adequate remedy in order to afford a remedy by certiorari by statute. Code Civ.Proc. § 1068.

4. Certiorari ⇐5(1)

Where there is a direct appeal from order of an inferior court under statute, certiorari will not lie. Code Civ.Proc. §§ 963, 1068.

5. Certiorari ⇐5(1)

In determining whether certiorari should be granted to review an order of an inferior tribunal from which there is no direct appeal, the question to be determined is whether a review on appeal from the final judgment would nullify effect of the order. Code Civ. Proc. §§ 963, 1068.

6. Pleading ⇐204(3)

Where complaint was in four counts, defendant was entitled to demur generally, in separate paragraphs, not only to the entire complaint but to each separate count thereof and was entitled to a ruling on the demurrer according to its merits. Code Civ. Proc. § 431.

7. Pleading ⇐216(1), 220

Where defendant demurred generally to entire complaint and to each of four counts thereof, each separate count of the complaint was required to be considered separately and the number of counts contained in complaint did not affect the ruling on demurrer to any single count. Code Civ. Proc. § 431.

8. Appeal and error ⇐1201(4)

Where defendant demurred generally to entire complaint and to each of four counts thereof, and trial court sustained demurrer, and reviewing court upheld sustaining of demurrer as to two counts but required reversal of judgment of dismissal on ground that remaining counts stated cause of action, decision on appeal had effect of finally disposing of the first two counts and on return of the case to the trial court, it was without authority to proceed further as to the first two counts and was without jurisdiction to grant further amendment thereto.

9. Appeal and error ⇐1201(4)

Where reviewing court upheld sustaining of demurrer without leave to amend as to first two counts of complaint but reversed judgment of dismissal on ground that other counts of complaint stated cause of action, reviewing court was without power to direct trial court to allow plaintiff to amend the counts of the complaint to which demurrer was properly sustained, since decision reversing judgment of dismissal was necessarily limited to sufficient counts of complaint and direction to allow plaintiff to amend complaint could not be interpreted as applying to any but counts held to be sufficient.

10. Certiorari ⇐5(2)

Where reviewing court upheld sustaining of a demurrer, without leave to amend as to first two counts of complaint but reversed judgment of dismissal on ground that other counts of complaint stated cause of action, certiorari would lie to review order of trial court granting permission to amend first two counts of complaint, since it would be unconscionable to compel defendant to submit to trial and await final outcome be-

fore obtaining redress for unwarranted reopening of litigation in face of valid judgment disposing of it.

On rehearing.

Previous decision adhered to.

Prior opinion, 117 P.2d 733.

Edmund Nelson, G. L. Berrey, Freston & Files, and James A. McLaughlin, all of Los Angeles, for petitioner.

Mitchell, Silberberg, Roth & Knupp and Livingston & Livingston, all of Los Angeles, for respondent.

DORAN, Justice.

Upon rehearing and a reconsideration of the questions involved, no good reason has been found to alter the decision of this court previously rendered herein. However, in order to point out more clearly the reasons for the decision it is advisable to revise to some extent the former opinion [117 P.2d 733, 734].

"By this proceeding petitioner seeks a review of an order of the superior court permitting an amendment as to the first two causes of action set forth in a first amended complaint in an action entitled Herbert Hellman Aronson, et al, v. Bank of America National Trust & Savings Association, et al, L. A. Superior Court No, 409371, brought against petitioner for an alleged conversion of certain shares of bank stock. The complaint in question consisted of four counts, each based upon a separate alleged conversion of stock, and the order granting plaintiffs leave to amend their first two counts was made upon motion of plaintiffs therefor after a general demurrer to the entire complaint had been sustained without leave to amend further, the action had been dismissed, an appeal had been taken from the judgment of dismissal, and the appellate court had upheld the sustaining of the demurrer without leave to amend as to the first two counts of the complaint but had reversed the judgment of dismissal upon the ground that the third and fourth counts of the complaint stated a cause of action. See Aronson v. Bank of America Nat. Trust & Sav. Ass'n, 42 Cal.App.2d 710, 109 P.2d 1001, 1007." In the opinion there handed down the appellate court pointed out: "The instant action is the second such between the same parties and for the same cause. A general demurrer to plaintiff's complaint in the first action was sustained without leave to amend, the cause was dismissed and the judgment of dismissal was affirmed by the Supreme Court of this state on October 4, 1937, the opinion being reported in Aronson v. Bank of America, etc., Assn., 9 Cal.2d 640, 72 P.2d 548. The facts which form the basis of appellants' complaint are briefly summarized in that opinion. * * * Before the affirmance of the judgment in the former action and on November 28, 1936, the present action was commenced by appellants and the complaint therein was thereafter amended on June 18, 1937, and again on May 21, 1938, after which respondent bank put in an appearance and interposed its demurrer." [42 Cal.App.2d 710, 109 P.2d 1003]

"In its opinion the appellate court stated: 'It should be mentioned in passing that the complaint is far from a model of pleading and is in no sense concise. It is clear, however, that no attempt has been made to set out more than one cause of action in each count.

" 'In view of the fact that the allegations of the first and second counts of the complaint reveal a situation wherein no cause of action would lie against respondent bank or its predecessor the trial court did not err in refusing to grant leave to plaintiffs to amend those counts, but for the reasons above given the court erred in sustaining the demurrer to the third and fourth counts and in dismissing the action.

" 'The judgment of dismissal is therefore reversed with directions to the trial court to grant appellants leave to file an amended complaint if they are so advised.'

"Respondent contends that the effect of the judgment of reversal was to vacate the order sustaining the demurrer to plaintiffs' complaint and to place the action in exactly the same situation it occupied before there was any ruling on the demurrer. Respondent also contends that certiorari will not lie in the present instance because the question here presented may be reviewed upon an appeal from a final judgment in the action now pending." It is also argued that the error, if any, committed by the trial court in permitting the amendment to the first and second causes of action in the complaint was merely one committed within the exercise of the jurisdiction of the court and did not constitute an act in excess of jurisdiction.

[1, 2] "It is undoubtedly true that the propriety of the trial court's action in granting plaintiffs leave to amend their first two causes of action, after reversal of the judgment of dismissal, could be reviewed on an appeal from a final judgment in the action; although of itself the order in question is not an appealable order under section 963 of the Code of Civil Procedure. It has been generally held that even if the order in question is not appealable, certiorari will not lie if the effect of the order can be reviewed and nullified by an appeal from the final judgment. Bryant v. Superior Court, 16 Cal. App.2d 556, 562, 61 P.2d 483; Hughson v. Superior Court, 120 Cal.App. 658, 8 P.2d 227. But in Bottoms v. Superior Court, 82 Cal.App. 764, 777, 256 P. 422, the trial court had vacated an order granting a continuance. The continuance had been granted on the ground that one of counsel was a member of the legislature attending a session thereof. Certiorari was sought to review the order vacating the order of continuance. It was held that while such an order would be reviewable on appeal from a final judgment in the action, the circumstances obviously required a more speedy and adequate remedy. It should be noted that the Bottoms case presented a situation where the effect of the order in question could not be nullified on an appeal from the final judgment. The continuance having been vacated and the action having been tried, the party aggrieved could be afforded no real remedy on an appeal from the final judgment. It could hardly be said that justice would be done by reversing the final judgment and remanding the cause to be tried all over again because the trial court had refused a continuance.

"Bryant v. Superior Court, supra, was concerned with the review of an order vacating orders allowing claims against an estate. At page 562 of 16 Cal.App.2d at page 486 of 61 P.2d, in that case the court stated: 'The order under review is not an appealable order. (Cases cited.) It has been held that even so, if the effect of an order can be reviewed and nullified by an appeal from the judgment, certiorari will not lie. (Citing Hughson v. Superior Court, supra.) Relying on this principle of law, respondents claim that petitioners have a plain, speedy, and adequate remedy at law, as they can again present their claim to one of the judges of the superior court for allowance; if disallowed in whole or in part, a suit to enforce the claim may be prosecuted, and, if an adverse judgment is had, an appeal lies therefrom. Prior to the order vacating these claims, they stood as acknowledged debts against the estate. The approval of a claim against an estate is prima facie evidence of its validity, and the burden of showing invalidity is cast upon those who contest it. (Citing authority.) It is apparent, therefore, that the effect of the order vacating the orders allowing the claims cannot be reviewed or nullified by the method suggested by respondents.'

"In Stanton v. Superior Court, 202 Cal. 478, at p. 490, 261 P. 1001, at page 1005, a case having to do with the review of a void order setting aside a judgment, it is said: 'To require review to be by appeal of every unauthorized order or judgment attacking the proceedings by which the regular judgment was given and made would seriously embarrass, if not destroy, the efficiency of our whole legal system.'

[3-5] "Section 1068 of the Code of Civil Procedure provides that a writ of review may be granted when jurisdiction has been exceeded 'and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy'. The conditions on which such a writ may be granted have been held to be separate and concurrent. See Monterey Club v. Superior Court, 44 Cal.App.2d 351, 112 P.2d 321.

Accordingly, in order to afford a remedy by certiorari under the code, two requisite elements must be present, aside from that of excess of jurisdiction, namely: (a) No appeal; (b) No other plain, speedy and adequate remedy. Where there is a direct appeal from the order in question under section 963 of the Code of Civil Procedure, certiorari will not lie in any event. Stoddard v. Superior Court, 108 Cal. 303, 41 P. 278; Monterey Club v. Superior Court, supra.

Likewise, as already seen from the authorities heretofore cited, certiorari will not lie if the effect of the order can be reviewed and nullified on an appeal from the judgment, even though the order itself is not appealable. * * *

"Bottoms v. Superior Court and Bryant v. Superior Court furnish examples of instances in which a subsequent review on appeal would not nullify the effect of the order in question."

[6, 7] In the instant situation, respondent concedes that if counts I and II of the complaint constituted the only counts then the decision on appeal would have ended the matter and plaintiffs would not then have been privileged to return to the trial court and apply for permission to make further amendment. But, according to respondent, because the complaint contained two additional counts which were held good on appeal, requiring a reversal of the judgment of dismissal, the plaintiffs were given an opportunity to make another effort to propose a good amendment to the insufficient counts. Respondent claims that the demurrer was to the complaint as a whole and not to each separate count thereof, but the record reveals this to be untrue. Petitioner, in separate paragraphs, demurred generally not only to the entire complaint but to each separate count thereof as well. The demurrer was in proper form to reach not only the complaint as a whole but each separate count thereof. Petitioner was entitled to so demur (Sec. 431, Code of Civil Procedure) and was entitled to a ruling on the demurrer according to its merits. See Wigman v. Superior Court, 74 Cal.App. 132, 239 P. 427. To this end, each separate count of the complaint must be considered separately; and the number of counts contained in a complaint cannot affect the ruling upon a demurrer to any single count. It follows, therefore, that the effect of sustaining a demurrer to any separate count of a complaint is the same, whether the complaint contains one count or a hundred. If the decision on appeal, to the effect that petitioner's demurrer to the first two counts of the complaint was properly sustained without leave to amend, would have finally disposed of those counts had they been the only counts in the complaint, such a ruling would likewise constitute a final disposition of the matter even where the complaint contained other counts held to be good. Respondent's argument to the contrary is without foundation.

[8] Since the decision on appeal from the judgment of dismissal had the effect of finally disposing of the first two counts of the complaint, upon the return of the case to the trial court that court was without authority to proceed further as to the first two counts and was thus without jurisdiction to grant a further amendment thereto. See Anderson v. Great Republic Life Insurance Co., 41 Cal.App.2d 181, 106 P. 2d 75; and see Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411, as to the meaning of the term "jurisdiction" in modern jurisprudence.

[9] Moreover, the appellate court was without power to direct the trial court to allow plaintiffs to amend the counts of their complaint to which petitioner's demurrer was held properly sustained. The appellate court, having determined that the demurrer to the first two counts was properly sustained without leave to amend, had no other course than to affirm the judgment as to those two counts. It could not, under the circumstances, reverse the judgment as to those counts in order to allow plaintiffs to amend. Mulford v. Cohn, 18 Cal. 42, 46; People v. Jackson, 24 Cal. 630; Davie v. Board of Regents, 66 Cal.App. 693, 702, 227 P. 243; Gibbons v. Scott, 15 Cal. 284; Sutter v. City and County of San Francisco, 36 Cal. 112, 117. The decision on appeal reversing the judgment of dismissal was therefore necessarily limited to the sufficient counts of the complaint and the direction to allow plaintiffs to amend their complaint could not be interpreted as applying to any but the counts of the complaint held to be sufficient.

[10] The order of the trial court allowing the amendment of the first two counts of the complaint, after the ruling sustaining demurrers thereto without leave to amend had been upheld on appeal is no different in principle than an order allowing an amendment of a complaint and the reopening of a case after a final judgment upon the merits had been so upheld. In such a situation it would manifestly destroy the efficiency of the legal system to compel a defendant to submit to a second trial and a second appeal before the unwarranted action of the court could be reviewed. Throughout its argument respondent ignores the fact that here an appeal had already been had and the question finally determined. It would be unconscionable to say in such case that the unsuccessful party had the right to return to the trial court notwithstanding, start in all over again, and compel the prevailing party to submit to a trial and await the final outcome thereof before obtaining redress for the unwarranted reopening of litigation in the face of a valid judgment disposing of the same. If such action were permitted every lawsuit could be perpetual. Under the cir-

cumstances here presented substantial justice requires a review of the matter upon certiorari.

It follows from the foregoing that the order of the trial court granting permission to amend the first two counts of the complaint in the pending action, after the sustaining of a demurrer thereto had been upheld on appeal, was void. Accordingly, the order of the trial court purporting to grant plaintiffs leave to amend the first two counts of their complaint should be and the same is therefore annulled.

YORK, P. J., and WHITE, J., concurred.



49 Cal.App.2d 707

IRVINE et al. v. SACRAMENTO & SAN JOAQUIN DRAINAGE DIST. et al.

Civ. 6437.

District Court of Appeal, Third District, California.

Feb. 14, 1942.

Action ⇐6

An action for a declaratory judgment regarding rights of drainage district bondholders could not be maintained against governmental agencies such as the drainage district and the State Reclamation Board. Code Civ.Proc. § 1060.

Appeal from Superior Court, Yuba County; George L. Jones, Judge.

Action by James Irvine and others against the Sacramento & San Joaquin Drainage District and others for declaratory relief regarding rights of bondholders. From an adverse judgment, plaintiffs appeal.

Affirmed.

W. Coburn Cook, of Turlock, for appellants.

Earl Warren, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for respondents.

PARKER, Justice pro tem.

This is an appeal from a judgment entered after an order sustaining defendants' demurrer to a second amended complaint. The action was commenced against a large number of defendants other than those named in the title. The only questions presented on this appeal, however, are between plaintiffs, appellants, and the defendants Sacramento and San Joaquin Drainage District and the State Reclamation Board.

The complaint in much detail sets forth the organization of Reclamation District No. 784, its subsequent history and the unhappy ending of the dreams surrounding the enterprise.

It summarizes that unforgettable era sometimes referred to as the Depression and by way of sidelight appear the many plans outlined from the beginning of the district, namely, the proposed improvements, the issuance of bonds and the levying of assessments; then the efforts of the landowners to repay the bonds, the delinquencies occurring and finally the sales.

The complaint stresses the abandoned hopes of that never-to-be-forgotten man, the bondholder, whose tragic plight is accentuated by his loneliness, and who, after all relief legislation was enacted and moratoria expired, is left pondering ways and means to recoup his loss; and he is the complainant here.

The complaint presents fully the proceedings had in this particular district resulting in delinquent sales, the acquisition by the various officers of large holdings as trustees, etc., and finally recites that in the process of reclamation legislation the defendants named, in some capacity, whether as a sovereign agency or otherwise, took over certain parcels of land held in trust as aforesaid. It is claimed, and it seems quite apparent, that a controversy arises between the parties named which is of a nature requiring judicial determination declaring the rights and liabilities of all parties concerned. The action is maintained under section 1060 et seq. of the Code of Civil Procedure.

Defendants interposed demurrers which were, by the court, sustained, and leave to amend was denied.

The one point involved on this appeal is whether an action for declaratory relief may or may not be brought against the state or any of its political agencies or subdivisions.

It is conceded that the action is one seeking declaratory relief and it is further conceded by all sides that the defendants and respondents here are governmental agencies of the State of California.

At the time the within case was submitted there seemed to be little direct authority on the question in California. There were persuasive authorities from other jurisdictions supporting the position of the respondents, and the general theory, as expounded by the law writers, seemed in accord therewith. However, since the submission, the point has been decided expressly in the case of Bayshore Sanitary District v. County of San Mateo, 48 Cal. App.2d 337, 119 P.2d 752. The ruling distinctly and affirmatively determines that the action provided for in section 1060 of the Code of Civil Procedure, an action for declaratory relief, does not lie against the state or any of its political subdivisions or agencies.

The judgment is affirmed.

TUTTLE, J., and THOMPSON, Acting P. J., concurred.



PARKHURST v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 13335.

District Court of Appeal, Second District, Division 1, California.

Feb. 11, 1942.

Rehearing Denied March 10, 1942.

Hearing Granted April 9, 1942.

1. Workmen's compensation ⇐939

Where the circumstances attending the act of commission or omission are such as to evince a reckless disregard for the safety of others and a willingness to inflict injury complained of, such actions amount to serious and "willful misconduct" within Workmen's Compensation Act authorizing additional compensation, since "serious misconduct" means conduct which the employer either knew or ought to have known to be conduct likely to jeopardize the safety of his employees.

See Words and Phrases, Permanent Edition, for all other definitions of "Serious Misconduct" and "Willful Misconduct".

2. Workmen's compensation ⇐1674

In employee's proceeding for additional compensation because of serious and willful misconduct of employer in knowingly failing to furnish fresh and pure drinking water to employees, evidence sustained industrial accident commission's finding that employees were exposed to entamoebic histolytica as a result of and in course of employment, that by reason thereof employee contracted amoebic dysentery, and that the facilities furnished the employees for drinking water were in violation of state health statutes. St.1917, p. 1517; St.1915, p. 815.

3. Workmen's compensation ⇐1674

In employee's proceeding for additional compensation because of serious and willful misconduct of employer in knowingly failing to furnish fresh and pure drinking water to employees, evidence sustained industrial accident commission's finding that employee complained to superintendent and managing superintendent of employer concerning drinking water. St.1917, p. 1517; St.1915, p. 815.

4. Workmen's compensation ⇐1674

In employee's proceeding for additional compensation because of serious and willful misconduct of employer in knowingly failing to furnish fresh and pure drinking water to employees, evidence was insufficient to sustain finding that employer did not have knowledge that drinking water, or facilities for distributing drinking water, was capable of producing amoebic dysentery or was otherwise dangerous to the health of its employees. St.1917, p. 1517; St.1915, p. 815.

5. Workmen's compensation ⇐1939

The action of the industrial accident commission based on conflicting evidence or on slight evidence cannot be disturbed on appeal.

6. Workmen's compensation ⇐1177

The industrial accident commission is without jurisdiction to act where there is a total absence of evidence to support its finding.

7. Workmen's compensation ⇐941

Where employer continued to furnish impure water, unmistakably deleterious to health of its employees, after complaint had

been made to employer and it had knowledge thereof, the industrial accident commission had duty to determine as a matter of law that the action of the employer constituted "serious and willful misconduct" and to award additional compensation to employee sustaining injury because thereof. St.1917, p. 1517; St.1915, p. 815.

8. Workmen's compensation ⇐941

Where subcontractor furnished impure water unmistakably deleterious to health of its employees, the subcontractor could not escape liability under Workmen's Compensation Act for additional compensation to injured employee, on theory that the general contractor undertook to furnish drinking water and facilities for its distribution. St. 1917, p. 1517; St.1915, p. 815.

9. Workmen's compensation ⇐939

An employer cannot absolve himself of his responsibility to properly protect his employees by relying upon the agreement of someone else, general contractor or otherwise, to perform that duty for the employer.

10. Workmen's compensation ⇐941

Where subcontractor's employee sustained injury because subcontractor furnished impure drinking water unmistakably deleterious to health of employee, the employee's only recourse under the Workmen's Compensation Act was against the subcontractor for neglect in affording proper protection, since there was no duty under the act imposed upon the general contractor to safeguard the subcontractor's employee. St. 1917, p. 1517; St.1915, p. 815.

11. Workmen's compensation ⇐941

An employer, a subcontractor, could not accept facilities of general contractor who undertook to furnish drinking water and facilities for its distribution and escape liability when later confronted with ensuing consequences because the water furnished was impure and unmistakably deleterious to the health of employee. St.1917, p. 1517; St. 1915, p. 815.

12. Workmen's compensation ⇐1674

In employee's proceeding for additional compensation for injury caused by serious and willful misconduct of employer, a subcontractor, in failing to furnish fresh and pure drinking water, evidence did not sustain determination of industrial accident commission that the subcontractor's acceptance and use of drinking water and facilities for its distribution which were installed by the general contractor did not constitute "serious and willful misconduct". St.1917, p. 1517; St.1915, p. 815.

13. Workmen's compensation ⇐11

The Workmen's Compensation Act is founded on sound public policy and with the objective of protecting workmen against economic insecurity.

Proceeding by William R. Parkhurst, employee, to review an award of the Industrial Accident Commission denying additional compensation against J. Phillip Murphy Corporation, employer.

Award annulled.

William J. Currer, Jr., of Los Angeles, for petitioner.

Everett A. Corten and J. Gould, both of San Francisco, for respondent Industrial Accident Commission.

WHITE, Justice.

Petitioner, William R. Parkhurst, seeks to have reviewed a decision of the Industrial Accident Commission wherein he was denied additional compensation by reason of his claim that his disability resulted from serious and willful misconduct on the part of his employer. The facts are not in serious dispute, and as gathered from the record are that the P. J. Walker Company contracted for the construction of certain buildings and equipment at Camarillo, California. Gilmore Fabricators, Inc., by subcontract agreed to furnish and install all structural steel on the job for P. J. Walker Company. By an additional subcontract with Gilmore Fabricators, Inc., respondent J. Phillip Murphy Corporation undertook to install all structural iron work on the job, using therein materials fabricated by the Gilmore Fabricators, Inc.

Early in the year 1938 Mr. J. Phillip Murphy, owner of a majority of the stock of the corporation bearing his name and president and general manager thereof, went to the scene of the work. While there, Mr. Murphy noticed that the water for drinking purposes was furnished to the men on the job by means of a common dipper and bucket, and the men drank the water from the dipper by dipping it in the bucket and not by pouring. Mr. Murphy made no inquiry as to this, nor as to the ultimate source of the supply of drinking water. It does appear, however, that on one of his

visits to the job he himself drank some of the water, and he at all times denied any knowledge that the same was in any manner inimical to health.

Work was started on the job in the year 1938. The water used by the workmen was piped to the job by the general contractor, P. J. Walker Company, by attaching the water line to the job to a pipe which connected the irrigation pump and a large uncovered irrigation reservoir. The water system was so connected that when a certain valve near the irrigation reservoir was opened water from the reservoir ran back through the irrigation pipe to the connecting pipe and thence to the outlets on the job. The irrigation system was so interconnected that whenever irrigation was in progress a certain amount of water from the open reservoir was siphoned back to the water supply on the job. The reservoir in question was simply an open reservoir for raising the water on the ranch surrounding the job to the highest point to facilitate irrigation. It was used by boys in the neighborhood and others as a swimming pool.

On or about June 12, 1938, petitioner was employed by respondent J. Phillip Murphy Corporation to work on the job at Camarillo as a journeyman ironworker. About June 17th, the caretaker of the ranch surrounding the job opened the valve of the reservoir and irrigated the ranch; and thereafter the caretaker proceeded to irrigate the ranch practically every Saturday and Sunday throughout the summer months. In doing this, water was siphoned from the reservoir into the water supply on the job, so that such water drawn and furnished the men on the job was polluted and contaminated by the water from the reservoir. On the job water boys drew water from taps located near the toilets on the job into buckets which were then carried to the men, who drank from a dipper used in common by all of them, by dipping the water from the buckets. The taps referred to were located just ouside the building housing the toilets, and were used by men coming from the toilets for the purpose of washing their hands. The evidence indicates that the toilets were not kept in a particularly sanitary condition, and several times overflowed, thereby creating a more or less unsanitary condition. The men on the job washed at the faucets from which water was drawn for drinking purposes, and in so doing placed their hands upon the faucets. Virgil Smith, superintendent and managing representative of respondent J. Phillip Murphy Corporation, was in charge of all the men and the work of such corporation on the job. From the inception of the work at Camarillo the men employed by respondent J. Phillip Murphy Corporation and others complained to said Virgil Smith, as their superintendent and the managing representative of respondent, concerning the water, and told him that it gave them diarrhea; that it had a foul odor and taste and was not fit to drink. No other water for drinking purposes was available at any place at or near the job which could be used by the respondent corporation's employees. However, nothing was done about the matter, and the men continued, by reason of necessity, to drink the water as furnished.

Approximately two weeks after petitioner commenced work on the Camarillo job, he began to notice a diarrheic condition, which was at first mild, and which he dismissed in his own mind as something which would probably disappear. Other men on the job had the same difficulty to a greater or lesser degree. Some of the employees refused to drink the water furnished, and carried other liquids which they consumed. At first it appears petitioner did not attribute his diarrheic condition to the water, but such condition became progressively worse, while he and other men continued to complain to the superintendent, Smith, concerning the water. Nothing was done about the matter until some time in September, 1938, when the public health authorities ordered casks installed and that the water be distributed by pouring into individual drinking cups, in conformity with the law. Stats. 1917, p. 1517, Deering's Gen.Laws, Act 6259; Stats. 1915, p. 815, Deering's Gen.Laws, Act 4725. Examination by the public health authorities of the water indicated that it was contaminated with fecal material.

Petitioner's condition grew steadily worse until January 19, 1939, when he was no longer able to carry on his duties as an ironworker and was forced to stop work. Some four or five months intervened before the doctors finally succeeded in establishing the nature and cause of petitioner's illness, which was diagnosed as amoebic dysentery.

From the record it appears that during the time work progressed on the job, and

while petitioner was there employed, some 200 to 300 other men were on the job, and at the hearing before respondent commission numerous witnesses testified that various complaints, including cramps and diarrheic conditions, resulted from consuming the water supplied. Expert testimony produced at the hearing established that entamoeba histolytica, the disease germ which causes amoebic dysentery, can exist and multiply only in the human body, and that such disease is usually contracted by the drinking of impure water or water infected by the amoebae. Evidence was also introduced that a single person who is a carrier or has the disease can by infecting the water supply cause an epidemic among all persons drinking the water so contaminated. Water may be contaminated with entamoeba histolytica by contact with the fingers or by contact with fecal material.

Following a hearing had before respondent commission, the latter made two sets of findings and awards, the first of which was made on the issue of normal compensation and determined that "said employee during said period of employment was exposed to entamoeba histolytica, as the result of and in the course of his employment, and contracted an amoebic dysentery." Based thereon, the commission made its award in favor of petitioner for normal compensation benefits. This award is not under attack, and it is conceded that respondent corporation paid and continues to pay petitioner the normal compensation awarded. On the issue of serious and willful misconduct, respondent commission on September 16, 1939, made its findings and award in favor of petitioner, reading in part as follows: "The injury herein was proximately caused by the serious and willful misconduct of the employer in knowingly failing to furnish fresh and pure drinking water to his employees as required by Chapter 485, Statutes of 1915, and the indemnity herein is increased fifty per cent, payable by said employer to the applicant herein." Thereafter respondent J. Phillip Murphy Corporation regularly and duly filed a petition for rehearing, and respondent commission made its order that the findings and award on the issue of serious and willful misconduct of the employer be revoked and rescinded, and on rehearing substituted therefor new findings against petitioner on the issue of serious and willful misconduct, coupled with an award in favor of respondent Murphy Corporation upon such issue. The last-named findings include the following:

"2. The employee during his period of employment was exposed to entamoeba histolytica, as a result of and in the course of his employment, and contracted an amoebic dysentery.

"3. The exposure referred to in Finding 2 hereof was through the drinking water which the employee was furnished during the time that he was employed at his work. * * *

"5. By reason of the nature of the work of J. Phillip Murphy Corporation, a corporation, it is customary for this corporation to commence operations after the work of a general contractor is in progress, and facilities for the care and comfort of all employees engaged in the work have been installed by the general contractor. It is the policy and custom of J. Phillip Murphy Corporation to accept and use for its workmen, the drinking water and the method and facilities for its distribution that have been installed and are in use by the general contractor. In the instance and time mentioned, such facilities, including the provisions for drinking water and its distribution, had been installed by P. J. Walker Company, a corporation, and were in use before J. Phillip Murphy Corporation placed any of its own employees on the job.

"6. The facilities for the distribution of drinking water to workmen which were furnished by P. J. Walker Company, did not provide for the furnishing of drinking water in individual cups and there was no compliance with Statutes of 1915, page 815, Deering Act, 4725, and Statutes of 1917, page 1517, Deering Act, 6259.

"7. After defendant commenced work as subcontractor as aforesaid, and prior to the commencement of the employment of the said applicant, Mr. J. Phillip Murphy went to the scene of the work together with a representative of P. J. Walker Company and the Gilmore Fabricators, Inc., another subcontractor, for the purpose of inspecting the site and progress of the work. At the time he was there, the said J. Phillip Murphy noticed that the water for drinking purposes was furnished to the men on the job by means of a common dipper and bucket, and that the men on the job drank from the dipper by dipping it into the bucket and not by pouring. The said J. Phillip Murphy made no inquiry as to the ultimate

source of the water supply and at no time made any attempt to furnish his employees, including the applicant, with pure, fresh drinking water.

"8. One Virgil Smith was an employee and the Superintendent and Managing Representative of defendant J. Phillip Murphy Corporation in charge of all of the men and work of said defendant, J. Phillip Murphy Corporation, on said job during all times mentioned herein. From the commencement of the work at Camarillo the men employed by defendant J. Phillip Murphy Corporation and others, complained to said Virgil Smith as their Superintendent and Managing Representative of defendant, of the drinking water furnished. Said employees, including applicant William R. Parkhurst, and others, complained to said Virgil Smith that the drinking water on this job had a foul odor and taste and that its use apparently caused diarrhea. Said Virgil Smith said in effect that he realized the water was bad, but no other was available. * * *

"10. No officer or representative of J. Phillip Murphy Corporation, a corporation, had any knowledge either actual or constructive, that the drinking water or the facilities for distributing the drinking water furnished to its employees on this job, was capable of producing amoebic dysentery, or was otherwise dangerous to the health of its employees."

[1] From a reading of the foregoing résumé of the commission's findings, it is at once apparent that the commission took the position that respondent J. Phillip Murphy Corporation was absolved of any serious and willful misconduct charged against it because "it is the policy and custom of J. Phillip Murphy Corporation to accept and use for its workmen the drinking water and the method and facilities for its distribution that have been installed and are in use by the general contractor." We shall first give consideration to the question of whether or not the furnishing of drinking water of the type and in the manner presented by the instant case amounted to serious and willful misconduct. We are prepared to hold that when the circumstances attending the act of commission or omission are such as to "evince a reckless disregard for the safety of others and a willingness to inflict the injury complained of," such actions amount to "willful" misconduct. "Serious" misconduct we take to mean "conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees." E. Clemens Horst Co. v. Industrial Acc. Comm., 184 Cal. 180, 188, 189, 193 P. 105, 16 A.L.R. 611.

[2-6] Upon substantial evidence the commission found not only that the employee and his fellow employees on the job were exposed to entamoebic histolytica as a result of and in the course of employment and that by reason thereof petitioner contracted amoebic dysentery, but further found that the facilities furnished the employees for drinking the water were in direct violation of the mandate of state health statutes above referred to. In addition thereto, the commission found, and the evidence supports the finding, that from the very commencement of the work at Camarillo the men employed by respondent Murphy Corporation, including petitioner herein, complained to the superintendent and managing representative of respondent corporation concerning the drinking water supplied them, advising such superintendent that "the drinking water on this job had a foul odor and taste and that its use apparently caused diarrhea"; that to such remonstrances the superintendent replied, in effect, "that he realized the water was bad, but no other was available." In the face of the foregoing, respondent commission, however, made a further finding that no officer or representative of respondent corporation "had any knowledge either actual or constructive, that the drinking water or the facilities for distributing the drinking water furnished to its employees on this job, was capable of producing amoebic dysentery, or was otherwise dangerous to the health of its employees." In view of the previously narrated findings, and particularly the finding of constant complaints having been made by the employees to respondent Murphy Corporation's superintendent concerning the drinking water furnished on the job from the very inception, all of which are supported by competent and substantial evidence the last-quoted finding cannot be sustained because the record is barren of any evidence to support it. As has been frequently held, the action of the commission based on conflicting evidence or on slight evidence, cannot be disturbed on appeal. On the other hand, the commission is without jurisdiction to act when and where there is a to-

tal absence of evidence to support its findings. Furthermore, we are not prepared to hold that respondent Murphy Corporation's superintendent on the job is not to be charged with knowledge of conditions which contravene health regulations contained in the statutes of this state.

[7] In all other cases with which we are familiar the problem of serious and willful misconduct occurs in connection with a dispute as to whether there is evidence to support such a finding and conclusion of the commission. Unlike them, the converse of that question is presented in the within appeal. Here the findings are such that we are required to determine whether the commission, in the face of certain findings, has by virtue of its jurisdiction any alternative than to conclude that serious and willful misconduct must follow, as a matter of law, from certain findings. In continuing to furnish impure water, unmistakably deleterious to the health of its employees, after complaint was made to the employer and it had knowledge thereof, as found by the commission, it became the duty of the latter to determine as a matter of law that the facts so found constituted serious and willful misconduct and to make an award accordingly.

[8-11] Respondent commission, however, seeks to sustain its award in favor of Murphy Corporation on the issue of serious and willful misconduct on the ground that "in accordance with custom and agreement, and, indeed, with the exigencies of the situation, the P. J. Walker Company, the general contractor, undertook to furnish drinking water and facilities for its distribution, and that the company had actually fulfilled its undertaking prior to the time the J. Phillip Murphy Corporation commenced its part of the work. When the J. Phillip Murphy Corporation came on the job, the water facilities then installed and in use were serving approximately 300 men without apparent distress to any one. * * *" The latter part of this contention is refuted by the positive and direct testimony that from the very commencement of respondent J. Phillip Murphy's Corporation's activities on the job petitioner herein and his fellow employees constantly complained not only regarding the taste and odor of the water, but of the diarrheic effects thereof. Concerning the first part of the quoted claim of the commission, we have no hesitancy in holding that an employer cannot absolve himself of his responsibility to properly protect his employees by relying upon the agreement of someone else, general contractor or otherwise, to perform that duty for him. The primary obligation to afford protection for petitioner rested upon his employer, respondent J. Phillip Murphy Corporation. The employee's only recourse under the Workmen's Compensation Act was against his employer, for neglect in affording such protection. The terms of the act impose no duty upon the general contractor to safeguard the subcontractor's employees, nor do they give petitioner herein any recourse against the general contractor, because the two did not stand in the relationship of employer and employee to each other. The employer cannot accept the facilities of the general contractor under the circumstances above described and escape the liabilities when later confronted with the ensuing consequences.

[12, 13] The conclusion of law arrived at by the commission reads as follows: "The acceptance and use by J. Phillip Murphy Corporation, a corporation, of the drinking water and the facilities for its distribution which were installed and in use by the general contractor, P. J. Walker Company, a corporation, before J. Phillip Murphy Corporation placed any of its own men on the work does not constitute serious and willful misconduct." This conclusion and the award based thereon in favor of respondent corporation are not supported by either competent evidence or the findings. As stated by this court in Moquin v. Industrial Acc. Comm., 33 Cal.App. 2d 511, 517, 92 P.2d 413, "The law under which the respondent commission functions in cases like this is founded upon sound public policy and with the objective of protecting, in a proper case, a workman against economic insecurity."

For the foregoing reasons the award is annulled.

YORK, P. J., and DORAN, J., concurred.

49 Cal.App.2d 626

POMONA CEMETERY ASS'N v. BOARD OF SUP'RS OF LOS ANGELES COUNTY et al.

Civ. 11892.

District Court of Appeal, First District, Division 1, California.

Feb. 10, 1942.

Hearing Denied April 9, 1942.

1. Cemeteries ⇐15

Generally, the transfer of a cemetery lot does not convey title but merely an interest to be used exclusively for the purpose of burial.

2. Taxation ⇐245

The distinction between an assessment on physical property and upon interment rights is not important in determining claim of exemption under constitutional provision that property used exclusively for burial of human dead, except as used or held for profit, shall be free from taxation. Const. art. 13, § 1b.

3. Taxation ⇐245

Where cemetery association was a nonprofit organization, personal property consisting of office furniture, equipment for upkeep of grounds, convenience in making burials, etc., some of which were used on all portions of the cemetery regardless of present or future interment, was exempt from taxation. Const. art. 13, § 1b.

4. Taxation ⇐245

Under constitutional provision that "all property" used or held exclusively for the burial of the human dead or for the care, maintenance or upkeep of such property, except as used or held for profit, shall be free from taxation, it is immaterial whether the property is real, personal or mixed in character since the provision refers to that property exclusively used or held for permanent deposit of the human dead or for the care, maintenance or upkeep of such property. Const. art. 13, § 1b.

See Words and Phrases, Permanent Edition, for all other definitions of "All Property".

5. Taxation ⇐245

Unsold lots, crypts, or niches owned by nonprofit cemetery association were "held exclusively for burial" within constitutional provision exempting all property used or held exclusively for burial from taxation as against contention that the quoted phrase applied only to right of interment after transfer by the association to purchasers since the controlling factor was not whether a particular person, group or association held an exclusive right to a specific plot or space used or intended to be used for burial but whether the property was held exclusively for that purpose. Const. art. 13, § 1b.

See Words and Phrases, Permanent Edition, for all other definitions of "Held Exclusively for Burial".

6. Taxation ⇐245

Under constitutional provision exempting from taxation all property used or held exclusively for burial, the word "exclusively" does not refer to persons using or holding rights of interment as against contention that no plot or niche is used exclusively for burial until it has been transferred to a person who devotes it to that purpose. Const. art. 13, § 1b.

See Words and Phrases, Permanent Edition, for all other definitions of "Exclusively".

7. Taxation ⇐245

In constitutional provision exempting from taxation all property used or held exclusively for burial, the word "used" may refer to the property employed as a burial place for the human dead whereas "held" refers to property that has been prepared, made available, maintained or offered for sale for burial purposes. Const. art. 13, § 1b.

See Words and Phrases, Permanent Edition, for all other definitions of "Used" and "Held".

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Mandamus proceeding by Pomona Cemetery Association, a nonprofit cemetery association, against the Board of Supervisors of the County of Los Angeles and others to compel the cancellation of assessments. From an adverse judgment, defendants appeal.

Affirmed.

J. H. O'Connor, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for appellants.

Allard, Whyte & Brownsberger, of Pomona and Holbrook & Tarr and W. Sumner Holbrook, Jr., all of Los Angeles, for respondent.

WARD, Justice.

This appeal is from a judgment in favor of petitioner, a non-profit association engaged in conducting a cemetery, in a proceeding in which it sought a writ of mandate commanding the respondents—Board of Supervisors of the County of Los Angeles and its several members—to cancel assessments theretofore levied upon the property of petitioner used in conducting said cemetery, and also commanding the county counsel to consent thereto in writing.

The property includes five contiguous parcels. The trial court found that one had not been platted, improved or developed in any manner as a burial ground, and that it was not enclosed as part of the cemetery. The taxability of this parcel was upheld. As to the other four, it found that at the time of the levy of the assessments they were and at all times since have been used and held exclusively for the burial of the human dead; that no part thereof has ever been used for profit, and that such parcels thus come within the exemption provided in section 1b of art. XIII of the state Constitution, which reads as follows: "All property used or held exclusively for the burial or other permanent deposit of the human dead or for the care, maintenance or upkeep of such property or such dead, except as used or held for profit, shall be free from taxation and local assessment."

The county assessor in assessing some portions of the land and improvements belonging to the cemetery association adopted the following method: In the case of the land intended for burial purposes, although in most cases the lots or rights to interment were scattered and not contiguous, he placed a value upon such as were undisposed of by the association based upon the proportion of such lots to the total area; in connection with a new mausoleum, a value was placed upon the building and site based upon the percentage which the content of the unsold crypts and niches therein bore to the total cubical content of the building, notwithstanding some of them were owned by one Hughes, who received as his sole compensation for the erection and construction of the building the right to dispose of interment rights and privileges therein. The assessment on an old mausoleum, one wing of which is used for the purpose of cremation and to house tools and equipment, was arrived at in a similar manner, the value of its site having been previously declared by court decision to be exempt. The site of a joint office and public lavatory building was assessed, as were the improvements thereon, office equipment and certain "merchandise." The cemetery equipment, consisting of trucks, power mowers, casket lowering devices and materials used by the association in connection with the care and maintenance of the entire cemetery, was assessed upon a percentage basis, the foundation of which was the proportion which the unsold interment rights bore to the entire cemetery. The cemetery association questions the propriety of the assessment of this outdoor equipment, but the action is to cancel the entire assessment.

In justification of the judgment canceling the assessments and taxes specifically set forth in the findings, the association contends that the description of the property assessed is insufficient and incomplete; that assessments indivisibly combine property admittedly exempt and that claimed to be taxable; that the assessment of the lands and improvements could not be enforced by a tax sale; that the assessment of the entire unsold space in the new mausoleum to the association was improper in that Hughes, the builder, held the right to dispose of a large portion of interment rights therein; that the exempt character of a portion of the property involved on this appeal has been previously determined and is res judicata between the parties, and finally, that the unsold lots, crypts and niches were used or held exclusively for purposes embraced within the constitutional exemption. A goodly portion of the arguments by the county are also directed to the above points, but the main question for determination on this appeal is, as stated by appellants, "whether grave sites and mausoleum space and personal property held by a cemetery corporation for sale, but with the anticipation that any purchasers will use or will hold for burial purposes can, while it yet continues the property of and in the hands of the cemetery corporation, constitute 'property used or held exclusively for the burial or other permanent deposit of the human dead,' and whether personal property in common use as to both sold and unsold grave space constitutes property 'used or held for the burial or other permanent deposit of the human dead or for the care, maintenance or upkeep of such property or such dead.'"

Appellants' first contention is that a particular finding of the trial court which is in the language of the constitutional provision is a conclusion of law or a finding of ultimate fact, and is at variance with the conclusions drawn from specific facts found. On this appeal, for the purpose of considering all the facts and circumstances relative to the main question, we will assume that such finding does not preclude consideration of whether property of the nature shown by the specific findings is in law exempt.

The association contends that the assessment was of physical property. The appellants claim that it was of the easement of privilege of interment, and that there was no direct finding against the taxability of a right of interment held for sale. The findings recognized that it was the right to bury, in the form of an easement, that was conveyed or offered for sale, but the record shows that the answer to the petition treated the assessment as one on physical property, and included allegations of proceedings before the Board of Supervisors. The description as set forth in the judgment refers to "unsold portions" of four distinct parcels, with assessed valuation placed upon "Land" and "Imps." Under the circumstances, neither the findings nor the judgment is inadequate or insufficient to determine the merits of the appeal.

[1, 2] The general rule is that the transfer of a cemetery lot does not convey title, but merely an interest to be used exclusively for the purpose indicated, namely, burial. Hollywood Cemetery Ass'n v. Powell, 210 Cal. 121, 291 P. 397, 71 A.L.R. 310. The distinction between an assessment on physical property and upon interment rights is not important in determining a particular claim of exemption. It is the right of interment which gives the space value, since the dedicated land may not be used for other than cemetery purposes. It was this value which the assessor sought to reach, although he actually placed the assessment on the land, improvements and personal property. Regardless of the language used by him or by the trial court, the question is whether the constitutional provision is applicable to the properties of the Pomona Cemetery Association.

This appeal, unlike that of San Gabriel Cemetery Association v. County of Los Angeles, Cal.App., 122 P.2d 330, filed this date, is on the judgment roll alone. The court found that the Pomona Cemetery Association "is a non-profit cemetery association," and "that it is a fact that none of petitioner's properties have ever been used or held for profit, and have never earned, made or paid any profits." The provision in the constitutional amendment "except as used or held for profit" (Cypress Lawn C. Ass'n v. San Francisco, 211 Cal. 387, 295 P. 813) may be eliminated from consideration in this case. In this connection appellants refer to the argument sent to all voters, quoted in part in the Cypress Lawn case at page 392 of 211 Cal., at page 814 of 295 P., as follows: " 'It will not relieve from taxation property of cemetery associations and others which is to be sold for profit, but only property to be used exclusively for the burial of the dead, and this sacred property should be kept tax free. * * *'" If in this appeal upon the judgment roll it were proper to refer to said argument, it is fully met by the finding of the trial court that the Pomona Cemetery Association is a non-profit organization which has "never earned, made or paid any profits."

[3] In view of the findings, no good purpose could be served by discussing the various assessments, including those on personal property consisting of office furnishings, etc., or equipment for the upkeep of the grounds, convenience in making burials, etc., some of which were in fact used on all portions of the cemetery, regardless of present or future interment. The primary and major use of such equipment appears to have been in direct connection with property found by the court to be exempt.

[4-6] It is immaterial whether the property assessed be real, personal or mixed in character. The provision uses the words "all property," and refers to that exclusively used or held for the permanent deposit of the human dead or for the care, maintenance or upkeep of such property or dead. The basis of appellants' argument in that regard is that the unsold portions of the land, crypts or niches, while "held" by the association, are not held for burial purposes but for sale, and that they may not be said to be held exclusively for burial until sold by the association. In other words, that "held for burial" applies only to rights of interment after transfer by the association to purchasers. The answer to this argument seems to be that the purchaser could obtain no other right than

that conveyed by the vendor. The right, if any, of interment must first have been in the association. In this connection, appellants stress the word "exclusively," contending that it means that no plot or niche is used exclusively for burial until it has been transferred to a person who devotes it to this purpose. This argument presupposes that the word "exclusively" refers to persons using or holding rights of interment. We cannot so construe article XIII, section 1b, the language of which is "all property used or held exclusively for the burial" etc. The controlling factor is not whether a particular person, group or association held an exclusive right to a specific plot or space used or intended to be used for burial, but whether the "property" was held exclusively for that purpose. Upon the dedication of the land by the association to the interment of the human dead, it was held by the association for that purpose just as effectively as would be a segregated portion thereof transferred to an individual and thereafter by him devoted to that purpose.

[7] It may be noted that the court used the words of the constitutional provision "used or held." The word "used" may well refer to the property employed as a burial place for the human dead, whereas "held" refers to property that has been prepared, made available, maintained and offered for sale for burial purposes. The Cypress Lawn case is not of assistance to appellants. The court there held at page 389 of 211 Cal., at page 814 of 295 P., that, subject to the exception "for profit," the "provision exempts from taxation and local assessment two kinds of property, classified on the basis of its use, but without *consideration of the status or character of its owner or possessor.*" (Italics added.) The hotel property held as an investment by the Cypress Lawn Cemetery Association was at least a degree or more removed from that which may be said to be held exclusively for cemetery purposes, but in the present case the trial court found—and the facts and circumstances substantiate the finding—that all of the property assessed was "used or held exclusively for the burial and other permanent deposit of the human dead or for the care, maintenance or upkeep of such property or such dead."

The conclusion reached on the main question eliminates the necessity of considering the numerous points raised by respondent in justification of the trial court's entry of judgment directing the county counsel of Los Angeles to consent to the cancellation of the illegal and erroneous assessment and taxes.

The judgment is affirmed.

PETERS, P. J., and GOODELL, J. pro tem., concurred.



49 Cal.App.2d 624

SAN GABRIEL CEMETERY ASS'N v. LOS ANGELES COUNTY.

Civ. 11891.

District Court of Appeal, First District, Division 1, California.

Feb. 10, 1942.

1. Taxation ⇐245

Where cemetery association sold lots or graves for more than their cost but the price included expenses incident to making the place salable, and no part of the operating surplus of the association was distributed to stockholders or members of association, but was used to buy more land, for employment of salesmen and good will representatives, for advertising purposes and for upkeep of cemetery, the lots sold at a price in excess of their cost were not sold at a "profit" within constitutional provision regarding taxation of cemetery property. Pol.Code, § 3804; Civ.Code §§ 608–617; St. 1939, p. 696 et seq., § 8100 et seq., and p. 1370 et seq., § 5096 et seq.; Const. art. 13, § 1b.

See Words and Phrases, Permanent Edition, for all other definitions of "Profit".

2. Taxation ⇐245

The word "profit" as used in constitutional provision regarding taxation of cemetery property does not mean financial benefit that accrues to a cemetery association through the sale of burial space at a price in excess of its costs where such gain is used for the upkeep of the cemetery property, but means net earnings, the benefits of which ac-

crue directly or indirectly to the stockholders or members of the association. Const. art. 13, § 1b.

3. Taxation ⇐543(7)

In action by cemetery association to recover taxes on cemetery property, evidence authorized recovery on ground that property had been used and held exclusively for burial or other permanent deposit of human dead or for care, maintenance or upkeep of such property or such dead and that no part thereof had ever been used or held for profit. Pol.Code, § 3804; Civ.Code, §§ 608–617; St.1939, p. 696 et seq., § 8100 et seq., and p. 1370 et seq., § 5096 et seq.; Const. art. 13, § 1b.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by San Gabriel Cemetery Association, a nonprofit cemetery association, against the County of Los Angeles to recover taxes paid. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. H. O'Connor, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for appellant.

Joseph Coleman Singer, Holbrook & Tarr, and W. Sumner Holbrook, Jr., all of Los Angeles, for respondent.

WARD, Justice.

This is an appeal by the county of Los Angeles from a judgment in favor of San Gabriel Cemetery Association, defendant and plaintiff respectively, in a suit seeking the refund of taxes alleged to have been illegally and erroneously collected for the years 1933, 1934 and 1935 on cemetery property claimed to be exempt from such taxes. (Political Code, sec. 3804; see Revenue and Taxation Code, div. 1, pt. 9, ch. 5, art. 1, St.1939, p. 1370 et seq.) The appeal has been taken under the alternative method.

The views expressed in our opinion in the case of Pomona Cemetery Association v. Board of Supervisors, 122 P.2d 327, filed this day, on the question of the exemption from taxation under the provisions of article XIII, section 1b of the state Constitution of real property used or held exclusively for burial purposes, and of personal property used primarily in connection with its care, maintenance and upkeep, are adopted as part of this decision. This disposition leaves for determination a question not before the court on the judgment roll in the Pomona case, namely, whether cemetery property otherwise exempt from taxation under such constitutional provisions would, by reason of being held, as appellants claim, for profit, come within the exception provided in such section.

The San Gabriel, like the Pomona, Cemetery Association was organized under the provisions of the Civil Code, sections 608–617 (repealed in 1931, p. 2434, but reenacted under similar provisions in div. VIII of the Health and Safety Code in 1939, St.1939, p. 696 et seq.). On the present appeal it is earnestly contended that the evidence does not support the finding that the unsold lots and crypts are not held for profit.

The original cemetery site containing about four acres was acquired by gift in 1872. Since that time the association has purchased approximately twelve additional acres, all of which, except the site of the superintendent's office and residence, are entirely platted into burial lots and graves. (The cemetery contains in excess of 15,000 graves.) The trial court held that the office and residence property was not exempt from taxation. The association has not appealed from that part of the judgment and no opinion, therefore, is expressed on the question.

[1, 2] It is appellant's contention that any amount received by the association for cemetery lots or graves in excess of their cost represents profit. The price charged for burial space represents not only its actual cost, but includes expenses of many kinds incident to making the place salable for the purpose intended, including in many instances an obligation of perpetual care, proper supervision, beautification of grounds, clerical services, equipment of various kinds, etc. Annual statements of the association indicate an "operating surplus." No part of this amount is distributed to stockholders or members of the association as dividends or otherwise, but is used to buy more land as needed, for the employment of salesmen and goodwill representatives, for advertising purposes and for the upkeep of the cemetery as above set forth. It may not be held herein that lots sold at a price in excess of their cost are sold "at a profit" as the word is used in article XIII, section 1b. Washelli Cemetery Ass'n v. King County, 158 Wash. 599, 292 P. 101; City of Paducah v. Common-

wealth, 136 Ky. 232, 124 S.W. 286; Mountain View Cemetery Co. v. Massey, 109 W.Va. 473, 155 S.E. 547; Cypress Lawn Cemetery Ass'n v. San Francisco, 211 Cal. 387, 295 P. 813; Pomona Cemetery Association v. Board of Supervisors, supra. The word "profit" does not mean financial benefit that accrues to the association through the sale of burial space at a price in excess of its cost where such gain is used for the upkeep of the cemetery property. The word "profit" in article XIII, section 1b, means net earnings the benefits of which accrue directly or indirectly to the stockholders or members of the association.

[3] The court found that the parcels in question "have been used and held exclusively for the burial and other permanent deposit of the human dead, or for the care, maintenance or upkeep of such property or such dead, and no part thereof has ever been used or held for profit." The evidence sustains the finding.

The judgment is affirmed.

PETERS, P. J., and GOODELL, J. pro tem., concurred.



49 Cal.App.2d 671

HAMMOND v. McDONALD et al.

Civ. 13086.

District Court of Appeal, Second District, Division 1, California.

Feb. 11, 1942.

Hearing Denied April 6, 1942.

1. Appeal and error ⇦1099(3)

Where the point decided in prior appeal of action to abate liquor nuisance was that the statute authorizing such actions was not repealed by constitutional amendment relating to liquor control and Alcoholic Beverage Control Act of 1935, a portion of opinion, characterizing such amendment and act as prohibiting the disposal of intoxicating liquors for consumption by the public upon the premises, except when served with meals, was mere "obiter dictum" and did not become the "law of the case", determining that liquor can be thus disposed of only when served with meals. Gen.Laws 1937, Act 3778; Act 3796, §§ 2(m), 5, subds. 20–23; §§ 6(j), 18, 53; Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case" and "Obiter Dictum".

2. Evidence ⇦1

The District Court of Appeal was not required to institute an independent investigation to determine whether there had been any action by the State Board of Equalization which would constitute an administrative construction of the constitutional amendment relating to liquor control of which the court should take judicial notice, but the court's attention should be called to the fact of such action, if any. Code Civ. Proc. § 1875, subd. 3; Const. art. 20, § 22.

3. Constitutional law ⇦20

Administrative construction of the Constitution may be considered by the court only where there is uncertainty in the provision of constitution to be construed, and, where the meaning is not doubtful, administrative acts or regulations in conflict with Constitution are void.

4. Intoxicating liquors ⇦17

In constitutional amendment prohibiting the sale of intoxicating liquors other than beer for consumption on the premises in any public saloon, public bar, or public barroom, "provided, however, that subject to the aforesaid restrictions", such liquors may be disposed of in hotels, restaurants, etc., the proviso is not inconsistent with and does not abrogate the prohibition immediately preceding it. Const. art. 20, § 22.

5. Constitutional law ⇦16

In ascertaining the meaning of constitutional amendment relating to liquor control, the history thereof must be given due consideration. Const. art. 20, § 22.

6. Constitutional law ⇦18
Statutes ⇦147

A substantial change in the language of a statute or constitutional provision by an amendment thereto indicates an intention to change its meaning, and an omission may be as significant as an insertion or substitution, but a mere change in phraseology, incident to a revision of Constitution or statute, does not result in a change of meaning unless the intent to make such a change clearly appears.

7. Constitutional law ⇐12

Generally principles of construction applicable to statutes are also applicable to the Constitution.

8. Intoxicating liquors ⇐110

The 1935 amendment to constitutional provision of 1932, relating to liquor control, by eliminating from the prohibition against public saloons, etc., the words "or other public drinking place" and permitting the sale not only of wine and beer but of all intoxicating liquors, for consumption on the premises in hotels, restaurants, etc., and omitting therefrom the provision, "when served with meals", evidenced an intention to make a change in the meaning of the 1932 provision. Const. art. 20, § 22.

9. Constitutional law ⇐16

If any doubt existed as to whether framers of constitutional amendment had given consideration to Supreme Court decision, construing the constitutional provision prior to amendment, the argument officially circulated to the voters in support of the amendment could be examined and considered for the purpose of aiding in the construction of the amendment.

10. Constitutional law ⇐15

It is a settled rule of constitutional construction that, if there are apparent conflicts, it is the duty of courts to harmonize them, if this can be reasonably done without distorting the meaning of any provision, so as to give effect to every portion of the instrument, and each provision must be read with direct reference to every other which relates to the same subject, and so read, if possible, as to avoid repugnancy.

11. Intoxicating liquors ⇐110

The constitutional amendment authorizing the sale of intoxicating liquors by hotels, restaurants, etc., for consumption on the premises, permits such sale of intoxicating liquor without meals to some extent and in some places. Const. art. 20, § 22.

12. Constitutional law ⇐14

In the absence of a definition in constitutional provision of the terms therein used, words, having no technical meaning, will be taken in the ordinary and generally accepted sense.

13. Intoxicating liquors ⇐110

The words "saloon" and "barroom", as used in constitutional amendment relating to liquor control, import a place where intoxicating liquors are sold for consumption on the premises, commonly without meals. Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for all other definitions of "Barroom" and "Saloon".

14. Intoxicating liquors ⇐110

The constitutional amendment, permitting the sale of intoxicating liquors by restaurants, etc., for consumption on the premises, uses the word "restaurant" as meaning a public eating house. Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for all other definitions of "Restaurant".

15. Evidence ⇐20(1)

It is a matter of common knowledge, of which the District Court of Appeal may take judicial notice, that the saloons and barrooms existing before the enactment of prohibition, which undoubtedly it was the intent of the constitutional amendment, relating to liquor control, to prohibit, were not devoted to the furnishing of meals. Const. art. 20, § 22.

16. Intoxicating liquors ⇐110

A restaurant, kept and operated for the purpose of furnishing meals, the service of intoxicating liquors therein being merely incidental to such business, is a "bona fide restaurant" within the meaning of constitutional amendment permitting the sale of alcoholic liquors in such restaurants for consumption on the premises, and such liquor may be there sold without meals, but, where the main business of a restaurant becomes the sale of intoxicating liquors, the service of meals being merely incidental thereto, such place is to be regarded as a public "saloon" or "barroom", in which such sale of liquor is prohibited. Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for all other definitions of "Bona Fide Restaurant."

17. Constitutional law ⇐14

Legislative definitions of words used in constitutional provision are not controlling, if palpably opposed to the meaning of constitution, but must be followed where the Legislature adopts one of two reasonable and possible constructions of the constitutional provision.

18. Intoxicating liquors ⇐110

The legislative definition of "saloon" contained in the Alcoholic Beverage Control Act of 1935, requiring the presence of a bar or counter in order to constitute a saloon,

in so far as it is intended to define the word saloon as used in constitutional amendment, prohibiting the sale therein of intoxicating liquors other than beer, is ineffective as attempting to place an unwarranted limitation on the constitutional provision. Gen.Laws 1937, Act 3796, § 2(m); Const. art. 20, § 22.

19. Intoxicating liquors ⇐143

Whether a given place is a bona fide restaurant, in which intoxicating liquor other than beer may legally be sold for consumption on the premises, or is so operated as to be a public saloon, bar, or barroom in which such sale would be illegal, is a "question of fact". Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

20. Intoxicating liquors ⇐276

In action to abate a liquor nuisance, finding that defendants were conducting a bona fide restaurant but that they also sold intoxicating liquors, other than beer, without meals, which was illegal and in effect amounted to the maintenance therein of a saloon and barroom contrary to law, were irreconcilably inconsistent, and required reversal of judgment of abatement. Gen.Laws 1937, Act 3778; Const. art. 20, § 22.

21. Intoxicating liquors ⇐260

The constitutional amendment prohibiting the sale of intoxicating liquors, other than beer, in a saloon, bar, or barroom for consumption upon the premises, makes such sale in a place answering to the description "saloon, bar or barroom", as used in the constitutional amendment, unlawful and subject to abatement under statute, authorizing action to abate nuisance consisting of unlawfully selling, serving, or giving away alcoholic liquors, even though such sale be not in violation of the Alcoholic Beverage Control Act. Gen.Laws 1937, Act 3778, § 1; Act 3796, §§ 2(m), 53; Const. art. 20, § 22.

22. Constitutional law ⇐32

Where an act is directly prohibited by the Constitution as unlawful, no legislation is needed to put the prohibition in force and outlaw the prohibited acts.

WHITE, Judge, dissenting in part.

Appeal from Superior Court, Los Angeles County; Lucius P. Green, Judge pro tem.

Action by George Y. Hammond against Vernon McDonald and another to abate a nuisance resulting from the alleged illegal sale of alcholic beverages. From a judgment of abatement of the nuisance, defendants appeal.

Judgment reversed and cause remanded for a new trial.

See, also, 45 Cal.App.2d 226, 113 P.2d 899.

Hearing denied; CARTER, J., dissenting; TRAYNOR, J., not participating.

Hanna & Morton, of Los Angeles, for appellants.

Newby & Newby, of Los Angeles, for respondent.

SHAW, Justice pro tem.

This is an action brought by the plaintiff as a citizen and resident of the county of Los Angeles, to abate a nuisance consisting of a place in said county used by the defendants, it is alleged, for the unlawful sale and service of intoxicating liquor. The action purports to be brought under a statute of 1915 (Stats.1915, p. 236; Deering's General Laws, 1937 ed., Act 3778), which in terms authorizes such an action to be brought by any citizen of the county where the nuisance exists. On a former appeal in this action it was held that the statute just referred to was not repealed by the adoption in 1932 or the later amendment in 1934 of section 22, article XX of the Constitution regulating the sale of intoxicants or by the Alcoholic Beverage Control Act (Stats.1935, p. 1123; Deering's General Laws, 1937 ed., Act 3796) or by subsequent amendments of that act, but is still in full force and effect and authorizes the bringing of this action by the plaintiff. Hammond v. McDonald, 1939, 32 Cal.App. 2d 187, 89 P.2d 407. After that decision the case was tried, findings in favor of plaintiff were made, and judgment of abatement of the nuisance was entered thereon, from which defendants appeal.

The record shows that the place in question is, to some extent, at least, operated by the defendants as a cafe and lunch counter; and for convenience we will use, in referring to this part of their activities, the term "restaurant," which appears before "cafe" in the constitutional provision hereinafter construed and is synonymous therewith in ordinary use. This action is brought by the plaintiff to obtain a determination of the question, to what extent, if at all, may intoxicating liquors be sold without meals, in restaurants and other public

eating places licensed to make sales of such liquors for consumption on the premises.

The controlling rule on this subject is established by section 22 of article XX of the Constitution of this state, as amended in 1934, which, after vesting in the state the exclusive power to regulate dealings with intoxicating liquors, further provides: "Intoxicating liquors, other than beers, shall not be consumed, bought, sold, or otherwise disposed of for consumption on the premises, in any public saloon, public bar or public barroom within the State; provided, however, that subject to the aforesaid restriction, all intoxicating liquors may be kept and may be bought, sold, served, consumed, and otherwise disposed of in any bona fide hotel, restaurant, cafe, cafeteria, railroad dining or club car, passenger ship, or other public eating place, or in any bona fide club after such club has been lawfully operated for not less than one year." Then follow provisions giving the State Board of Equalization "the exclusive power to license" all liquor business, subject to legislative control to an extent not now in question. By reason of the exception of "beers" in the first part of the language quoted, our problem does not affect the sale of beers, and references hereinafter made to intoxicating liquors do not include beers in that term, unless it is so stated. So also, the facts here raise no question in regard to clubs, and we do not undertake to construe the provisions relating to them.

For the purpose of enforcing and applying this constitutional provision, the legislature in 1935 passed the Alcoholic Beverage Control Act above mentioned, which, as amended in 1937 (Stats.1937, p. 2169) provides in section 53: "Every person who sells, serves or otherwise disposes of any alcoholic beverage, except beer which may be so sold, served or disposed of, over or at any public bar or in any public barroom, for consumption on the premises, shall be guilty of a misdemeanor." A definition of the terms used in this section is supplied by subdivision (m) of section 2 of the same act as amended in 1937 (Stats.1937, p. 2129), which, with its introductory clause, reads as follows:

"Sec. 2. The following words, terms and phrases when used in this act have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning: * * *

"(m) Public bar, or 'public saloon' or 'public barroom' is hereby expressly prohibited and means any room to which the public has access in which there is any bar, counter or other structure over which beverages of an alcoholic content in excess of four per cent by weight are sold or served by the drink to the public consumption on the premises; provided, however, that counters or other structures used for the sale, service and consumption of meals, and not as a subterfuge for a public bar, shall not be deemed to be a public bar within the meaning of this act."

The same statute provides for the issuance of what it denominates "on-sale" licenses to sell beer and wine and to sell distilled spirits (sec. 5, items 20, 21, 22 and 23; Stats. 1937, p. 2131); and these licenses authorize sales "for consumption on the premises where sold." (Sec. 6, subd. (j), Stats.1937, p. 2134.) Such "on-sale" licenses may be issued only for the places designated in the proviso above quoted from the constitutional provision. (Sec. 18, same act, Stats.1935, p. 1131.) The defendants had licenses under these provisions at the time to which this action relates.

[1] Before approaching a decision of the main question, it seems advisable to clear away some of the surrounding underbrush growing from subordinate or incidental contentions of the parties. Thus, plaintiff contends that the question now raised was answered by the decision of this court on the former appeal and that such decision has become the "law of the case" and cannot be questioned on this appeal. That contention is based on the words we now emphasize in the following passage from the opinion on the former appeal: "A reading of the constitutional amendment and the Alcoholic Beverage Control Act, especially sections 1 and 53 thereof, indicates that it was the intention of the people, as well as of the legislature, to prevent the return of the public saloon or barroom to the social life of California after the repeal of the Eighteenth Amendment to the federal Constitution. It was apparently with that idea in mind that the amendment was adopted and the statute enacted prohibiting the disposal of intoxicating liquors, other than beer, for consumption by the general public upon the premises, *except when served with meals.* The 1915 statute is entirely consistent with such viewpoint, and was obviously con-

tinued in effect in order to give a supplemental or additional remedy by which the sale of intoxicating liquor to the general public in a public saloon or barroom could be restrained through a civil suit in equity." (Italics added.) (Hammond v. McDonald, supra, 1939, 32 Cal.App.2d 187, at page 194, 89 P.2d 407, at page 411.) This, however, was obviously not intended as a ruling on the construction of the Constitution. That matter was not then under consideration. The question before the court arose on a demurrer to the complaint, and a request for leave to file an amended complaint. Neither of these complaints contained allegations adequate to raise on demurrer the question now under consideration, and the point decided, as stated by the court, was simply that "* * * the statute of 1915 is still in full force and effect and has never been repealed or superseded." Before making the statement relied on by plaintiff the court had referred to the 1932 version of the constitutional provision and to the State Liquor Control Act adopted in pursuance thereof, both of which did expressly prohibit disposal of intoxicating liquor for consumption on the premises except with meals, and the form of the statement may have been influenced by that fact. At any rate, the statement relied on is a mere passing remark, and if it can be said to lay down any legal rule at all, it is at best obiter dictum. It is therefore not binding on us as the law of the case (Millsap v. Balfour, 1910, 158 Cal. 711, 714, 112 P. 450, and cases there cited; Mulford v. Estudillo, 1867, 32 Cal. 131, 138), and does not bar us from now deciding the question on its merits.

It is urged by defendants that there have been legislative and administrative constructions of the constitutional provision above mentioned in accordance with their contentions. In support of their claim of a legislative construction, they call attention to provisions of the Alcoholic Beverage Control Act which we have already mentioned (secs. 5, 6 and 18, supra), relating to licenses, and characterize them as "providing that a bona fide restaurant, hotel, etc., might serve intoxicating liquors without meals." This characterization is not borne out by a reading of the provisions mentioned. Their language goes no further than to authorize the sale of alcoholic beverages "for consumption on the premises where sold," without mention of meals; those sections authorize service of liquor without meals, if at all, only by not prohibiting it. This leaves the question open for determination upon such other provisions of Constitution or statute as may be found applicable. Far from putting a construction on the Constitution, it evades such construction. Reference is also made to subd. (m) of section 2, as amended in 1937, which is above quoted, and to the 1935 form of the same provision, which did not differ materially from that of 1937 as far as the present matter is concerned. These provisions say nothing of the service of meals with liquor, and are no more interpretive of the Constitution in that respect than are the other provisions just discussed.

[2, 3] On the claim of administrative construction it is argued that "the State Board of Equalization has uniformly construed the amendment of 1934 as authorizing the serving of all types of intoxicating liquors without meals in restaurants and hotel dining rooms and has consistently issued many thousands of licenses in the state of California for such purpose," and that we may take judicial notice of this fact. The issuance of licenses since 1935 must have been done under the statutory provisions already referred to, and their purpose could be no other than that stated in the statute, which, as we have already said, declares nothing regarding the question here in issue. What other acts the board may have done by way of construing the Constitution are not disclosed either in the record or in the briefs. If there be anything to which our judicial notice could extend, either under section 1875, subdivision 3 of the Code of Civil Procedure or otherwise, our attention should be called to it. We are not required to institute an independent investigation on the subject. In this connection we note that such administrative construction of the Constitution may be considered only when there is uncertainty in the provision to be construed. (Carter v. Commission of Qualifications, 1939, 14 Cal.2d 179, 185, 93 P.2d 140.) Where the meaning is not doubtful, administrative acts or regulations in conflict with it are simply void. (Hodge v. McCall, 1921, 185 Cal. 330, 334, 197 P. 86; Morris Plan Co. v. Johnson, 1940, 37 Cal. App.2d 621, 624, 100 P.2d 493; see, also, 16 C.J.S., Constitutional Law, § 32, p. 71; People v. Ford Motor Co., 1922, 188 Cal. 8, 10, 204 P. 217.)

The record does disclose that representatives of the State Board of Equaliza-

tion inspected defendants' place of business from time to time, and in doing so paid particular attention to their facilities for serving food and the amount of food on hand. This shows a desire to ascertain whether defendants were conducting a bona fide restaurant for which an "on-sale" license could be properly issued, but indicates no opinion on the question whether meals must be served with drinks.

[4] Plaintiff argues that the proviso in the above quoted constitutional provision is repugnant to the body of the provision to which it is attached and is therefore void; while defendants argue that the proper function of a proviso is to limit the general language of an enactment and that the proviso here may be held to have that effect and is valid. Defendants also argue that if there is any inconsistency between the proviso and the provision preceding it, the proviso must control for several reasons; first, that in such case a special provision prevails over one of general character; second, that the provision which is last in point of arrangement prevails; and third, that the provision which is later in point of time—claimed to be the proviso—controls. Careful consideration of the constitutional language discloses that it affords no foundation for any of these arguments, and hence the questions presented under them need not be resolved here. We repeat here that constitutional language, emphasizing the part of it which disposes of the questions above mentioned: "Intoxicating liquors, other than beers, shall not be consumed, bought, sold, or otherwise disposed of for consumption on the premises, in any public saloon, public bar or public barroom within the State; *provided, however,* that *subject to the aforesaid restriction,* all intoxicating liquors may be kept and may be bought, sold, served, consumed, and otherwise disposed of in any bona fide hotel, restaurant, café, cafeteria, railroad dining or club car, passenger ship, or other public eating place, or in any bona fide club after such club has been lawfully operated for not less than one year." (Italics added.) The framers of this provision must have had in mind the questions above suggested, and to set them all at rest, they caused the Constitution to provide its own rule of construction in these respects. It declares that the authority given by the proviso for the sale of intoxicating liquors in bona fide hotels, restaurants, etc., is "subject to the aforesaid restriction." The only restriction previously stated, and hence the only restriction to which this language can refer, is the provision that intoxicating liquors shall not be consumed, sold, etc., "in any public saloon, public bar or public barroom." The conclusion is inescapable that the proviso is not inconsistent with and does not abrogate the prohibition immediately preceding it, although the terms of the proviso may, as hereinafter indicated, affect the construction of that prohibition.

[5-7] This brings us to the principal question above stated, the answer to which must be found in the constitutional provision just quoted. In ascertaining the meaning of this constitutional provision, its history, to which defendants point, must be given due consideration. The section 22 of article XX which we have before us (another section of the same number, covering a different subject, was adopted in 1934) was first placed in the Constitution in 1932, and as then adopted the provisions now to be construed differed from their present form in several respects. Following substantially the same provision as now exists giving the state the exclusive power to regulate dealings with intoxicating liquors there were two provisos which read as follows: "provided, however, no public saloon, public bar or barroom or other public drinking place where intoxicating liquors to be used for any purpose shall be kept, bought, sold, consumed or otherwise disposed of, shall ever be established, maintained or operated within the State; provided, further, subject to the above provisions, that the hotels, boarding houses, restaurants, cafes, cafeterias and other public eating places, wines and beer may be served and consumed with meals furnished in good faith to the guests and patrons thereof."

While the first proviso just quoted from the original section is different in form from the provision—not worded as a proviso—which takes its place in the amended section, the two enactments are substantially the same in effect insofar as they prohibit the sale and the consumption of intoxicating liquors in any public saloon, public bar or public barroom. But the second proviso of the original section was substantially revised and altered by the amendment, and this is a fact of considerable significance here. A substantial change in the language of a statute by an amendment indicates an intention to change its

meaning. (Meyerfeld v. South San Joaquin Irr. Dist., 1935, 3 Cal.2d 409, 417, 45 P. 2d 321; Thomas v. Driscoll, 1940, 42 Cal. App.2d 23, 28, 108 P.2d 43; Hoffman v. McNamara, 1929, 102 Cal.App. 280, 285, 282 P. 990; McCarthy v. Board of Fire Com'rs, 1918, 37 Cal.App. 495, 497, 174 P. 402.) This rule has been specifically held applicable to the interpretation of constitutional provisions (Hyatt v. Allen, 1880, 54 Cal. 353, 356), and "Generally speaking, principles of construction applicable to statutes are also applicable to constitutions" (16 C.J.S., Constitutional Law, § 15, p. 51; see, also, People v. Denault, 1927, 81 Cal. App. 1, 9, 253 P. 151; Hyatt v. Allen, supra). An omission may be as significant as an insertion or a substitution. (Oakland Pav. Co. v. Whittell Realty Co., 1921, 185 Cal. 113, 120, 195 P. 1058.) But a mere change in phraseology, incident to a revision of Constitution or statute, does not result in a change of meaning unless the intent to make such a change clearly appears. (Hyatt v. Allen, supra; Pacific Gas & Electric Co. v. Industrial Acc. Comm., 1932, 124 Cal.App. 303, 309, 12 P.2d 649.)

[8] Applying these rules to the portions of section 22, article XX of the Constitution, as amended in 1934, which are now under consideration, it is plain that we have something more than a mere change of phraseology resulting from a revision; there is clearly evident an intention to make changes in the meaning. Thus, the second proviso, as adopted in 1932, limited itself to "wines and beer"; in 1934 the authorization given by the corresponding proviso was extended to "all intoxicating liquors." At first, the authorization was only that "wines and beer may be served and consumed with meals furnished in good faith to the guests and patrons"; now those words have been omitted and the authorization is that "all intoxicating liquors may be kept and may be bought, sold, served, consumed, and otherwise disposed of in any bona fide hotel, restaurant" et cetera, with no reference at all to meals. The amendment also eliminated from what was the first proviso the words "other public drinking place." There can be no doubt that, as a result of these changes, the authorization previously given for the sale of wines and beer has been extended to all intoxicating liquors. This we understand plaintiff to concede; but he contends that these changes have no effect at all on the requirement that meals be served with intoxicating liquors, because of the declaration that the remaining proviso is subject to the prohibition against saloons, barrooms and bars, arguing further, in this respect, that whenever intoxicating liquor is served in a restaurant and is consumed on the premises, without a meal, such restaurant ipso facto becomes, at least for the time being, a public saloon or barroom. Defendants' argument goes to the opposite extreme, their claim being that the right of the keeper of a bona fide restaurant to sell liquor without meals for consumption on the premises is unlimited as to quantity, that no matter how much liquor is so sold or how great a proportion of his total business such sales may be, his place of business remains a bona fide restaurant and his sales are in such a restaurant and not in a public saloon, bar or barroom.

[9] We think the true rule lies somewhere between these contentions. There is in the changes made by the amendment a strong indication of an intent to free restaurant keepers and others from the limitation that their sales must be with meals. Not only were the words "with meals" stricken from the permissive provision, but the restriction regarding "other public drinking place" was eliminated from the prohibitory clause. The last quoted words were those upon which the Supreme Court relied, in Sandelin v. Collins, 1934, 1 Cal.2d 147, 154, 33 P.2d 1009, 93 A.L.R. 956, to support its holding that the constitutional provision, as first adopted in 1932, prohibited the consumption of intoxicating liquor in hotels, restaurants, et cetera, otherwise than with meals. This decision was made a little more than four months before the election at which the 1934 amendment was adopted, and the framers of that amendment no doubt gave it consideration. If any uncertainty exists in this respect, the argument officially circulated to the voters in support of the amendment, when it was adopted by them, may be examined and considered for the purpose of aiding in the construction of the amendment. (People v. Ottey, 1936, 5 Cal.2d 714, 723, 56 P.2d 193; Beneficial Loan Society, Ltd., v. Haight, 1932, 215 Cal. 506, 515, 11 P.2d 857.) Looking at that argument we find it emphasizing the proposition that under the amendment liquor may be served by the drink with or without meals, in restaurants et cetera.

[10] It is a settled rule of constitutional construction that, "If there are apparent

conflicts, it is the duty of courts to harmonize them, if this can be reasonably done without distorting the meaning of any provision, so as to give effect to every portion of the instrument. Each provision must be read with direct reference to every other which relates to the same subject, and so read, if possible as to avoid repugnancy." (5 Cal.Jur. 583; see, also, Webster v. Board of Regents, 1912, 163 Cal. 705, 709, 126 P. 974; Wheeler v. Herbert, 1907, 152 Cal. 224, 236, 92 P. 353; Crowe v. Boyle, 1920, 184 Cal. 117, 129, 193 P. 111.) "The legal intendment is that each and every clause has been inserted for some useful purpose, and when rightly understood may have some practical operation." (5 Cal.Jur. 586.) This rule must be applied in connection with the other rule requiring effect to be given to substantial changes in language, including omissions, made by an amendment, so that in determining the effect of several provisions and their interaction upon each other as they now stand, we must consider changes made in them by amendment as well as their present form, and give effect to all of these matters so far as it is possible to do so.

[11] We have here two provisions for consideration: first, that prohibiting sale, consumption, etc., of intoxicating liquors "in any public saloon, public bar or public barroom"; and second, the proviso thereto attached, that "subject to" this prohibition, all such liquors may be sold, consumed, etc., "in any bona fide hotel, restaurant," etc. Under the rule just stated we must find, if possible, some construction which will give effect to both of these provisions; we cannot conclude that the words declaring the proviso subject to the prohibition were intended to nullify the proviso entirely or shut our eyes to the changes made by the amendment. Giving consideration to all these matters, we conclude that the Constitution, as it now stands, intends to permit the sale of intoxicating liquors without meals, for consumption on the premises, to some extent and in some places. The plaintiff's construction to the contrary entirely ignores the significant changes of omission made in the Constitution by the amendment.

[12-16] On the other hand, this permission given by the Constitution is expressly made subject to the prohibition of sales, consumption, et cetera, in any public saloon, bar or barroom. Some effect must be found for this restriction also. In this connection we note that while the provision requiring meals to be served in good faith with intoxicating liquors consumed on the premises has been eliminated from the Constitution, the idea of good faith has been retained, and the words "bona fide" have been inserted, where they did not formerly appear, at the head of the list of places in which sales for consumption on the premises are permitted. In other words, such sales are not permitted in every restaurant, but only in those which are "bona fide." Such bona fide restaurants are to be contrasted with the public saloons, bars and barrooms mentioned in the prohibition. To harmonize and effectuate all of these provisions we must hold that there are or may be bona fide restaurants in which intoxicating liquors are served and consumed without meals, and which are not saloons, bars or barrooms; but that there are or may be other restaurants in which such liquors are so sold and consumed, which are not to be regarded as bona fide restaurants, but, in the view of the Constitution, merely as saloons, bars or barrooms. Such a conclusion may be reached without doing violence to the language of the Constitution. No definitions of the terms used appear in the Constitution. In the absence of such definitions, the words, having no technical meaning, will be taken in the ordinary and generally accepted sense. (Kaiser v. Hopkins, 1936, 6 Cal.2d 537, 539, 58 P.2d 1278; San Pedro, etc., R. R. Co. v. Hamilton, 1911, 161 Cal. 610, 617, 119 P. 1073, 37 L.R.A.,N.S., 686.) The words "saloon" and "barroom," as used in connection with the sale of intoxicating liquor, import a place where such liquors are sold for consumption on the premises (7 C.J. 930; 9 C.J.S., Barroom, p. 1550; 55 C.J. 1345; see, also, Words and Phrases, Perm.Ed., under these words); to which Webster's New International Dictionary, 2d ed., first published in 1934, adds, in case of a saloon, that such sales are "commonly without meals." A restaurant is "a public eating house" (Webster's Dict. above cited), and it is evidently so regarded in the constitutional provision under consideration, for the enumeration including it is there followed by the words, "or other public eating place." It is a matter of common knowledge of which we may take judicial notice, that the saloons and barrooms existing before the enactment of prohibition, which undoubtedly it was the intent of this constitutional amendment to prohibit, were not devoted to the furnishing

of meals. They did, in some cases, furnish "free lunches," usually of rather minor character; but the business for which they were established was the selling of intoxicating liquor for consumption on the premises, and any furnishing of food or meals was purely incidental to that business. Persons whose main object was the obtaining of meals, even if they desired drinks of intoxicants with them, went to restaurants and cafes, whose principal business was the serving of meals, not of intoxicants. The Constitution, by its use of the words "bona fide" to modify the words designating the places where intoxicating liquors may be sold and consumed on the premises, has drawn a similar distinction. As the court said in Webster v. Denison, 1853, 25 Vt. 493, 498, "The proper distinction in the law, between bona fides and mala fides, is that the former requires the thing to be, in fact, just what it purports to be." Such is also the common meaning of the words "bona fide." (See Webster's Dictionary, already cited.) A restaurant which is kept and operated for the purpose of furnishing meals to the public, the service of intoxicating liquors therein being merely incidental to that business, is what it purports to be, and is therefore a bona fide restaurant, and may as a casual and incidental part of its business sell such liquors and allow their consumption upon the premises even without meals. But where the principal business of the restaurant becomes the sale and service of intoxicating liquors, which are consumed on the premises, with the sale and service of meals the incidental matter, or "side-line," such place is no longer a bona fide restaurant, but is to be regarded as a public saloon or barroom, within the intent of the constitutional provision, and the sales of such liquor therein are prohibited. Any rule more liberal to the restaurant keeper would, in effect, wipe out the prohibition of saloons, et cetera, and give the proviso complete dominance over the "restriction" to which, by its own terms, it is subject.

[17, 18] The legislature has undertaken to define some of the words used in the Constitution and now under consideration. Such a definition, while not controlling, if plainly opposed to the meaning of the Constitution (Worswick Street Pav. Co. v. Industrial Acc. Comm., 1919, 181 Cal. 550, 561, 185 P. 953) must be followed where the legislature adopts one of two reasonable and possible constructions of the constitutional provision. (Kaiser v. Hopkins, 1936, 6 Cal.2d 537, 540, 58 P.2d 1278; Pacific Indemnity Co. v. Industrial Acc. Comm., 1932, 215 Cal. 461, 464, 11 P.2d 1, 82 A.L.R. 1170.) This legislative definition is in subdivision (m) of section 2 of the Alcoholic Beverage Control Act, which now stands as amended in 1937, and has already been quoted. This definition departs from the Constitution in one respect. By its terms a room is not a saloon unless it contains a "bar" or counter. There is nothing in the usual or common meaning of the word "saloon" which requires the presence of a counter to constitute a "saloon," nor do we see any possibility of a double meaning of the Constitution in this respect. Hence, the definition places an unwarranted limitation on the constitutional provision, and, if intended as a definition of this term as used in that provision, it is to that extent ineffective.

[19, 20] Upon the construction we have given the constitutional provision, the question whether any given place is a bona fide restaurant, or is so operated as to be a public saloon, bar, or barroom, is one of fact. On that question the trial court, in this case, made findings which include the following: "* * * at the commencement of this action, and at all times thereafter, down to and including the time of the trial of this action, said defendants and each of them have been conducting in good faith, in a brick building on the premises above described, a cafe and lunch counter business; that said defendants have also, during said period in said building on said premises, engaged in the business of serving to the public intoxicating liquors" (Finding III); "Drinks, both soft and alcoholic and in excess of four per cent by weight, with and without meals, are served both over said counters and in said ballroom and dining room" (Finding III); "* * * the business conducted by said defendants upon said premises by the sale of intoxicating liquors (other than beers) containing alcohol in excess of four per cent, by weight, without meals, is illegal, and, in effect, amounts to the maintenance therein of a saloon and barroom, contrary to law." (Finding IV.) Between the findings quoted are statements of a number of facts of an evidentiary nature, but the findings quoted are not declared to be conclusions from these other facts. Upon our view of the Constitution, these findings, declaring, in effect, that the defendants are conducting a bona fide restaurant or cafe and that by

their method of conducting it they are at the same time and place maintaining a public saloon and barroom, are irreconcilably inconsistent. For that reason the judgment must be reversed. Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, 1932, 217 Cal. 131, 137, 17 P.2d 712.

[21, 22] Because of the limited nature of the provisions of section 2, subdivision (m) and section 53 of the Alcoholic Beverage Control Act, both already quoted, it may be that, even if defendants are not conducting a bona fide restaurant, some of the sales of intoxicating liquor made by them without meals, particularly those in the ballroom, where there appears to be no counter, are not in violation of that act, but they are not for that reason excluded from the operation of the act of 1915 by which this action is sanctioned. By the terms of section 1 of the act last mentioned a place "used for the purpose of unlawfully selling, serving or giving away any spirituous, vinous, malt or other alcoholic liquor" is a nuisance which may be abated by proceedings under the act. The sales here, even if they do not violate any legislative enactment, are, if defendants' restaurant is not bona fide, in direct contravention of the constitutional provision. That provision directly prohibits certain acts, and no legislation is needed to put this prohibition in force and thus outlaw the prohibited acts. Of course, it would be possible and even desirable for the legislature to provide further sanctions, but without such sanctions an act directly prohibited by the Constitution is unlawful. (Sheehy v. Shinn, 1894, 103 Cal. 325, 329, 37 P. 393; Garms v. Jensen, 1894, 103 Cal. 374, 37 P. 337; 13 C.J. 424; 17 C.J.S., Contracts, § 208, p. 560.)

The judgment is reversed, and the case is remanded for a new trial.

YORK, P. J., concurred.

WHITE, Justice (dissenting in part).

I concur in that portion of the judgment which reverses the judgment of the court below, but I dissent from that portion which remands the cause for a new trial. I am firmly of the opinion that the cause should be remanded with directions to the trial court to enter judgment for the defendants. The reason for such belief upon my part is engendered by the fact that the sole question here involved is whether, under the provisions of section 22 of article XX of the Constitution of this state, as amended in 1934, intoxicating liquors may be sold without meals in bona fide restaurants, cafes, hotels, clubs or other legitimate eating places. The trial court found, upon substantial and convincing evidence, that the defendants were conducting in good faith a cafe and lunch counter business, but nevertheless held that because in such bona fide restaurant defendants were serving intoxicating liquors without meals, their action in so doing was "illegal, and, in effect, amounts to the maintenance therein of a saloon and barroom, contrary to law." The bona fide character of defendants' restaurant is conceded, and the sole and paramount question which we should determine is, therefore, one of law, viz., can this bona fide restaurant serve intoxicating liquors without meals. While it might be inferred from the decision of this court that restaurants of a bona fide character may serve intoxicating liquors without meals, such holding is in my opinion more or less equivocal. I believe we should in this case decisively and unequivocally settle and determine that question of law. I am firmly convinced that under the existing provisions of our Constitution, a bona fide restaurant, etc., may legally and lawfully sell and serve intoxicating liquors either with or without meals. In that connection, let us consider the constitutional provision as adopted in 1932, so far as here pertinent. It read: "* * * provided, however, no public saloon, public bar or barroom or other public drinking place where intoxicating liquors to be used for any purpose shall be kept, bought, sold, consumed or otherwise disposed of, shall ever be established, maintained or operated within the State; provided, further, subject to the above provisions, that in hotels, boarding houses, restaurants, cafes, cafeterias and other public eating places, wines and beer may be served and consumed with meals furnished in good faith to the guests and patrons thereof."

As amended in 1934, the Constitution, so far as it concerns the question before us, was made to read: "Intoxicating liquors, other than beers, shall not be consumed, bought, sold, or otherwise disposed of for consumption on the premises, in any public saloon, public bar or public barroom within the State; provided, however, that subject to the aforesaid restriction, all intoxicating liquors may be kept and may be bought, sold, served, consumed, and otherwise dis-

posed of in any bona fide hotel, restaurant, cafe, cafeteria, railroad dining or club car, passenger ship, or other public eating place, or in any bona fide club after such club has been lawfully operated for not less than one year."

It seems clear to me that by adopting the 1934 amendment the people intended to and did make a substantial change in the organic law. Under the 1932 constitutional provision only the sale of beer and wine for consumption on the premises was permitted, and then only when such service was made with meals, while the sale of so-called hard liquor by the drink was prohibited whether with or without meals in any public restaurant. If there be any doubt as to what was in the minds of the framers of the initiative amendment of 1934, or in the minds of the people when they voted to adopt such amendment, that doubt is dissipated by reason of the argument addressed to the electors of California as contained in the pamphlet compiled by the state legislative counsel and distributed to each qualified voter by the Secretary of State. In the argument favoring adoption of the 1934 initiative amendment, we find the following clear and unequivocal language: "* * * The issue is clear-cut. The sale of beer and wine, with or without meals, and of hard liquor by the drink, with or without meals, must stop in California after November 6th unless the people approve Proposition 2 at the polls. In voting for this proposition the people will vote for the open and regulated sale of all intoxicating liquors, with or without meals, in legitimate eating places so licensed by the State Board of Equalization."

That the opponents of the initiative measure suffered no illusions as to the intent and purpose of the amendment is evidenced by the following quotation from the argument made against the adoption of such amendment, and which argument, by the way, was signed by one of counsel for respondent herein: "It (referring to the amendment) provides that intoxicating liquors 'other than beers' shall not be consumed, bought, sold or otherwise disposed of for consumption on the premises in any public saloon, public bar, or public barroom within the state; but that subject to this restriction, 'all intoxicating liquors may be kept and may be bought, sold and served, consumed and otherwise disposed of in any bona fide hotel, restaurant, cafe, cafeteria, railroad dining or club car, passenger ship or other public eating place, or in any bona fide club after such club has been lawfully operated for not less than one year.' * * * The places in which all intoxicating liquors may be freely sold and consumed if the proposed amendment is adopted, are so varied, diversified and numerous that it would amount to no restriction worthy of the name and could only have been designed to fool the public, as the liquor forces have been prone to do at all times and under all circumstances."

With the foregoing arguments before them, the people wrote the initiative measure into the Constitution. The language of the amendment to me seems clear and understandable. After outlawing a return of the public saloon, it provides, subject to the just-mentioned restriction, that all intoxicating liquors may be kept, bought, sold, served, consumed and otherwise disposed of in any bona fide hotel, restaurant, etc. In other words, the service of meals with liquor is not required when such service takes place in a licensed bona fide hotel, restaurant, club, cafe, etc. The requirement of meal service with the sale of beer or wine contained in the former constitutional provision of 1932 was completely eliminated by the 1934 amendment and the sale of such malt and vinous as well as distilled liquors was authorized without any reference to meal service, provided the restaurant, cafe, etc., was in good faith conducted as a restaurant, cafe, etc.

Pursuant to the power granted by the Constitution, and to carry out its inhibition against the return of the old-time saloon or barroom, the legislature, in the Alcoholic Beverage Control Act referred to in the main opinion, expressly prohibited the operation of a public bar, public saloon, or public barroom, and defined the latter to be "any room to which the public has access in which there is any bar, counter or other structure over which beverages of an alcoholic content in excess of four per cent by weight are sold or served by the drink to the public for consumption on the premises; provided, however, that counters or other structures used for the sale, service and consumption of meals, and not as a subterfuge for a public bar, shall not be deemed to be a public bar within the meaning of this act." Section 2(m).

That by the 1934 amendment a substantial change was made in the Constitution to me seems clear and undeniable.

That this indicates a clear intention to change its meaning is conceded by the main opinion, with cases cited in support of such concession. As admitted in the main opinion, the indicated change was to free restaurant keepers and others from the limitation that the sale of liquor must be accompanied by the service of meals. The main opinion decides that the Constitution in its present form prohibits the sale of intoxicating liquors for consumption on the premises in all places where that is the principal business, but permits it in hotels, restaurants, etc., where the principal business is the service of meals and the sale of intoxicating liquor is merely incidental thereto. The main opinion attempts to read into the Constitution the term "principal business," and thus add to the functions of the Board of Equalization the duty of determining what the "principal business" is. To my mind, this is not at all what is contemplated by the Constitution. A mere reading of its terms demonstrates clearly and unerringly that once the bona fide character of the hotel, restaurant, cafe, etc., as such, is determined, then the sale of liquor, either with or without meals, is permitted in licensed places. The trial court took the position, and the main opinion approves thereof, that because the amount realized from the sales of liquor exceeds that obtained from the sale of meals, the place becomes a public saloon or barroom and loses the characteristics of a bona fide restaurant, cafe, hotel, etc. This to my mind is not the true test. I feel that if the place in question, exclusive of the sale of liquor, could qualify as a bona fide restaurant, cafe, etc., as these terms are commonly known and understood—that is to say, is prepared to furnish meals and foodstuffs in the event such service is requested by the patron, then such establishment, if licensed by the Board of Equalization, may maintain upon its premises and sell intoxicating liquor, with or without meals.

It is true that the 1934 amendment prohibits public saloons and barrooms. But by its very language it provides that a bona fide restaurant, cafe, etc., is not a saloon. And this is but common sense. The voters of this state, when they adopted the 1934 initiative amendment, knew and understood what the old-time saloon was. They knew it never afforded an opportunity to order and consume a meal therein. It takes no skilled or learned lexicographer to understand that an establishment equipped to serve bona fide meals cannot be labeled as a saloon, because in the latter only liquor is sold, with possibly an occasional distribution of "free lunch."

In the face of the findings made by the trial court that defendants were operating a bona fide eating place, fully equipped with facilities and foodstuffs for the service of meals, it does not seem to me that there remains anything for the trial court to do but enter a judgment for the defendants, because as heretofore pointed out, the constitutional provision makes but one test for determining whether the Board of Equalization is entitled to license a restaurant, cafe, etc., to serve liquors, with or without meals, and that test is whether such establishment is conducted as a bona fide restaurant, cafe, etc. The evidence supporting as it does the finding of the trial court that the defendants were conducting a bona fide restaurant in compliance with the constitutional provision, their establishment could not be the subject of an abatement action on the ground that it constituted a nuisance, and they are therefore entitled to have a judgment entered in their favor. The decision of this court should so direct.



50 Cal.App.2d 10

BALLAGH v. WILLIAMS.

Civ. 12760.

District Court of Appeal, Second District, Division 1, California.

Feb. 17, 1942.

Rehearing Denied March 12, 1942.

Hearing Denied April 16, 1942.

1. Contracts ⇐270(2)

Failure to act promptly to rescind a contract upon discovery of mistake of fact may bar right to rescind.

2. Appeal and error ⇐1010(1)

In action to recover money paid to defendant and used as portion of down payment for corporate stock of mining corporation, a specified percentage of which was to be delivered to plaintiff, whether plaintiff was guilty of laches barring his right to rescind contract after mine, which was operated as the individual property of defend-

ant, who also retained all of the corporate stock, proved worthless, was a "question of fact" for the trial court, whose decision supported by substantial evidence would not be disturbed on appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

3. Appeal and error ⇐1010(1)

Laches is in the first instance a question for determination by the trial court, whose conclusion with respect thereto will not be set aside by an appellate court if there is reasonable support therefor in the evidence.

4. Action ⇐63

All of the circumstances of the case must be considered in determining whether a party is guilty of laches.

5. Trial ⇐404(1)

Trial court's finding "that all of the allegations" in a designated defense "are not true" did not fail to support judgment for plaintiff because it was in the nature of a "negative pregnant" finding, where finding as a whole was not uncertain but was to the effect that all the allegations of the paragraph were untrue, except certain specified facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Negative Pregnant".

6. Trial ⇐404(1)

Trial court's findings should receive a construction which will uphold rather than defeat the judgment.

7. Trial ⇐395(1)

The logical defect of a negative pregnant does not apply to trial court's findings.

8. Appeal and error ⇐1008(1)

In action to recover money paid to defendant and used as a portion of down payment for corporate stock of mining corporation, a specified percentage of which was to be delivered to plaintiff, but which had not been so delivered at time plaintiff gave notice of rescission, whether plaintiff and a third person, not a party to the action, who had also contributed a portion of purchase price of stock, were joint obligees of promise of defendant so that a discharge as between such third person and defendant would operate to release defendant from any obligation to plaintiff was a "question of fact" for trial court.

9. Money received ⇐11

Where money was paid by plaintiff to defendant for purpose of purchasing stock of a corporation, which defendant purchased but failed to deliver specified percentage thereof to plaintiff, plaintiff was entitled to bring an action for money had and received without rescission, and his recovery was not barred on theory that since plaintiff had rescinded the contract, he could not recover on a common count without proof of total failure of consideration.

10. Vendor and purchaser ⇐334(6), 339

Where the vendor neglects to convey, being under a duty to do so, the vendee is entitled to bring an action for money had and received without rescission.

11. Money received ⇐18(3)

In action to recover money paid to defendant to be used as a portion of down payment for the corporate stock of a mining corporation, which defendant purchased but failed to deliver specified percentage thereof to plaintiff, defendant's testimony that, as he had explained to another associate in the venture, he intended to take care of plaintiff as respects the money advanced when he completed another deal, was sufficient to warrant recovery on the common count for money had and received.

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge pro tem.

Action by J. C. Ballagh against W. J. Williams to recover money paid by plaintiff to defendant to be used to purchase the capital stock of a mining corporation, no part of which stock was delivered to plaintiff. From a judgment in favor of plaintiff on the count for money had and received, defendant appeals.

Judgment affirmed.

Baldwin Robertson, of Los Angeles, for appellant.

Gwyn S. Redwine, Musick & Burrell, Clayton Straub, and James E. Ludlam, all of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Four men became interested in a placer mine on the Mother Lode. In a placer mine gold is mixed in with sand and gravel, generally a deposit in the stream bed of a living or an ancient river. If there is gold enough in the gravel to pay the cost of

extracting it, and something more for the miner, it is said to be a paying proposition. If there is enormous profit for the miner, it is said to be a bonanza. But, if there is no profit, or not enough profit to pay the cost of operation, then it is said to be borrasca. In this case, and with reference to this particular mine,—and not for the first time in the history of mining,—the recovery of gold did not pay the cost of getting it out of the gravel. It was borrasca.

And so, two of the four men who became interested in the mine have resorted to the courts to determine their rights. In the beginning, the parties met in Sacramento and went to Wheatland to see the mine. Title to the property was vested in a Nevada corporation. Being impressed with the possibilities, there was an agreement that the defendant was to purchase all of the stock in the corporation, whereupon the mine would be operated by the corporation for their benefit. The purchase price of the stock was to be $10,000 down, together with the note of the corporation for $15,000, which the defendant was to endorse, and an additional payment of $5,000 out of the recovery of gold.

The defendant received from the plaintiff $3,333.33. One of the other parties put in a like amount. The defendant put up the balance of the down payment, went to Nevada and closed the deal. The terms of purchase were changed in that the defendant gave to the vendor of the stock the note of the corporation, endorsed by him, for $20,000, instead of $15,000. Just prior to this, all of the stock in the corporation was, by appropriate corporate action, delivered to the defendant.

Thereafter, the defendant operated the mine as an individual, and not through the corporation, until he quit because it would not pay. He caused the gravel to be worked to extract the gold; he paid all of the expenses involved; and he disposed of the gold for his own account.

The plaintiff knew nothing about the increase of the principal sum of the promissory note. The defendant did not convey to the plaintiff any of the corporate stock which he received, although the plaintiff had put up his money on the understanding and with the expectation that he would receive 12½ per cent of the total stock of the corporation.

After the lapse of several months the plaintiff served the defendant with a notice of rescission, and then commenced this action, with a common count for money had and received in his complaint.

At the trial in the superior court and in the briefs and arguments before us, plaintiff and defendant each assert that the other was attempting to inflict upon him a sort of "heads I win and tails you lose" policy. The defendant asserts that the plaintiff rode with him until he found out that the mine was a failure and then wanted his money back. The plaintiff asserts that the defendant kept title to the property so that if it was a success, he would receive all of the profits, and be liable to the plaintiff only for money advanced; but if it was a failure, the defendant would then contend their relationship was a joint venture.

The trial court found for the plaintiff, and judgment was rendered against the defendant upon the money count.

Upon appeal, the defendant contends that the plaintiff could not rescind, because, especially where a mining venture is involved, the plaintiff is estopped to recover back his money if the project fails while he delays to promptly rescind.

[1] Delay to act promptly warrants a court in denying the right to rescind. Sanders v. Magill, 9 Cal.2d 145, 70 P.2d 159.

[2] But this is a question of fact, committed to the trial court for decision. If there is substantial evidence to support that decision it is our duty to affirm the judgment. We have examined the record, and find evidence therein which requires us to affirm the finding of the trial court that the plaintiff acted promptly upon discovery of the facts upon which his notice of rescission was based.

[3, 4] Laches is in the first instance a question for the determination of the trial court. Its conclusion will not be set aside by an appellate court if there is reasonable support for it in the evidence. All of the circumstances of the case are to be considered in a determination as to whether or not a party is guilty of laches. McMahon v. Grimes, 206 Cal. 526, 275 P. 440; Alexander v. State Capital Co., 9 Cal.2d 304, 70 P.2d 619; Wolpert v. Gripton, 213 Cal. 474, 2 P.2d 767.

[5] Next, appellant attacks one specific finding and asserts that because the court used the words, "That all of the allegations" (in the fourth grounds of defense) "are not true," there has been expressed

what he terms "a negative pregnant finding." Therefore, it is argued that the finding does not support the judgment.

A reading of the language of the particular finding as a whole demonstrates that there is no uncertainty in it. The finding is to the effect that all the allegations of the paragraph were untrue, except certain specified facts which were found to be true.

[6] Findings should receive a construction which will uphold rather than defeat the judgment. Schomer v. R. L. Craig Co., 137 Cal.App. 620, 31 P.2d 396.

[7] In any event the logical defect of a negative pregnant does not apply to findings. McAuliffe v. McAuliffe, 53 Cal.App. 352, 199 P. 1071.

[8] Next the appellant presents the contention that the plaintiff and one of the other associates interested in this mining property, not a party to this action, were joint obligees of the promise of the defendant, and that a discharge as between this associate and the defendant operated to release the defendant from any obligation to the plaintiff. This again is a question of fact upon which the trial court's finding is in favor of the plaintiff, and with which we have neither the right nor the disposition to interfere.

[9] Finally, the appellant urges that the judgment may not rest upon a common count, there having been a rescission of a contract, unless there is a total failure of consideration. This contention may be readily disposed of by discussing the barest essentials of the case. The defendant received the money; with this money he was to purchase for the plaintiff stock in the corporation. He did purchase all of the stock of the corporation, but he failed to deliver any of it to the plaintiff. Therefore, we have to do here simply with an executory contract under which the plaintiff paid the defendant for corporate stock which was to be delivered to him, and which was not delivered.

[10] When the vendor neglects to convey, being under a duty to do so, then the vendee is entitled to bring an action for money had and received without rescission. Moresco v. Foppiano, 7 Cal.2d 242, 60 P.2d 430.

[11] Indeed there is testimony by the defendant upon which alone the court could have based a finding against him upon this simple issue. "* * * I explained to him and to my attorney at that time, that any money he had advanced to me would be taken care of when I got the deal on the Mississippi Bar" (testimony of the defendant as to conversations with one of the other associates respecting the money which the plaintiff advanced). The Mississippi Bar is another mine owned by the defendant. "Any arrangement I make with anybody, if it don't pay up, I intend to take care of them some other way. I intend to reimburse you for what money you have put in, and let you come in on the Mississippi Bar situation" (further testimony of the defendant on the same subject matter).

The judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.



49 Cal.App.2d 716

SMITH v. SMITH.

Civ. 11998.

District Court of Appeal, First District, Division 2, California.

Feb. 17, 1942.

Hearing Denied April 16, 1942.

1. Divorce ⇐87

Where wife filed action for divorce and alleged that defendant while intoxicated had used firearms, had threatened lives of plaintiff and children, and had destroyed property to which complaint the defendant filed a demurrer, on hearing of show cause order why defendant should not remove himself from family home pending trial, allegations of complaint constituted a portion of the record to be considered by the trial court and were admitted by defendant's demurrer and failure to deny them.

2. Divorce ⇐87

On appeal from order requiring defendant in divorce proceeding to remove himself from family home because of past acts of violence and threats to kill plaintiff and her children, record showed that at least on one occasion defendant was violent about the home and had threatened the lives of his family, and that irreparable injury might result from his continued presence there, and

hence trial court acted within its jurisdiction in excluding defendant from home during pendency of divorce action. Code Civ. Proc. § 526, subd. 2; § 527.

3. Divorce ⇐87

In divorce proceeding where the requirements of service of notice set forth in Code of Civil Procedure were followed, issuance of a temporary injunction requiring defendant because of previous acts of violence and threats to remove from home during pendency of divorce action, was within jurisdiction of court. Code Civ.Proc. § 527.

4. Divorce ⇐216

Under codal provision that when a divorce action is pending court may require husband to pay alimony and that court may require husband or wife as the case may be to give reasonable security for providing maintenance or making any payments required, and appoint a receiver and that in executing such provisions, court must resort to community property, then to separate property of husband, trial court had jurisdiction to order sale of brokerage account and use of proceeds by trustee for support of plaintiff wife and her children. Civ.Code, §§ 137, 140, 141.

5. Divorce ⇐216

The general rule that a money judgment must be stated with certainty is not applicable to a situation where alimony pendente lite is awarded and a receiver is appointed to use the money for the support of the wife and children as required by them for their support during the course of the litigation.

6. Divorce ⇐216

In divorce action, an order directing sale of brokerage account and use of proceeds for support of wife and her children was in nature of an order to deliver personal property and contained all the elements essential to the rendition of an order of the court where there was an application in a pending action for the order addressed to the court, the court had jurisdiction of the parties and subject matter, notice was given to adverse party, and a hearing was had in open court at which both parties were present.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action for divorce by Lucile Rawleigh Smith against Quentin Roland Smith. From portions of a minute order requiring the defendant to remove himself from the family home and to authorize the sale of a brokerage account the proceeds of which were to be deposited with the trustee and used for support of plaintiff and minor children, the defendant appeals.

Affirmed.

See, also, 116 P.2d 3.

Hearing denied; CURTIS, EDMONDS, and CARTER, JJ., dissenting.

George Stahlman and Harry Duckett, both of Los Angeles, for appellant.

Arthur William Green, of Los Angeles, for respondent.

NOURSE, Presiding Justice.

The defendant appeals from portions of a minute order entered by the trial court in a divorce proceeding requiring him to remove himself from the family home and to authorize the sale of a brokerage account, the proceeds of which would be deposited with a trustee, to be used for the support of the plaintiff and the minor children of the parties.

The plaintiff filed a complaint for divorce, in which she alleged that while in an intoxicated condition the defendant had used firearms in and about their home premises, had threatened her life and the lives of her children and had destroyed property in and about the residence. The defendant filed a demurrer to the complaint. On plaintiff's affidavit the court issued an order to the defendant to show cause why he should not be required to pay plaintiff's attorney's fees, to pay a sum of money for support of his wife and children and to leave the family residence pending the hearing of the action. The defendant was served with the order and filed an affidavit in opposition relating to the financial condition of the parties, but not denying the charges of misconduct in the family home. The order to show cause was heard after a hearing in chambers as a conciliation matter where the court was unable to effect a reconciliation. A minute order was thereupon entered requiring defendant to move from the family home, the order further provided: "* * * defendant to authorize the broker to sell out the brokerage account, deliver the proceeds from said sale to plaintiff's and defendant's attorneys and they are to choose a trustee with whom to deposit the money; said money to be used to support the plaintiff and the children." Defendant filed a notice of appeal from these portions of the order. He was subsequently adjudged in

contempt of court for disobeying the order but was discharged after a hearing on his petition for habeas corpus, the operation of the mandatory order having been stayed by the appeal.

[1-3] The first question presented on this appeal is whether the trial court had jurisdiction to order appellant to remove himself from the family home pending the trial of the divorce action. The complaint filed in the proceeding alleged that appellant had committed acts of violence about the residence, had threatened the life of respondent and the children and had destroyed property; this allegation of the complaint constituted a portion of the record to be considered by the trial court at the hearing of the order to show cause and was admitted by appellant's demurrer and failure to deny. The hearing was held after lawful notice had been given to appellant, and seems to have been conducted in part in the nature of a conciliation proceeding under section 1767, Code of Civil Procedure. Since no reporter was present in chambers the transcript of testimony fails to disclose whether or not any evidence was then introduced to substantiate the allegation in the complaint concerning appellant's violence. However, the subsequent order to show cause in the contempt proceeding, which has been included in the record on appeal, indicates that the minute order appealed from was made on statements of the appellant and on facts stated by counsel for both parties in appellant's presence, and not denied by him, to the effect that upon one occasion he discharged firearms in the home, destroyed property and threatened the lives of his family to the extent that it was necessary to summon the police to disarm him. In addition to this the admitted allegations of the complaint were evidence of those facts upon the hearing. Hence it must be taken to have been pleaded and proved that appellant, on one occasion at least, was violent about the home, threatened the lives of his family, and irreparable injury might result from his continued presence there.

Under such circumstances it is clear that the trial court acted within its jurisdiction in entering an order in the nature of a temporary injunction excluding appellant from the residence during the pendency of the action. The power to make such an order is specifically granted to the courts by the legislature and appears in subdivision 2 of section 526 of the Code of Civil Procedure providing that an injunction may be granted "When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action." It might also be noted in passing that the requirements of service and notice set forth in section 527 of the Code of Civil Procedure were followed and therefore the issuance of the temporary injunction was within the jurisdiction and power of the court. The appellant relies upon Luitwieler v. Luitwieler, 57 Cal.App. 751, 207 P. 931. That case was decided upon the ground that it was an abuse of discretion to make the order because it did not appear that any physical injury was threatened. Here the appeal is confined strictly to the question of power and jurisdiction. In holding that the superior court has such jurisdiction we do not pass upon the facts supporting the order, or of the discretion in making it.

The only other issue raised is whether or not the trial court had jurisdiction to order appellant to sell the brokerage account in order that the proceeds from the sale might be used by a trustee for the support of respondent and the minor children of the parties pending the hearing of the action. Section 137 of the Civil Code provides that when an action for divorce is pending the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children or to prosecute or defend the action. 1 Cal.Jur. 958. Section 140 of the Civil Code provides: "The court may require the husband or wife, as the case may be, to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case." In executing these sections the court must resort to the community property, then to the separate property of the husband. Section 141 of the Civil Code.

[4-6] Under these code sections it is clear that the court acted within its power in ordering the brokerage account sold and the money received from the sale delivered to a trustee to be used to support respondent and her children. Although the general rule is to the effect that a money judgment must be stated with certainty (D'Arcy v. D'Arcy, 89 Cal.App. 86, 92, 264

P. 497) this rule cannot be held applicable to a situation wherein alimony pendente lite is awarded and a receiver is appointed to use the money for the support of the wife and children as required by them for their support during the course of the litigation. The order to appellant to sell the brokerage account was in the nature of an order to deliver personal property and contained all of the elements essential to the rendition of an order of court; to wit, there was an application in a pending action for the order addressed to the court, the court had jurisdiction of the parties and subject matter, notice was given to the adverse party, and a hearing was had in open court, at which both parties were present. United Railroads v. Superior Court, 197 Cal. 687, 691, 242 P. 701. In fact, from the record before us, it would appear that counsel for appellant agreed in open court to the arrangement.

The trial court acted within its jurisdiction in making the order and we find no error committed by the court in entering it.

The portions of the order appealed from are affirmed.

STURTEVANT and SPENCE, JJ., concurred.



49 Cal.App.2d 730

BLANCHARD v. NORTON et al.

Civ. 3002.

District Court of Appeal, Fourth District, California.

Feb. 17, 1942.

Rehearing Denied March 18, 1942.

Hearing Denied April 16, 1942.

1. Appeal and error ⇐1170(9)

In an action involving a collision between plaintiff's southbound automobile and defendants' northbound automobile which turned left to enter an auto court driveway, the refusal of defendants' instruction that failure to keep a vigilant lookout is negligence was error but did not warrant reversal of the judgment for plaintiff, where it appeared that plaintiff saw defendants' automobile when between one and two thousand feet away and saw it turn left, and that defendants' driver, after seeing plaintiff's automobile 900 feet away, looked south and did not see it again until just before the collision. Const. art. 6, § 4½.

2. Trial ⇐260(8)

Though it would have been better practice in an automobile collision case to have given an instruction defining contributory negligence, the refusal thereof was not prejudicial, since the question was sufficiently covered where the court properly defined negligence and instructed the jury to return a verdict for defendant if they found that plaintiff was negligent and that such negligence contributed in any degree as a proximate cause of the accident.

3. Trial ⇐256(10)

An instruction that to establish contributory negligence, the burden is on defendants to prove by a preponderance of evidence that plaintiff was negligent and that such negligence contributed in some degree as a proximate cause of the injury was correct as far as it went, and defendants could not complain that it omitted the element that contributory negligence may be proved by plaintiff's evidence, since it was the duty of defendants, if desiring a further instruction on the subject, to request it.

4. Automobiles ⇐242(4)

The existence of a 25-mile speed sign on the west side of a highway just north of an auto court driveway did not in itself establish the prima facie limit of 25 miles an hour for southbound vehicles, where there were no structures on the east side of the highway and, for one-fourth of a mile south of the sign, only nine buildings on the west side that came within the limitations provided in the section of the Vehicle Code relating to business and residence districts, in view of another section conclusively presuming a highway to be outside of such a district unless its existence therein is clearly established. Vehicle Code § 90.1, St.1939, p. 2106; § 758, St.1935, p. 243.

5. Statutes ⇐190

The statute conclusively presuming a highway to be outside of a business or residence district unless its existence therein is clearly established and unless such district is duly signposted is unambiguous and not subject to judicial interpretation. Vehicle Code § 758, St.1935, p. 243.

6. Statutes ⇐225¾

Judicial construction of a statute applies to a subsequent statute constituting a virtual re-enactment of the earlier one.

Appeal from Superior Court, Fresno County; Andrew R. Schottky, Judge Assigned.

Action by Alan Blanchard against W. L. Norton and others, for personal injuries resulting from an automobile collision. Judgment for plaintiff, and defendants appeal.

Affirmed.

Hoge, Pelton & Gunther and A. Dal Thomson, all of San Francisco, for appellants.

Richard Wagner, of San Francisco, for respondent.

MARKS, Justice.

This is an appeal from a judgment against defendants for injuries received in a collision between an automobile being driven south on Highway 99 by plaintiff and one belonging to defendants and being driven by W. L. Norton from the east to the west side of the highway to enter a private driveway into the Hansen Auto Court. The accident happened about nine o'clock on the morning of November 24, 1939. The roadway was dry and visibility good.

At the point of the accident, Highway 99 consisted of a paved three-lane road with wide oil macadam shoulders on both sides. Just north of the driveway into the Hansen Auto Court there was a twenty-five-mile speed sign, facing north, on the west side of the highway. The evidence shows that for a distance of one-quarter of a mile south of this sign there were only nine buildings on the west side of the highway that came within the limitations provided in section 90.1 of the Vehicle Code, St. 1939, p. 2106. There were no structures on the east side of the highway.

Plaintiff testified that at the time of the accident he was driving his automobile south in the west traffic lane of the highway at a speed of between 40 and 50 miles per hour; that he kept a lookout for vehicles ahead of him; that he saw the Norton automobile when it was between one and two thousand feet from him; that it was traveling north with its right wheels on the edge of the east macadam shoulder and its left wheels in the east traffic lane; that when Norton was about opposite the driveway, and between one hundred twenty-five and one hundred fifty feet distant from the Blanchard car, he turned sharply to his left, heading toward the auto court driveway and proceeded on his course across the highway directly in the path of the oncoming car; that when Blanchard saw this movement he applied his brakes and swerved his car to his right; that the left front of his car came into collision with the right front of the Norton car; that at the time of the collision the Norton car was headed west with its front wheels on the west macadam shoulder and its rear wheels in the west traffic lane. Plaintiff further testified that he continually observed the Norton car as it proceeded north and turned west across the highway; that Norton gave no arm signal indicating his intention to make the turn.

This evidence is contradicted in but two particulars. Norton testified he gave an arm signal before making the turn, and a witness estimated the speed of plaintiff's car at between fifty and fifty-five miles an hour at a point about five hundred feet north of the place of the collision.

Norton testified that he saw plaintiff's car traveling south in the west traffic lane when it was about three hundred yards distant from him; that he did not continue to observe this automobile but looked for vehicles approaching from the south and did not again see the Blanchard car until just before the impact.

Appellants admit the negligence of Norton. The necessity of this concession is obvious from the statement of facts.

[1] Defendants complain of the refusal of the trial judge to give an instruction proposed by them to the effect that it was the duty of the driver of a motor vehicle to keep a vigilant lookout for other vehicles on the highway and that the failure to do so was negligence. This instruction should have been given, as we find no other in the record that exactly covers this subject. However, we cannot regard the failure to give the instruction so prejudicially erroneous as to require a reversal of the judgment. The evidence shows that the plaintiff maintained a sufficiently vigilant lookout to observe defendants' car as it approached him and crossed the highway ahead of him, while Norton admitted that after seeing plaintiff's car approaching three hundred yards away he looked away and did not see it again until about the moment of impact. If the proposed instruction had been given it would have pointed to an added act of negligence on Nor-

ton's part. The error does not afford ground for reversal under the provisions of section 4½ of article VI of the Constitution.

[2] Defendants proposed an instruction defining contributory negligence which was not given. While we believe it would have been better practice to have given this instruction we can find no serious prejudice in failing to do so because of other instructions given. The trial judge properly defined negligence and instructed the jury as follows:

"If you find that plaintiff was negligent, you then must determine a fourth issue, namely:

"Did that negligence contribute in any degree as a proximate cause of the accident?

"If you find that it did, your verdict must be for the defendant."

We believe the foregoing instruction sufficiently covered the question of contributory negligence so that the jury was not misled by the failure to give the requested instruction.

[3] The following instruction was given at the request of the plaintiff:

"To establish the defense of contributory negligence the burden is upon the defendant to prove by a preponderance of evidence that the plaintiff was negligent and that such negligence contributed in some degree as a proximate cause of the injury."

Defendants complain that this instruction omitted the element that contributory negligence may be proved by the evidence offered by plaintiff and that it was therefore incomplete.

We may assume the soundness of this argument and still cannot reverse the judgment. The instruction was a correct statement of the law in so far as it went. Richmond v. Moore, 103 Cal.App. 173, 284 P. 681. If defendants desired a further instruction on the subject it was their duty to request it. This they failed to do. Daniel v. Asbill, 97 Cal.App. 731, 276 P. 149.

[4-6] The trial court in its instructions quoted the various sections of the Vehicle Code bearing on prima facie speed limits, signs, and the different districts, including section 758 of that code, St.1935, p. 243, which provides as follows:

"Every highway shall be conclusively presumed to be outside of a business or residence district unless its existence within a business or residence district is established by clear and competent evidence as to the nature of the district and unless such district is duly signposted when and as required by this code."

Defendants now maintain this was error and argue that the existence of the twenty-five-mile sign on the west side of Highway 99, just north of the driveway into the Hansen Auto Court, in itself established the prima facie limit of twenty-five miles per hour for vehicles passing that sign in a southerly direction regardless of the density of structures on that portion of the road.

We regard this contention as entirely without merit as section 758 of the Vehicle Code is clear and unambiguous and not subject to judicial interpretation. It is a virtual reenactment of subdivision (c) of section 28½ of the former California Vehicle Act. Therefore judicial construction placed on the former section applies to the reenactment. Harris v. Barlow, 180 Cal. 142, 179 P. 682; Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann.Cas. 1913C, 1093. The earlier enactment was construed in Cunningham v. Cox, 126 Cal. App. 685, 15 P.2d 169, 171, where it was said:

"It is therefore clear that no road is deemed to be within a 'business or residence district' for the purposes of the act unless it appears first, that there is within the district the required density of structures, and, second, that the district is signposted 'at the boundary lines' thereof; and if the uncontradicted testimony affirmatively shows either an insufficient density of structures within the alleged district or a failure to post signs at the 'boundary lines' of the alleged district, then the district is outside of a 'business or residence district' for the purposes of the act." See, also, Wheeler v. Buerkle, 14 Cal.App.2d 368, 58 P.2d 230. A similar construction was put upon the section, 758 of the Vehicle Code, in Cavalli v. Luckett, 40 Cal. App.2d 250, 104 P.2d 708.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

49 Cal.App.2d 607

HEWETT et al. v. LINSTEAD et al.

Civ. 11834.

District Court of Appeal, First District, Division 1, California.

Feb. 10, 1942.

Hearing Denied April 9, 1942.

1. Trusts ⇐93

Where property was erroneously distributed to certain heirs who had no knowledge of the existence of other heirs, and all statutory notices were given, and there was no element of extrinsic fraud, and decree of distribution became final, heirs excluded from decree could not thereafter successfully impose a trust on property in hands of distributees on sole ground that distributees had received the property by reason of a "mistake" within meaning of the Code. Civ. Code, § 2224; Probate Code, § 228.

See Words and Phrases, Permanent Edition, for all other definitions of "Mistake".

2. Trusts ⇐93

Under proper circumstances, mistake, though unconnected with fraud, will warrant relief under the Code providing that one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it. Civ.Code, § 2224.

3. Trusts ⇐95

Where an heir knows of the existence of other heirs, and for the purpose of defrauding such heirs and benefiting himself, he fails to notify the court of the existence of such heirs, and knowingly files false petitions with the court representing that there are no such heirs, he is guilty of "extrinsic fraud" warranting the imposition of a trust under the Code on the fraudulent distributee's interest. Civ.Code, § 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

4. Appeal and error ⇐931(1)

On appeal by defendants from a judgment for plaintiffs on a bill of exceptions, the District Court of Appeal was required to give the findings the strongest interpretation in favor of plaintiffs.

5. Trusts ⇐110

In action by heirs of deceased wife of intestate who died after the wife, to impress a trust on intestate's property, which was distributed to defendants as intestate's sole heirs, evidence that many years prior to intestate's death, a defendant, who was intestate's niece and who was subsequently appointed his administratrix, visited intestate's home, and saw a woman come out of the home and shortly after go back into the home, and that such defendant thereafter made no effort to learn who the woman was or what relation if any she sustained to the intestate, was insufficient to establish that such defendant was guilty of "extrinsic fraud" within the Code as would justify declaring defendant to be an involuntary trustee of share bequeathed her for plaintiffs. Civ.Code, § 2224.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Charles Hewett and others against W. J. Linstead and others to impress a trust on a portion of property distributed to defendants as the sole heirs of George Golden, deceased, on ground that the decree of distribution was procured through mistake and a species of extrinsic fraud. From a judgment in favor of the plaintiffs, the defendants appeal.

Judgment reversed.

Hale McCowen, of Ukiah, for appellants Linstead.

Thomas & Thomas, of Ukiah, and M. Anderson Thomas, of San Francisco, for respondents.

PETERS, Presiding Justice.

This action was instituted by plaintiffs for the purpose of impressing a trust on a portion of the property distributed to defendants as the sole heirs of George Golden, deceased. This relief is sought on the ground that the decree of distribution was procured through mistake and a species of extrinsic fraud. This appeal is prosecuted by defendants from a judgment for plaintiffs on a bill of exceptions.

The main point urged for a reversal is that the facts alleged, proved and found do not support the judgment.

It was alleged, proved and found that George Golden was predeceased by his wife

Ellen Hewett Golden; that plaintiffs are the heirs at law of Ellen Hewett Golden; that a portion of the estate of George Golden consisted of property, which, during the lifetime of his wife, was community property; that plaintiffs reside without the State of California; that none of the plaintiffs had any actual knowledge of the death of George Golden until after the final decree of distribution in his estate; that in the petition for probate defendants were named as the heirs at law, and the only heirs at law of Golden; that by the final decree of distribution in Golden's estate the entire estate was distributed to defendants, who are the three surviving brothers of George Golden, and a niece, who is the daughter of a predeceased sister of Golden; that the niece, Margaret Holt Hauser, acted as administratrix of the estate. Plaintiffs first learned of the facts after the final decree of distribution had been entered, but while an appeal was pending by a third person. They immediately moved under section 473 of the Code of Civil Procedure to set the decree aside. This relief was granted in the trial court, but the order was annulled on certiorari. Linstead v. Superior Court, 17 Cal.App.2d 9, 61 P.2d 355. That decision became final in December of 1936, and this action was instituted shortly thereafter.

Plaintiffs as the heirs at law of the predeceased wife of Golden, were entitled, of course, to one-half of that portion of his estate that consisted of community property under the provisions of section 228 of the Probate Code. It is admitted that in the estate proceeding all required statutory notices were given.

The trial court held that defendants held a portion of Golden's estate distributed to them in trust for plaintiffs. There is no finding, and it is not contended, that defendants had actual knowledge of the existence of plaintiffs. Certain facts are alleged and found which plaintiffs contend are sufficient to make a case on the ground of extrinsic fraud. These facts will be considered after first disposing of plaintiffs' contention that in the absence of any fraud whatsoever distribution to the heirs of George Golden to the exclusion of Ellen Golden's heirs, who did not learn of the death of Golden until after distribution, constituted mistake from which relief in equity may be had. In this connection plaintiffs place their reliance squarely upon the provisions of section 2224 of the Civil Code. That section provides that: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

[1] We are thus faced with the problem as to whether, when property is erroneously distributed to certain persons (who, for the purposes of this portion of the opinion we will assume had no knowledge of the existence of other heirs) and all the statutory notices are given, and there is no element of extrinsic fraud, and the decree has become final, the persons who were excluded from the decree may successfully impose a trust on the property in the hands of the distributees on the sole ground that such distributees have received the property by reason of a "mistake" within the meaning of section 2224 of the Civil Code, supra. The cases clearly establish the true rule to be that where the distributees are innocent of any wrongdoing, the excluded heirs may not successfully impose a trust on the ground of such "mistake." The case of Lynch v. Rooney, 112 Cal. 279, 44 P. 565, involved exactly the same factual situation as exists in the instant case. In that case an heir did not learn of the death of his intestate until after distribution. The distributee and the administrator had acted in good faith, not knowing that the heir survived the decedent. The trial court imposed a trust under section 2224, Civil Code, supra. The Supreme Court expressly rejected the contention that the heir was entitled to impose a trust under section 2224. In so holding the court pointed out that the decree of distribution, not having been obtained by fraud, was final and conclusive as to who were the proper heirs; that if a trust were imposed it would in effect be setting aside the findings of the decree; that, "If such a thing could be done the stability of judgments and decrees would be a thing of the past"; that, "Decrees of distribution would be as unstable as the sands, for omitted heirs from such decrees would be seeking to have involuntary trusts declared thereon at most inopportune times, and in direct opposition to the law as declared by section 1908 of the Code of Civil Procedure, pertaining to the conclusiveness and finality of judgments and decrees." 112 Cal. page 287, 44 P. page 567.

The above case does not stand alone. In Mulcahey v. Dow, 131 Cal. 73, 63 P. 158,

the widow was the sole distributee of the estate of her husband. She did not inform heirs living in distant states of the death of her husband. There was some evidence from which it was claimed it could be inferred she knew of the existence of such heirs. These heirs sought to impose a trust under section 2224 and were non-suited. The judgment of the trial court was affirmed. The Supreme Court held that a final decree of distribution, when the proper statutory notices are given, is conclusive on the whole world; that heirs who have constructive knowledge of the decree are as much bound by it as those who have actual knowledge; that under the law every person, heir or creditor, who has a claim against the estate must present such claim in the manner and within the time provided by statute; that, whether he appears and presents his claim, or fails to appear, as long as such failure is not the result of acts of the person who secures distribution, the action of the court is equally conclusive. The court commented on the evidence as follows at page 78 of 131 Cal., at page 160 of 63 P.: "There is some general evidence tending in an unsatisfactory way to show that Elizabeth Waters knew of the existence of these plaintiffs several years prior to the death of her husband. There is also some evidence showing that she told W. H. Metson, an attorney at law, who prepared the petition for letters of administration in behalf of Grant and Pennell, petitioners for letters, that her husband had no relatives; and this is all the evidence of fraud that we can find in the record. The showing made is too weak to stand alone. It would not support a judgment if one rested upon it. The fact that Elizabeth Waters did not inform these relatives, living in different states, of the death of her husband, is not material here. No legal duty devolved upon her to furnish them with that information. There is nothing to indicate that she acted in bad faith at any stage of the administration, or made the statements to Metson with the purpose or design of defrauding anybody, or imposing upon the court. There is no evidence showing that she knew these plaintiffs were entitled to any part of the estate as heirs at law of her husband."

A similar holding was made in Beltran v. Hynes, 40 Cal.App. 177, 180 P. 540. In that case an heir of the decedent sought to maintain an action to impose a trust where the heir was admittedly entitled to share in the estate but resided in Mexico and had no knowledge of the death of her intestate. The estate had been distributed to a nephew of the deceased. In upholding the action of the trial court in sustaining a demurrer to a complaint alleging these facts this court stated at page 178 of 40 Cal.App., at page 540 of 180 P.: "No claim is made that due and legal notice as provided by law was not given of the hearing of the petition for distribution, nor is there any claim of the existence of any fiduciary relation existing between plaintiff and defendant, or of extrinsic or collateral fraud. Under these circumstances, the demurrer was rightfully sustained. Defendant was under no legal duty to notify plaintiff of the death of deceased, even assuming that he knew the plaintiff (Mulcahey v. Dow, 131 Cal. 73, 63 P. 158); and, proper notice having been given of the hearing, plaintiff is barred by the decree. (Langdon v. Blackburn, 109 Cal. 19, 41 P. 814; Warren v. Ellis [39 Cal.App. 542] 179 P. 544.)"

In Monk v. Morgan, 49 Cal.App. 154, 192 P. 1042, the court declared that an administrator and an heir does not in either capacity, owe to his coheirs any further duty of informing them of the death of the intestate and of the probate proceedings than that afforded by the giving of the statutory notices. The court went so far as to hold that such rule applied even where the distributee and administrator had actual knowledge of the existence of out-of-state heirs, and deliberately failed to notify them for the purpose of securing the estate for himself. It is to be noted that in the concurring opinion of Waste, P. J., he dissented from the above holding solely on the ground that a duty to notify out-of-state heirs exists when the administrator has knowledge of their existence—but he clearly implied that no such duty exists where the heir and administrator acts in good faith.

These cases establish the rule to be that where a distributee is ignorant of the existence of an heir, and such heir is excluded from the decree of distribution, and all statutory notices have been given, there has been no "mistake" that will warrant relief under section 2224 of the Civil Code.

[2] This does not mean that mistake unconnected with fraud will not warrant relief under the proper circumstances. The type of mistake intended by section 2224 is well illustrated by the case of Bacon v. Bacon, 150 Cal. 477, 89 P. 317, so strongly relied upon by plaintiffs in the present case. In that case the will that was pre-

sented for probate, and the will that was probated, gave to plaintiff a legacy of ten thousand dollars. Typewritten copies of this will were furnished interested parties, including plaintiff, in which, by mistake of a copyist, the word "ten" was typed as "two." As a result of this error the will was represented to all parties and to the court as giving a legacy of only two thousand dollars to plaintiff. This mistake was carried through all probate proceedings so that by the decree of distribution two thousand dollars were distributed to plaintiff, the balance of eight thousand dollars of her legacy being distributed to the residuary legatees. The court imposed a trust on the interest of the residuary legatees. In so doing the court emphasized that not only was the plaintiff free from any fault, but also that the mistake was made by the executors, one of whom was her husband, who owed her a duty of good faith. The plaintiff relied on the mistaken statements of the executors who were also the residuary legatees. The court held that in order to secure relief for fraud or mistake the situation must be one where the legatee is kept in ignorance of the true fact by some act of the distributee. The court emphasized that the legatee had been prevented from securing her full legacy by the affirmative acts of the residuary legatees. That is an entirely different type of "mistake" from that involved in the instant case. Here the defendants had no knowledge of the existence of plaintiffs. They owed them no duty to search them out. All notices were given. There was no act of defendants that tended to keep the plaintiffs in ignorance. There was no reliance by plaintiffs on any act of the defendants. Such a "mistake" is not contemplated by section 2224. It must be held, therefore, that relief may not be had in equity from a decree of distribution on the ground of mistake where all statutory notices are given and where the omitted heir fails to learn of the intestate's death, but the distributees, in good faith, are unaware of the existence of the omitted heir.

[3] The above discussion has been predicated on the theory that defendants were ignorant of the existence of plaintiffs and acted in good faith. Plaintiffs contend, however, that, under the facts, defendants were chargeable with knowledge that George Golden was married, and were under a duty to ascertain whether his wife was dead, and, if so, whether she had left heirs. Although there is some confusion in the cases, we agree with plaintiffs that the better rule is that where a legatee knows of the existence of other heirs, and, for the purpose of defrauding such heirs and benefiting himself, fails to notify the court of the existence of such heirs, and knowingly files false petitions with the court representing there are no such heirs, he is guilty of extrinsic fraud warranting the imposition of a trust on the fraudulent distributee's interest. In Mulcahey v. Dow, supra, it was impliedly held, and in Monk v. Morgan, supra, it was expressly held, that even in such a case the fraud is intrinsic and is not extrinsic. The better-reasoned cases, however, are in accord with the rule as above-stated. See Caldwell v. Taylor, 218 Cal. 471, at page 476, et seq., where the cases are collected and discussed, 23 P.2d 758, 88 A.L.R. 1194; United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93; see, also, cases collected in annotations in 113 A.L.R. 1235; 88 A.L.R. 1201. Thus, in Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am.St.Rep. 98, a one-eighth interest in decedent's estate was distributed to one Reuss, who it was alleged by the executrix, the wife of decedent, was the son of decedent. This fact was untrue and known to be so by both the executrix and Reuss, but not to the plaintiffs, the minor children of the decedent. It was held that this constituted extrinsic fraud. The court emphasized that the fraud was accomplished by the fraudulent connivance of the executrix who was the mother of the defrauded plaintiffs, and who had their actual custody and control and who was chargeable with all the high duties pertaining to that relationship. It was held that she was under a duty to disclose to the court all the facts, and her fraud in concealing the truth from plaintiffs and the court, and her conspiring with Reuss constituted extrinsic fraud.

In Simonton v. Los Angeles Trust & Savings Bank, 192 Cal. 651, 221 P. 368, the executor concealed certain property from the probate court, did not account for the same, and appropriated such property to her own use. It was held that failure knowingly to include the property in the estate of decedent was extrinsic fraud.

In Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230, an equitable action was brought by respondent to recover a certain share of decedent's estate

which had been distributed to one Schaffer. In the petition for probate of decedent's estate, Schaffer stated under oath that the only heir of decedent so far as known to him was decedent's son, Purinton. Schaffer was appointed executor. Later he filed a petition for distribution in which he stated the persons entitled to distribution were Purinton, Dyson and himself who were the three beneficiaries of the will. Decree was so entered. Respondent alleged that at the time the above petitions were filed, Schaffer knew respondent was an heir of the decedent, and that he failed to disclose this fact so as to defraud her out of her share. In fact, a deal was made between the three abovementioned beneficiaries whereby it was agreed that if Purinton did not notify respondent of the death of decedent, that Schaffer would make a will in favor of Purinton. The court held the acts of Schaffer amounted to extrinsic fraud. The court stated at page 326 of 8 Cal.2d, at page 779 of 65 P.2d, 113 A.L.R. 1230: "It is true that in most cases of extrinsic fraud the defendant has said something directly to the person whose rights were involved amounting to representations that it was not necessary for such person to take any part in the proceedings. In other cases, acts have been held to amount to such representations. But the rule allowing the maintenance of an action in equity for extrinsic fraud should not be limited so strictly as to require as a basis evidence of representations made directly to the one defrauded." The court also quoted from Bankers' Trust Co. v. Patton, 1 Cal. 2d 172, 175, 33 P.2d 1019, 1020, as follows: "It is assumed that the willful suppression in bad faith of material facts in probate proceedings by which the plaintiff and other creditors would be deprived of property and assets to which they would otherwise become entitled in satisfaction of their claims would constitute an extrinsic fraud against which equity could grant relief by discharging the distributees as trustees, even though the decree of distribution itself be not disturbed." Based on this reasoning, the court held that the acts of Schaffer amounted to extrinsic fraud and imposed a trust on the property distributed to him. See, also, Zaremba v. Woods, 17 Cal.App.2d 309, 61 P.2d 976.

These cases establish that, where the executor or heir knowingly suppresses evidence of the existence of other heirs with intent to defraud them, the fraud is extrinsic warranting the equity court in granting relief, but where the executor or heir acts in good faith the decree is final and conclusive and equity is without power to impose a trust.

Plaintiffs contend that the facts of the instant case show that the defendants knowingly suppressed the true facts from the probate court. What does the record show in this regard? The complaint alleges that "many many years prior to the time the said George Golden came to California, he had resided in an Eastern State"; that he left that state in the company of Ellen or Helen Hewett; that the two came West together and finally moved to Fort Bragg, California; that they were husband and wife; that they resided in Fort Bragg for many years prior to the time they died; that the defendants "W. J. Linstead, Ed Linstead, Frank Linstead and Margaret Holt Hauser knew that the said George Golden and the said Ellen Hewett, also known as Helen Hewett, were so residing together in the County of Mendocino, during said time, and that they also knew that the heirs of said Ellen Hewett, also known as Helen Hewett, and as Ellen Hewett Golden were entitled to share in the distribution of the property of said George Golden, Deceased."

It is to be noted that it is *not* alleged that defendants knew plaintiffs were the heirs of Ellen, nor that they knew that there were heirs of Ellen. The complaint was the fourth filed.

The court did not find that the three Linsteads knew anything at all about the existence of plaintiffs. As to Margaret Holt Hauser, niece of the decedent and administratrix of his estate, it did find that she had actual knowledge that George Golden lived for more than thirty years at Fort Bragg, that "many years prior to the death of said George Golden the said Margaret Holt Hauser visited the said George Golden at his home in Fort Bragg, Mendocino County, California, and at the time saw the woman in the home of the said George Golden but never thereafter made further investigation so far as the evidence shows to ascertain the relation between the said woman and the said George Golden and never thereafter made any effort to find or ascertain the heirs of the said woman, who would be entitled to share in the community property belong-

ing to the said George Golden, etc., and the said Ellen Golden at the time of the death of the latter."

The court further found that "notwithstanding such knowledge on the part of said Administratrix, she at all times represented to the probate court in which the estate of said George Golden, alias, was being probated, that she and her uncles, W. J. Linstead, Ed Linstead, and Frank Linstead were the only heirs of said deceased."

There is a further finding that when Mrs. Hauser went to Fort Bragg to see her uncle she inquired where he lived, and then went to his home; that "the woman she saw on that occasion came out of the Golden home and after remaining on the front porch for a short time went back into said home, and did not again appear while Mrs. Hauser was there, and it appears from Mrs. Hauser's testimony that she never thereafter made any effort to learn who this woman was, or what relation if any, she sustained to the said George Golden."

In the findings there is not one word that connects the three Linsteads with any knowledge of this occurrence. The evidence appearing in the bill of exceptions, which recites that it contains a "statement of all the evidence in the case and of all proceedings had therein," would not support broader findings than those above-quoted. Mrs. Hauser testified that she had seen her uncle, George Golden, but once in her life, and that was upon her visit to Fort Bragg; that the visit occurred in 1912; that, "After reaching Fort Bragg I went to his home and met him outside of the house where we talked for a short time. While we were talking a woman came out of the house onto the porch and then went back inside. I do not know whether she was living there or not. I never learned the woman's name as my uncle did not introduce us. I never knew that he was married.

"I did not then, or later, make any inquiry whether he was married or not, and did not ask him anything about the woman I saw on the porch of the house. I never tried to find out who that woman was. My uncle and I never corresponded and the only time I ever saw him was for those few minutes in 1912."

[4, 5] Under these circumstances, giving the findings the strongest interpretation in favor of plaintiffs, as we must, it is found that Mrs. Hauser visited her uncle in 1912, saw him for a moment or two, saw a woman come out of the house and then return inside. George Golden died in 1932. Between 1912 and 1932 Mrs. Hauser never saw her uncle again, nor did she correspond or hear from him. Under such circumstances, the trial court concluded that she was guilty of fraud in failing to remember the presence of the woman, in failing to assume or make inquiry as to whether she was his wife, in failing to ascertain in 1932 who the woman was, and in failing to ascertain that she was Golden's wife, in failing to discover that part of the estate was community property of George Golden and the woman, in failing to discover that this woman had predeceased Golden, and in failing to discover that plaintiffs were the heirs of the predeceased wife. To so hold would be in effect to rule that an administratrix is under a positive duty at her peril to discover the existence of possible heirs of whose existence she has no reasonable ground to suspect. Certainly, the 1912 visit and the fleeting view of a woman on the porch did not give her knowledge that Golden was married, that there was community property, that the wife had predeceased him, and that plaintiffs were the wife's heirs. To hold that the administratrix is guilty of extrinsic fraud under such circumstances, in not making inquiry for possible heirs, is to do violence to the many decisions heretofore cited. No other conclusion is possible but that defendants were chargeable with no duty owed to plaintiffs under the circumstances, and certainly were not guilty of acts sufficient to constitute extrinsic fraud.

For the foregoing reasons the judgment must be and is reversed.

KNIGHT and WARD, JJ., concurred.

49 Cal.App.2d 618

THAYER v. FISH.

Civ. 11709.

District Court of Appeal, First District. Division 1, California.

Feb. 10, 1942.

Rehearing Denied March 12, 1942.

Hearing Denied April 9, 1942.

1. Execution ⇐74

Where, after death of judgment debtor, distributee of judgment creditor secured from the superior court an order under statute authorizing the enforcement of the judgment, and by obvious typographical error the order read that the judgment could be enforced against the estate of the creditor rather than the estate of the debtor, trial court properly permitted the error to be corrected. Code Civ.Proc. § 685.

2. Executors and administrators ⇐436

In action on rejected claim against executrix of estate, the proper township in which to have tried the action was the township of the executrix' residence. Probate Code, § 714; Code Civ.Proc. § 395.

3. Executors and administrators ⇐453(2)

Generally, where extrinsic fraud or mistake of a personal representative in failing to disclose a claim against an estate is shown, the relief granted is limited to imposing a trust on the estate distributed, for the benefit of those entitled, and does not justify a personal judgment against the personal representative.

4. Executors and administrators ⇐315(4)
Trusts ⇐93, 95

Executrix, who gave statutory notice of hearing for distribution of estate as required by statute, and who acted in good faith, was not guilty of "extrinsic fraud" or "mistake", in failing to discover that action had been filed on rejected claim, and, on discovering the filing of the action, to inform the court, and holder of claim was not entitled to have decree of distribution set aside, or to have a trust imposed in his favor on the estate, or to judgment against estate for amount of claim or against executrix individually. Probate Code, § 1200.

5. Executors and administrators ⇐314(4)

Executrix who gave statutory notice of hearing for distribution of estate as required by statute and who acted in good faith was under no duty to communicate with each claimant who had had his claim rejected before filing a petition for distribution, and executrix performed her full duty when she inquired of the clerk of the court located in the township where she resided of the pendency of the suit on rejected claims and was under no duty to make inquiries in other counties and townships. Probate Code, § 1200.

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Action by Philip R. Thayer, individually and as executor, etc., against Emma Belle Mutchmor Fish, individually and as executrix, etc., to set aside a final decree of distribution in the estate of John T. Mutchmor, deceased, to impose a trust in favor of plaintiff, and to award a judgment against the estate for the amount of plaintiff's claim and against defendant individually. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment reversed.

Hearing denied; CARTER, J., dissenting.

Wm. B. Chaplin, of Oakland, for appellant.

Clarence E. Todd, of San Francisco, for respondent.

PETERS, Presiding Justice.

Defendant appeals from a judgment of the trial court setting aside the final decree of distribution in the estate of John T. Mutchmor, imposing a trust in favor of plaintiff on the estate as distributed to defendant, and awarding a judgment against the estate for the amount of plaintiff's claim and against the defendant executrix individually. The plaintiff's theory is that the decree of distribution in John T. Mutchmor's estate was procured as the result of the fraud or mistake of the defendant executrix who, it is claimed, concealed from, or at least failed to disclose to, the probate court at the time of distribution the fact that plaintiff had a suit then pending on a claim against the estate which had been rejected by defendant as executrix of the estate.

The facts as found by the trial court, and concerning which there is no material dispute, are as follows:

[1] On July 10, 1917, I. E. Thayer recovered judgment in Alameda County against John T. Mutchmor in the sum of $400 together with costs assessed at $8.50. Although the evidence and the inferences therefrom were in conflict, the court found

that the judgment has never been paid. In May, 1918, I. E. Thayer died, and, in due course, the judgment was distributed to Philip R. Thayer, plaintiff in the present action. In May, 1931, John T. Mutchmor died, and, in due course, his wife, who has since remarried and who is the defendant in the instant case, was appointed executrix of his estate. After publication of notice to creditors, plaintiff secured from the superior court an order under § 685 of the Code of Civil Procedure authorizing the enforcement of the judgment. By obvious typographical error this order read that such judgment could be enforced against the estate of Thayer rather than the estate of Mutchmor. At the time of the present trial the court granted plaintiff's request to amend the order on its face to insert the name of Mutchmor in place of Thayer. Appellant in a supplemental brief which the court directed to be filed on an entirely different point, for the first time raised the point that the court improperly permitted the amendment. For the purposes of this appeal we may assume that the trial court properly permitted the error to be corrected. This would seem to be the law. In re Estate of Goldberg, 10 Cal.2d 709, 76 P.2d 508.

After securing permission to enforce the judgment, plaintiff filed a claim in the estate of Mutchmor together with a copy of the order above-mentioned. No action was taken on that claim until April 20, 1936, on which date defendant, as executrix, executed a notice of rejection of the claim. This notice was served on plaintiff May 6, 1936. Under the law the plaintiff had three months after receipt of that notice to file his action on the rejected claim. § 714, Probate Code.

[2] On July 14, 1936, two months and eight days after receipt of the notice of rejection, plaintiff filed an action on the rejected claim against defendant as executrix of Mutchmor's estate in the Justice's Court of Oakland Township, Alameda County. The trial court found that defendant was then, and for many years prior thereto had been, a resident of Brooklyn Township in said county. The proper township to have tried this action was the township of the residence of the executrix. Vickerson v. Wehr, 42 Cal.App.2d 678, 109 P.2d 743; § 395, Code of Civ.Proc.

Two process servers visited defendant's home on several occasions but were unable to find defendant at home. Defendant at that time was, and for many years prior thereto had been, a teacher in the Oakland public schools. No effort was made by plaintiff's counsel to notify counsel for defendant of the pendency of the justice court suit, although the two lawyers had been in communication with each other concerning the claim. Process was finally served on defendant as executrix on September 30, 1936. Prior to this date, however, on August 19, 1936, three months and thirteen days after the service of notice of rejection of the claim, defendant filed her petition for final distribution. The petition referred to the claim filed by plaintiff, alleged that such claim had been rejected and then alleged that "more than three months have elapsed since the service of such notice of rejection, and no suit has been filed thereon." The final decree of distribution was presented to, and signed by, the probate court on September 15, 1936, the court not being advised on that date of the pendency of plaintiff's action. The entire estate was distributed to defendant.

The complaint alleged that there was a fraudulent concealment from the probate court of the fact that plaintiff had filed suit on the rejected claim. The complaint refers to the allegation that no action had been filed as "false and fraudulent," and as a "wilful and fraudulent concealment." The trial court, however, simply found that the probate court was not advised that suit was pending. There is no finding of fraud or wilful concealment. In fact, the evidence would not sustain such a finding. Neither defendant nor her counsel knew that the action had been filed on the claim. Defendant's counsel testified that before preparing the petition for the final decree of distribution he telephoned to the clerk of the justice's court in Brooklyn Township where defendant resided and was informed that no action had been filed.

[3-5] As already pointed out, the trial court not only imposed a trust on the property distributed to defendant, but also set the final decree of distribution aside and granted a personal judgment against defendant. It would seem doubtful whether the trial court had power to set the decree aside or to grant a personal judgment against the defendant. The general rule seems to be where extrinsic fraud or mistake is shown that the relief granted is limited to imposing a trust on the estate distributed for the benefit of those entitled.

11B Cal.Jur. 806, § 1301; Simonton v. Los Angeles Trust, etc., Bank, 192 Cal. 651, 221 P. 368; In re Estate of Walker, 160 Cal. 547, 117 P. 510, 36 L.R.A.,N.S., 89; Sohler v Sohler, 135 Cal. 323, 67 P. 282, 87 Am.St. Rep. 98; Mulcahey v. Dow, 131 Cal. 73, 63 P. 158; but see 15 Cal.Jur. 32, § 130; Baker v. O'Riordan, 65 Cal. 368, 4 P. 232; Bacon v. Bacon, 150 Cal. 477, 89 P. 317. Whatever the proper rule should be in such cases, we are of the opinion that in this case the trial court was in error in granting any relief to the plaintiff.

Plaintiff argues that, under the facts, defendant was guilty of extrinsic fraud or mistake, it being recognized that one of these must exist in order to grant any relief to plaintiff. The problem as to what constitutes extrinsic fraud or mistake sufficient to warrant an equity court in granting relief from a final judgment has been discussed in Hewett v. Linstead, 49 Cal.App.2d 607, 122 P.2d 352, this day filed. No useful purpose would be served by repeating what was said in that opinion. From the cases therein cited it is apparent that the facts above set forth are not sufficient to support the theory of plaintiff that either extrinsic fraud or mistake was shown. It is obvious that defendant acted in good faith. She gave the statutory notice of the hearing for distribution required by § 1200 of the Probate Code. That section only requires posted notice. While plaintiff argues that it would have been a simple matter for defendant's counsel to have telephoned to his counsel and to have asked whether suit had been filed, certainly no duty is imposed on an executrix to communicate with each claimant who has had his claim rejected before filing a petition for distribution. Moreover, it would have been an equally simple matter for plaintiff to have filed a request for special notice as provided by § 1202 of the Probate Code. In that event plaintiff would have had ample time to have advised the probate court of the pendency of his suit before the decree of distribution was entered. Moreover, defendant's counsel did make inquiry of the clerk of the court located in the township where defendant resided. Even if the defendant was under some duty to make inquiry, was that duty not performed when inquiry in the township of the residence of the executrix was made? Can it be the law that an executrix must not only make inquiry in the county or township where she resides, but also in other counties and townships? I think not. In the present case, the attorney for plaintiff could easily have protected his client against the very situation that arose by either filing the notice abovementioned, or by notifying the attorney for defendant of the filing of the action. Certainly there was no greater duty on the attorney for defendant to notify the attorney for plaintiff, than there was on defendant's counsel. Such a situation falls far short of a showing of extrinsic fraud or mistake.

Plaintiff relies on the case of Zaremba v. Woods, 17 Cal.App.2d 309, 61 P.2d 976, as supporting his contention. A study of that case demonstrates that it involved an entirely different problem from that presented in the instant case. There the fraud consisted of the wilful concealment of the heirs of decedent. There the sole legatee of a will secured by his undue influence falsely and fraudulently represented in his petition for probate that the decedent had no heirs when he had actual knowledge that the decedent had a brother living in Chicago. This, of course, prevented the statutory notice being given the brother. Clearly, such wilful concealment constituted extrinsic fraud, but in the present case there is no evidence of any knowledge on the part of defendant that a suit had been filed when she filed the petition for final distribution. The other cases cited by plaintiff such as Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230; Sohler v. Sohler, supra; Simonton v. Los Angeles Trust, etc., Bank, supra, and Scott v. Dilks, 47 Cal.App.2d 207, 117 P.2d 700, involved situations where the person making the false statement knew it was false and made it for the purpose of preventing the court from considering the rights of other parties. No case has been cited that holds that where all statutory notices are given, and where no duty because of relationship exists, and where the injury was caused as much by the fault of one party as the other, that an equity court possesses the power to declare a trust. There are many cases that hold where the distributee represents in good faith that there are no other heirs, and certainly a creditor stands in no stronger position than an heir, the equity court is without power to grant relief. Mulcahey v. Dow, supra; Monk v. Morgan, 49 Cal.App. 154, 192 P. 1042; Lynch v. Rooney, 112 Cal. 279, 44 P. 565; Beltran v. Hynes, 40 Cal. App. 177, 180 P. 540. It is the knowing suppression of the true facts with intent to defraud that is the gist of the action.

For the foregoing reasons it is quite apparent that under the facts plaintiff was entitled to no relief. The judgment appealed from is reversed.

KNIGHT, J., and B. C. JONES, J. pro tem., concurred.



49 Cal.App.2d 709

Ex parte RAMIREZ.

Cr. 1796.

District Court of Appeal, Third District, California.

Feb. 14, 1942.

1. Habeas corpus ⇐21

Where petitioner, seeking habeas corpus, while under sentence for misdemeanor of vagrancy escaped from industrial road camp, the holding of petitioner, after his apprehension, under charge of felony for escaping from the road camp was illegal and he was entitled to his discharge. Pen.Code, §§ 647, 995, 4532.

2. Escape ⇐1

The statute providing that a prisoner, charged with or convicted of a felony, who escapes from certain institutions shall be guilty of a felony does not apply to the escape of a prisoner who is committed for a mere misdemeanor. Pen.Code, §§ 17, 4532.

3. Criminal law ⇐27

A "felony" is a crime of a graver or more atrocious nature than those designated as misdemeanors.

See Words and Phrases, Permanent Edition, for all other definitions of "Felony".

4. Escape ⇐1

The statute providing that every prisoner, charged with or convicted of a felony, who is confined in any jail or prison or industrial farm or industrial road camp and escapes or attempts to escape from such jail, prison, industrial farm or industrial road camp is guilty of a felony is not subject to the construction that a prisoner who escapes from institutions other than county jail is subject to the penalty therein prescribed if he had been committed for a mere misdemeanor while those who escape from a jail must have been charged with or convicted of a felony. Pen.Code, § 4532

5. Statutes ⇐195

Where a statute defining an offense designates one class of persons as subject to its penalties, all other persons are deemed to be exempt under the principle of "expressio unius est exclusio alterius".

See Words and Phrases, Permanent Edition, for all other definitions of "Expressio Unius Est Exclusio Alterius".

6. Escape ⇐1

In determining whether petitioner, seeking habeas corpus, was illegally held on charge of felony for escaping from industrial road camp to which he had been committed after conviction for misdemeanor of vagrancy, statute confined to felony prisoners who escape from public training schools, reformatories or county hospitals was inapplicable. Penal Code, §§ 107, 647.

Habeas corpus proceeding by Philip C. Wilkins, on behalf of Frank Ramirez.

Writ granted.

Philip C. Wilkins, of Sacramento, for petitioner.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

THOMPSON, Acting Presiding Justice.

By means of habeas corpus the petitioner seeks to secure his release from the custody of the Sheriff of Sacramento County. He is held upon a charge of felony under section 4532 of the Penal Code for escaping from the Sacramento County Industrial Road Camp. After a preliminary examination, an information was filed in the superior court, charging him with the felony provided for by that section. A motion to set aside the information, under section 995 of the Penal Code, on the ground that he was illegally committed without probable cause, was denied. The evidence shows that he was convicted on June 30, 1941, of the misdemeanor of vagrancy under section 647 of the Penal Code, and sentenced to imprisonment in the county jail at Sacramento for the term of 130 days. He was subsequently transferred to the Sacramento County Industrial Road Camp, from

which he escaped September 16th. He was subsequently apprehended and the felony charge for escaping from the officers of that camp was then instituted. He has served his sentence for the misdemeanor charge.

It is contended the petitioner is illegally held in custody and charged with the felony of escaping from the road camp for the reason that section 4532 of the Penal Code has no application to the escape of a prisoner from a road camp who is committed thereto for a mere misdemeanor.

[1] We are of the opinion the petitioner is illegally held in custody. Section 4532 of the Penal Code clearly provides that a "prisoner charged with or convicted of *a felony*" only, who escapes from the institutions therein named, shall be guilty of a felony. It makes no reference to the escape of a prisoner who is merely charged with or convicted of a misdemeanor. That section reads: "Every prisoner charged with or convicted of a felony who is confined in any jail or prison or industrial farm or industrial road camp or who is engaged on any county road or other county work or who is in the lawful custody of any officer or person, who escapes or attempts to escape from such jail, prison, industrial farm or industrial road camp or from the custody of the officer or person in charge of him while engaged on or going to or returning from such county work or from the custody of any officer or person in whose lawful custody he is, is guilty of a felony * * *."

[2, 3] The foregoing section does not make it a felony, or any offense whatever, for a prisoner to escape from the institutions mentioned therein, who is committed thereto on a mere charge of misdemeanor. It is only such prisoners as are committed or charged with a felony who become guilty of a separate crime for escaping from such custody. If the legislature had intended to make it a felony for a prisoner to escape, regardless of whether he was committed for a misdemeanor or a felony, it would have been very easy for it to have so provided. The fact that the legislature specifically refers to the escape of "every prisoner charged with or convicted of *a felony*," leads to the inevitable conclusion that the legislature deliberately omitted from that statutory offense of escaping from the custody of officers those prisoners who were merely charged with or convicted of misdemeanors. The foregoing construction of the application of section 4532 is reinforced by reference to the heading which precedes that section of the Penal Code. It reads, "From jail, industrial farm or road camp: *Felons and persons accused of felony:* Punishment." (Italics added.) From this heading it is apparent that it is merely "felons and persons accused of felony" who are deemed to be guilty of the offense defined in that section when they escape. The term "felony" does not include the offense of a mere misdemeanor. Sec. 17 of the Penal Code; Black's Law Dictionary, 3d Ed., 764. Section 17 of the Penal Code defines the term "felony" as follows: "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. * * *" In Black's Law Dictionary, supra, it is defined as "A crime of a graver or more atrocious nature than those designated as 'misdemeanors.'"

[4, 5] It may not be reasonably said that a prisoner "who escapes" from institutions other than that of the county jail is subject to the penalty therein prescribed if he had been committed for a mere misdemeanor, while those who escape from the *jail* must have been "charged with or convicted of a felony." There is no room for that distinction. Clearly the various institutions successively mentioned in that section, from which the escape occurs, refer to one and the only class of prisoners which is therein described, namely, "prisoner[s] charged with or convicted of *a felony*." In 2 Lewis' Statutory Construction, 2d Ed., p. 918, sec. 491, it is said: "When a statute, defining an offense, designates one class of persons as subject to its penalties, all other persons are deemed to be exempted." For the application of the principle included within the common Latin phrase, "expressio unius est exclusio alterius", see People v. Doyle, 13 Cal.App. 611, 110 P. 458, and 15 Words & Phrases, Permanent Edition, at page 765.

[6] Section 107 of the Penal Code, as it now exists, has no application to this case, for it is confined to prisoners who escape from public training schools, reformatories or county hospitals. But the heading to that section also confines its application to "escapes of *felony prisoners* from other places of detention." (Italics added.)

When the case of In re Haines for a Writ of Habeas Corpus, 195 Cal. 605, 234 P. 883, was decided in 1925, section 107 of

the Penal Code, as it then existed, was preceded with the heading "Punishment for escape of *prisoner*." The court seems to have placed great stress on that heading in support of its construction. In enacting section 4532, in 1941, the heading to the former section 107 was omitted, and it now applies, according to the present heading, to "Felons and persons accused of felony." Moreover, section 4532 was not adopted as an amendment to former section 107. That section was amended in 1941, to apply only to escaped prisoners from public training schools, reformatories and county hospitals. Section 4532 was adopted as a new section which is "added" to the code in part 3 of the Penal Code, "relating to prisons, jails, prisoners, terms and conditions of imprisonment, the death penalty, parole, reprieves, commutations, pardons, and convict-made goods." Stats. 1941, p. 1080.

In support of our construction of section 4532, we may reasonably assume the legislature considered it a more grievous offense for a felon to escape from the custody of officers than for a prisoner who is merely guilty of a misdemeanor, such as vagrancy. The first class is likely to be more dangerous to society than the latter class. The fact that the legislature considered it a more grievous offense for a felon to escape from custody than for a prisoner who was previously convicted of a mere misdemeanor is evidenced from the penal statutes which formerly existed with relation to the subject of escapes from custody. Section 105 of the Penal Code, which was repealed in 1941, made it a felony for "Every prisoner confined in a state prison" to escape. Section 106, which was also repealed in 1941, made it a felony for "Every prisoner committed to a State prison" who escaped while he was being conveyed to or from prison, or while engaged in the performance of work "outside such prison." Section 107, as it existed prior to the amendment thereof in 1923, merely provided that prisoners who escaped from "any other prison than the state prison" would be guilty of a misdemeanor only. It then read: "Every prisoner confined in any other prison than the state prison, who escapes or attempts to escape therefrom, *is guilty of a misdemeanor.*" (Italics added.)

It thus appears that the legislature evidently considered it a much more serious offense for a felon who is committed to state prison to escape.

At least the clear language of the section, as it now exists, omits to include prisoners who have been convicted of misdemeanors only, and we are unable to reasonably hold that such petty offenders were intended, by mere inference, to be included within the class who are declared to be guilty of a felony for escaping from custody.

We are of the opinion that In re Haines, supra, upon which the respondent relies, is not authority for holding that section 4532 applies to escaped prisoners who have been formerly convicted of mere misdemeanors.

The writ is granted and the petitioner is discharged.

TUTTLE, J., and STEEL, J. pro tem., concurred.



50 Cal.App.2d 57

COBB v. COBB'S ESTATE et al.

Civ. 13424.

District Court of Appeal, Second District, Division 1, California.

Feb. 19, 1942.

Rehearing Denied March 16, 1942.

Hearing Denied April 16, 1942.

Appeal and error ⇐555

Where proposed bill of exceptions had been stricken from the files, and no steps on appeal were taken under the alternative method, and period prescribed by court rules within which transcript shall be filed had expired and appellate court had refused to settle a bill of exceptions so that nothing remained before Appellate Court but an ineffectual notice of appeal, the appeal must be dismissed. Code Civ.Proc. §§ 650, 652, 953a, 953d; Rules of Supreme Court and District Courts of Appeal, Rule 6, § 1.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action between Charles Sherman Cobb and estate of Charles Henry Cobb and others. From an adverse judgment, Charles Sherman Cobb appeals. On respondents' motion dismiss the appeal.

Motion granted.

Charles Sherman Cobb, in pro. per., for appellant.

Merriam, Rinehart & Merriam, of Pasadena, for respondents.

PER CURIAM.

This is a motion by respondents to dismiss an appeal which is taken from the verdict of the jury and the judgment rendered thereon. The motion is grounded on the claim that the transcript of record has not been filed and served within the time prescribed by law; that proceedings for a bill of exceptions had been dismissed by the trial court, and that no proceedings for bill of exceptions or transcript under section 953a of the Code of Civil Procedure are pending in the trial court. This motion is based on the certificate of the clerk of the trial court dated November 14, 1941, and filed in this court on November 18, 1941. This certificate contains the following averments:

(1) Notice of appeal was served and filed on March 24, 1941, by appellant, but the same does not state the court to which the appeal is taken; (2) no notice to the clerk to prepare a transcript under 953a of the Code of Civil Procedure has been filed; (3) motion for new trial was served on respondents on March 24, 1941, and filed the following day (this motion was denied on April 14, 1941, and minute entry of such denial entered April 16, 1941); (4) notice of order denying motion for new trial was filed July 31, 1941, and served on appellant by mail on July 29, 1941; (5) no clerk's transcript under section 953a of the Code of Civil Procedure has been filed; a reporter's transcript covering testimony taken March 18 and 19, 1941, was filed on September 15, 1941, and on September 22, 1941, a reporter's transcript on motion to settle bill of exceptions was filed; and (6) a proposed bill of exceptions was filed October 20, 1941, and a motion to strike the same was granted on the same day.

From the foregoing it is evident that no effort has been made on the part of appellant to perfect an appeal in accordance with the alternative method set forth in section 953a of the Code of Civil Procedure, because no request for a transcript was filed within the ten days allotted, and no transcript was filed within twenty days thereafter, nor at any time, and appellant's time to take an appeal by this method has since expired.

It is at once apparent that appellant has attempted to present his appeal on a bill of exceptions. However, the court, after giving appellant time to amend his bill, which he refused to do, granted a motion to strike the proposed bill from the files on October 20, 1941. On November 25, 1941, this court dismissed appellant's petition to settle a bill of exceptions under section 652 of the Code of Civil Procedure.

The question now presented is whether appellant's appeal can or should be dismissed, and this question seems to have been settled by the case of Tingley v. Otis, 141 Cal. 71, 74 P. 448, wherein, upon an appeal, where a bill of exceptions had been stricken from the files by the superior court, the Supreme Court held that nothing remained before it except the notice of appeal, and that if no motion to dismiss had been presented, it would have been the court's duty to dismiss on its own motion.

Rule VI, section 1, of the Rules of the Supreme Court and District Courts of Appeal provides that on motion to dismiss an appeal for failure to file the transcript within the prescribed time, there shall be presented the certificate of the clerk of the court below certifying "* * * the fact and date of the entry of order of termination, if any, by the trial court of any proceeding for the settlement of a bill of exceptions or transcript. It shall be incumbent on the party moving to dismiss to show by such certificate or by affidavit that no proceeding for a bill of exceptions or transcript under section 953a is pending in the trial court, and if no such proceeding was ever instituted that the time to institute the same has expired." The case of Attkisson v. Reynolds, 94 Cal.App. 185, 270 P. 686, holds that a statement in the clerk's certificate in words following the wording of said rule VI, section 1, is insufficient and merely the conclusions of the certifying clerk. In the present case the clerk's certificate shows the fact and date of the serving and filing of the notice of order denying motion for new trial and the other steps taken or not taken under sections 650, 953a and 953d of the Code of Civil Procedure, and is in accordance with the cases of Gross v. Cassin, 43 Cal. 27; Bruce v. Tunstall, 24 Cal.App.2d 370, 75 P.2d 120, and Atlas Assurance Co., Ltd., v. Tunstall, 24 Cal.App.2d 371, 75 P.2d 121, cited in support of the motion to dismiss. It is evident that the striking of the proposed bill of

exceptions from the files leaves no bill of exceptions in the case; that no steps on appeal were taken under the alternative method; that the forty-day period prescribed in rule I, section 1, Rules of the Supreme Court and District Courts of Appeal, within which the transcript shall be filed, has expired; and that the striking out of the proposed bill of exceptions and the refusal of this court to settle a bill of exceptions would seem to terminate proceedings completely as a dismissal in the lower court and leave this court in the same position as the court found itself in Tingley v. Otis, supra, that is to say, with nothing before it but an ineffectual notice of appeal.

For the reasons herein stated, the motion to dismiss the appeal must be granted, and it is so ordered.



PEOPLE v. DUANE.

Cr. 2192.

District Court of Appeal, First District, Division 1, California.

Feb. 11, 1942.

Hearing Granted March 12, 1942.

1. Criminal law ⇐620(1)

A charge of kidnapping with intent to commit robbery was properly consolidated for trial with a charge of robbery of same person on the same occasion and with a charge of assault with force and violence on that person with intent to rob on a different occasion. Pen.Code, § 954.

2. Robbery ⇐13

One who assaults another under circumstances set forth in codal provision defining robbery with intent to commit the consummated offense is guilty of an assault with intent to commit robbery. Pen.Code, §§ 211 et seq., 220 et seq.

3. Criminal law ⇐620(1)

A charge of kidnapping with intent to commit robbery was properly consolidated for trial with a charge of robbery of the same person on the same occasion, with charge of kidnapping with intent to commit robbery of that person and his wife on a different occasion and with a charge of robbery of the husband on the latter occasion. Pen.Code, § 954.

4. Indictment and Information ⇐127

The offenses of robbery on different occasions and accompanying offenses of the same class of crime may be charged in different counts in one information.

5. Criminal law ⇐620(1)

The consolidation for trial of criminal informations or indictments must be for good cause shown and in the interest of justice, which presupposes that consolidation must be without prejudice to substantial rights of the accused. Pen.Code, § 954.

6. Criminal law ⇐1166(6)

A defendant may be prejudiced if forced to stand trial on one charge with a codefendant or codefendants who are charged with a distinct and unconnected offense, even though charges are subject to consolidation because they are of the same class. Pen. Code, § 954.

7. Criminal law ⇐620(1)

The fact that offenses charged occurred on four different dates within six months' period did not preclude consolidation for trial of seven charges including robbery, kidnapping with intent to commit robbery and assault with force and violence with intent to rob on one person and charges of the first two offenses committed on two different occasions against another person, whose wife on one occasion was also a victim of kidnapping with intent to commit robbery. Pen. Code, § 954.

8. Criminal law ⇐620(1)

Where defendant in course of robberies of two grocery stores committed acts leading to three charges of robbery, two charges of kidnapping of store managers with intent to commit robbery, one charge of kidnapping manager and his wife with same intent and one charge of assault with force and violence with intent to rob, fact that the crimes were perpetrated upon different victims did not preclude consolidation of the cases for trial. Pen.Code, § 954.

9. Criminal law ⇐620(1)

The consolidation of cases for trial is not jurisdictional, but merely procedural. Pen.Code, § 954.

10. Criminal law ⇐1163(1)

It is incumbent upon defendant on appeal to show substantial prejudice to his rights.

11. Criminal law ⇐1159(1)

In prosecution for kidnapping and robbery, where package containing dynamite was removed from defendant's automobile at about the time of his arrest, jury's implied finding was binding on reviewing court, as against claim that evidence of defendant's statement to his victim that a box in his possession contained dynamite was no proof that it actually did and that evidence of a test explosion was fabricated merely to impress the jury.

12. Criminal law ⇐739(2)

The credibility of witnesses on issue of alibi was a matter for the jury.

13. Contempt ⇐20
Criminal law ⇐665(4)

Disobedience of a trial court's order excluding witnesses from the courtroom may be punished as a contempt, but does not constitute ground for exclusion of the testimony of the witness.

14. Criminal law ⇐1170(1)

A judgment will not be reversed for erroneous exclusion of testimony unless it affirmatively appears from the transcript that testimony was material, relevant, not too remote and not cumulative.

15. Criminal law ⇐1163(1)

An appellant seeking to set aside a judgment of conviction must present the appeal on a record affirmatively showing reversible error, since such error will not be presumed.

16. Criminal law ⇐1120(3)

Where defendant's witness had admitted talking to attorney who had represented defendant in civil matters and who had occupied a seat at his counsel table during trial, refusal to allow attorney to testify did not constitute reversible error in absence of any showing of nature of testimony which attorney would have given.

17. Robbery ⇐13

Proof that perpetrator was armed with a weapon is unnecessary to establish offense of assault with intent to commit robbery. Pen.Code, § 220.

18. Criminal law ⇐1159(1)

Where jury on charge of assault with intent to commit robbery returned two verdicts, one finding defendant guilty of the offense and the second finding that charge of being armed with a weapon was true, insufficiency of evidence to support the latter verdict was not ground for reversal of conviction for assault with intent to commit robbery. Pen.Code, §§ 220, 669, 969c, 1158a.

PETERS, P. J., dissenting in part.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

James Duane was charged with kidnapping with intent to commit robbery and with robbery on three different occasions, and with assault with force and violence with intent to rob. From judgments and orders denying a new trial following the conviction of the defendant on the seven separately charged offenses, the defendant appeals.

Judgments of conviction and orders denying new trial affirmed in six of the actions and the judgment of conviction on charge of assault with force and violence with intent to rob modified and as so modified the judgment and order denying motion for new trial were affirmed.

Raine Ewell, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener and Dennis Hession, Deputy Attys. Gen., for respondent.

WARD, Justice.

Appeal from judgments and orders denying a new trial following the conviction of defendant on seven separately charged offenses. The informations charged the commission in the City and County of San Francisco of the following: Case No. 32,109, kidnapping on March 16, 1940, of Antone Burkard with intent to commit robbery; case No. 32,111, robbery on the same occasion; case No. 32,105, assault with force and violence on July 7, 1940, on Antone Burkard, with intent to rob; case No. 32,-106 kidnapping on July 10, 1940, of Allen F. McLean, with intent to commit robbery; case No. 32,107, robbery of McLean on the same occasion; case No. 32,108, kidnapping on August 6, 1940, of Frances McLean and Allen F. McLean, with intent to commit robbery; case No. 32,104, robbery of McLean on the same occasion.

Each information charged that defendant, in the commission of the designated offense, was armed with a weapon, to-wit, a pistol; and each contained an allegation of previous conviction in California of a felony, to-wit, receiving stolen property, in connection with which a sentence was served; also of conviction in the State of Arizona of the crime of felony, to-wit, burglary, for which sentence was likewise served. Defendant entered pleas herein of not guilty, but admitted the prior convictions. Over his objection, the above cases were consolidated, and, following trial, he was found guilty as charged in each information.

The cases involve a series of kidnappings and robberies, the robberies being of two Safeway grocery stores, and the victims of the kidnappings, the managers thereof respectively; in one of the cases the wife of one of the managers was kidnapped with her husband. One of the cases involves an assault upon one of such managers, with intent to commit robbery.

It is contended by appellant that the court erred in consolidating the cases for trial. So far as pertinent to the facts herein, under the provisions of section 954 of the Penal Code, two or more indictments charging offenses connected together in their commission, or crimes or offenses of the same class, may, in the discretion of the trial court, be consolidated for trial or may be divided into two or more groups and each group tried separately.

[1, 2] For the purpose of convenient consideration, three of the informations may be referred to as the Burkard cases, the other four as the McLean cases. In each of the cases charging robbery, kidnapping was committed in furtherance and in consummation thereof, hence "connected * * * in their commission." Penal Code, § 954; People v. Morales, 56 Cal.App. 270, 204 P. 1088. Among the Burkard cases there appears an offense of assault with intent to rob, alleged to have been committed upon the same victim four months after the original robbery and kidnapping perpetrated upon him. The felonious taking of personal property in the possession of another from his person or immediate presence, and against his will, accomplished by force or fear, is robbery. Penal Code, § 211. One who assaults another under circumstances set forth in section 211, with intent to commit the consummated offense, is guilty of an assault with intent to commit robbery. Both offenses are denounced in the Penal Code as crimes against the person. Pt. 1, tit. 8, chapters 4 and 6, §§ 211 et seq., and 220 et seq. Each offense is characterized by practically the same essential features, except that in robbery there must be a felonious taking of property.

Each information in the Burkard cases alleges the same perpetrator and the same victim. Up to this point the alleged offenses are sufficiently "connected." In People v. Johnston, 114 Cal.App. 241, 299 P. 805, it was held permissible to include robbery and burglary in the same information. However, there is a difference in the alleged dates of commission, but it has been held that this contention standing alone, is without merit in the absence of proof of prejudice. In People v. Northcott, 209 Cal. 639, 289 P. 634, 70 A.L.R. 806, the indictment contained three counts of murder, the first alleged to have been committed on or about February 2, 1928, and the other two on or about May 16, 1928. In People v. Feigelman, 65 Cal.App. 319, 320, 223 P. 579, the court said: "The fact that the two crimes charged against the defendant were committed, the one more than a year after the other, does not in our opinion furnish any ground for the claim that the court abused its discretion in consolidating said actions and causing them to be tried at the same time."

[3] The conclusions herein relative to the Burkard cases may be considered as applicable to the McLean cases of kidnapping and robbery on July 10 and August 6, 1940. The only allegation of factual difference appearing in the informations is that in the kidnapping on August 6th it is alleged that Allen F. McLean and Frances McLean were enticed and forcibly taken away by the defendant with intent to restrain them and thereby commit a robbery. The evidence discloses that Frances McLean is the wife of Allen McLean. If appellant had been charged in a separate information with the offense of kidnapping the wife, Frances McLean, with intent to commit robbery of the husband, Allen, on the same date, the offenses would have been sufficiently connected to warrant consolidation.

[4-6] The next point for consideration is the consolidation of the two groups, the Burkard and the McLean cases. Here we have offenses of the same general class, but alleged to have been committed upon different persons on different dates. The dif-

ferent offenses of robbery, and the accompanying offenses of the same class of crime under separate counts, could have been charged in different counts in one information. Technically the consolidation was without error, but the consolidation for trial of criminal informations or indictments must be "for good cause shown" and "in the interest of justice," which presupposes that the consolidation must be without prejudice to the substantial rights of the accused. A defendant may be prejudiced if forced to stand trial on one charge with a codefendant or codefendants who are charged with a distinct and unconnected offense. The charges may be of the same class and therefore subject to consolidation, but if unconnected and dependent upon evidence of an entirely different state of facts, one defendant may be prejudiced by evidence introduced in support of an information charging a second defendant with a separate offense. This state of facts appeared in People v. Davis, 42 Cal.App.2d 70, 108 P.2d 85. See, also, People v. O'Connor, 81 Cal.App. 506, 254 P. 630; People v. Foward, 134 Cal.App. 723, 26 P.2d 532; People v. Aguinaldo, 3 Cal.App.2d 254, 39 P.2d 505; People v. Shepherd, 14 Cal.App. 2d 513, 58 P.2d 970.

[7] Based upon the above, as applied to the facts in the present case we find that no valid objection could be presented to the consolidation of the Burkard and McLean cases solely upon the difference in allegations of dates of commission of the offenses unless peculiar circumstances surrounding the transactions, which do not appear on this appeal, should of themselves indicate that the defendant would be prejudiced by the consolidation.

[8] One further factual subject deserves consideration, namely, the perpetration of the crimes upon different victims. A consolidation under circumstances unnecessary to mention, which do not apply to the present case, may give rise to a reasonable conclusion that a defendant has in fact been prejudiced. However, the consolidation of indictments alleging different dates and different victims has been approved in this state. In People v. Kelly, 203 Cal. 128, 133, 134, 263 P. 226, 228, the offenses alleged in different counts presumably were committed on the same date. In that case the court said: "Appellant therefore argues that the provision of law (Pen.Code, § 954), under which the present indictment was filed, is unconstitutional in that it makes it possible for one, accused as he was, to be placed on trial at the same time, and with the same jury, on three separate and distinct charges of murder, committed at different times, at different places, upon different individuals, and requiring different evidence from different witnesses to establish each separate act. We know of nothing in the state or Federal Constitutions sustaining appellant's position, and we do not agree with his contention that two crimes of the same grade, or class, could not be joined in separate counts in one indictment at the common law." In People v. Hanna, 100 Cal.App. 509, 280 P. 379, two defendants were charged jointly in one information with robbery, and in a second information with another robbery. One of the defendants pleaded guilty to one of the charges. The court properly granted a motion that the two defendants be tried separately, and that the two charges against one of them be consolidated. In People v. Northcott, supra, the defendant was charged with three crimes of murder on two separate dates. Evidence of separate and distinct crimes other than murder, having no direct connection with the charges of murder alleged in the indictment, was introduced for the purpose of establishing a general scheme or plan. Had Northcott been granted separate trials, the facts of one murder might with equal force have been introduced for the same purpose. In People v. Thorn, 138 Cal.App. 714, 734, 735, 33 P.2d 5, 15, the court said: "As we have seen the three groups of crimes joined are forgery, fraud in keeping accounts in corporate books, and presenting false claims of insurance. The Legislature, it seems to us, meant by the use of the words, 'the same class of crimes or offenses,' in such section, offenses possessing common characteristics or attributes, and it would seem that the different offenses set out in the information here do have many attributes in common. Fraud is involved in them all, and the purpose of each is to obtain property or credit by false writings. The inference drawn by the jury was that they were so used. The offenses charged were closely related in the plan and scheme of their commission, and the joinder saved useless repetition of evidence, time and expense, both to the state and to the defendant. We think the different offenses were properly joined." In People v. Garcia, 2 Cal.2d 673, 42 P.2d 1013, the defendant was tried for two separate murders. At pages

680, 681 of 2 Cal.2d, page 1017 of 42 P.2d, the court said: "* * * the evidence when considered in its entirety suggests that the two homicides were the culmination of a plan on defendant's part to 'get' his two victims before they 'got' him."

[9, 10] In the present case the defendant had developed a well defined plan to unlawfully and feloniously obtain the property of Safeway Stores, Inc. The assault by force, violence and intimidation, and the kidnapping of Burkard, McLean, and the latter's wife, were merely incidents to the accomplishment of his purpose. The methods used in the perpetration of the crimes were manifestly similar. The consolidation saved the state and the defendant the ordeal of possibly seven separate trials. The consolidation was not jurisdictional; merely procedural. People v. Thomas, 45 Cal. App.2d 128, 113 P.2d 706; People v. Aguinaldo, supra; People v. Shepherd, supra. It is incumbent upon defendant on appeal to show substantial prejudice to his rights. A bald declaration by his attorney is insufficient upon which to base error. "The determination whether a motion for severance of trial should be granted always rests within the sound discretion of the trial judge. There can be no clearly defined rule for determining when a defendant is entitled to a separate trial because the exercise of discretion means that the decision must be based upon a just and proper consideration of the particular circumstances which are presented to the court in each case. Only where an abuse of discretion is shown will the ruling of the trial court be disturbed upon appeal." People v. Eudy, 12 Cal.2d 41, 46, 82 P.2d 359, 361. What has been said of severance is equally applicable to consolidation. An abuse of discretion herein is not shown—on the contrary the order of consolidation appears to be in the interest of justice.

The nature and character of many of the objections raised by the attorney for appellant cannot be definitely determined. In many instances reference to certain cross-examination is set forth as improper, the reviewing court being left to conjecture the basis of the claimed impropriety. However, in justice to the appellant, the entire record has been considered. It does not reveal misconduct on the part of the court or the district attorney, as contended by appellant, that could be the basis for a holding of prejudicial error. The evidence contained in the record—as to which, except that relating to alibis, there is little, if any dispute—is sufficient to uphold conviction of each offense charged.

[11] There is testimony that appellant at the time of the commission of one of the offenses showed his victim a box which he said contained dynamite, stating that it would be used to blow up Burkard's home if he refused to obey appellant's orders. This evidence appears in proof of the allegations of the Burkard robbery and kidnapping cases. About the time of appellant's arrest, a package containing dynamite was removed from his car. Appellant's claims—that his statement that the box contained dynamite was no proof that it actually did, and that evidence of a test explosion of the dynamite by the police was fabricated to impress the jury—are without merit. At least the jury's implied finding is binding on this court.

[12] A substantial conflict appears in each instance wherein appellant offered evidence tending to prove an alibi. The credibility of the witnesses in this as in other respects was a matter solely for the consideration of the jury.

Appellant contends that "another reversible error committed by the court is shown in the misconduct of the trial judge refusing to allow Mrs. Leila Leep * * * to testify as a witness." This contention arises out of the following situation. At the outset of the trial the assistant district attorney, Mr. Skillin, invoked the rule that all witnesses be excluded from the court room. Appellant's defense was conducted by the assistant public defender, Mr. Toner. Mrs. Leep is an attorney, who had represented appellant in certain civil matters, and she had evidently taken an active part in the preparation of his defense. At no time did she request to be associated as attorney of record for appellant in these criminal actions, but during the progress of the trial she occupied a seat at his counsel table and frequently consulted with the public defender and the appellant. On cross-examination of some of appellant's witnesses Mr. Skillin asked the question, as he had the right to do, whether prior to taking the witness stand they had talked or consulted with Mrs. Leep. The last witness so interrogated was Mrs. Lucille Meegan, by whom with others, appellant sought to prove that he was at his home on the night of March 16, 1940, the night he is accused of having committed the crimes

charged in action No. 32,109, to-wit, the kidnapping and robbery of Anton Burkard. At the conclusion of Mrs. Meegan's testimony Mr. Toner called on Mrs. Leep to take the witness stand, but Mr. Skillin objected to her testifying upon the ground that she had been present in the court room during the trial of the case; and the court sustained the objection. That portion of the reporter's transcript showing the cross-examination of Mrs. Meegan and the proceedings relating to the sustaining of Mr. Skillin's objection is as follows:

"Q. [by Mr. Skillin, cross-examining] You still think it is Saturday night. And * * * who, if anyone, did you discuss the testimony with you were going to give here to-day? A. I discussed it with Mrs. Leep, and I discussed it with Mr. Duane's wife.

"Q. When did you discuss it with Mrs. Leep? A. I am not certain.

"Q. Well, when? A. It was several weeks ago. I am not certain.

"Q. Not since then? A. No. I talked to her exactly once.

"Q. Did you talk to her to-day? A. Yes.

"Q. Where? A. Right outside.

"Q. Right outside? A. Yes.

"Q. This morning? A. This afternoon.

"Q. And this morning? A. I think we exchanged the time of day.

"Q. That is all, just the time of day? A. That is all.

"Q. Did you talk with her after Mrs. De Soto left the stand to-day? A. Yes.

"Q. Mr. Skillin: That is all.

"Redirect Examination.

"Mr. Toner. Q. Just one question: Did Mrs. Leep suggest any testimony that you were to give here this afternoon? A. No.

"Mr. Toner: That is all.

"Mr. Skillin: That is all. (Witness excused.)

"Mr. Toner: I would like at this time to ask Mrs. Leep to take the stand.

"Mr. Skillin: Well, of course we object, if your Honor please to Mrs. Leep being sworn or testifying in this matter.

"The Court: She interviewed all of the witnesses. I couldn't allow it. She has been sitting here in court all the time the witnesses were being examined.

"Mrs. Leep: It is really my fault. I forgot I wasn't the man's attorney, because I had acted as his attorney, and I really felt in my heart I still was his attorney, and I have been trying to help him, as you know, here.

"The Court: There is no need of making any speech here, Mrs. Leep.

"Mr. Toner: Well, I am calling her, if the Court please, in good faith, because I feel that she didn't at the time realize as she sat here at counsel table that she would be excluded and not allowed to come forward as a witness in this matter. And that is why I am calling her.

"The Court: I don't see how I can permit it, under the objection." No statement or suggestion or offer of proof of any kind was made at any time during the trial as to the nature of the testimony Mrs. Leep intended to give, or as to the purpose for which she was called as a witness, or as to what testimony the appellant expected to elicit from her.

[13-16] Although there may be some conflict in the decisions of other jurisdictions, it has been held in this state that disobedience of a trial court's order excluding witnesses from the courtroom may be punished as a contempt, but does not constitute ground for exclusion of the testimony of the witness. People v. Russell, 34 Cal.App. 2d 665, 94 P.2d 400, and cases cited therein. But it is well settled that an appellate court is not warranted in reversing a judgment of conviction upon the ground of erroneous exclusion of testimony unless it affirmatively appears from the transcript on which the appeal is presented that the testimony sought to be introduced was material, relevant, not too remote, and not cumulative. Many of the later cases so holding are to be found in the 1940 supplement to vol. 7 of the New California Digest, Criminal Law (§ 1133). In other words, the rule is that it is incumbent upon an appellant seeking to set aside a judgment of conviction to present the appeal on a record affirmatively showing reversible error; that such error will not be presumed. It is evident, therefore, that since the transcript here is absolutely barren of any statement as to the nature of the testimony Mrs. Leep intended to or was expected to give, no legal ground for reversal has been established. The only suggestion as to the purpose for which she was called as a witness comes from appellant's

brief, which was filed by his present counsel, who did not participate in the trial, and so far as the record shows was not present at any time during its progress. After setting forth the portion of the reporter's transcript hereinabove quoted, he says: "Thus it is shown that a biased and prejudiced Trial Judge refused to allow appellant the right to have a witness testify against the insinuations of Assistant Distric Attorney Skillin, constantly repeated as the record shows, in order to cast the reflection to the Jury that Mrs. Leep was advising these witnesses in which way to testify." Even though we were permitted to accept the statement made by counsel in his brief that such was the purpose in calling Mrs. Leep as a witness, it could not be held that the exclusion of her testimony constituted ground for reversal because Mrs. Meegan on redirect examination stated that Mrs. Leep had made no suggestion to her as to the testimony she was to give, and obviously if Mrs. Leep had been sworn as a witness she would not have been permitted under the rules of evidence to relate the conversation she had with any of appellant's witnesses, including Mrs. Meegan.

Subsequently appellant testified in his own behalf, and as part of his story denying he had committed the crimes charged in actions 32,106 and 32,107, to-wit, the kidnapping and robbery of Allen McLean on the night of July 10, 1940, he testified that on that night he had been in Mrs. Leep's office and that she had driven him home in her car, arriving there between eleven and eleven-thirty o'clock, at which time and place they were met by appellant's wife. However, after appellant had testified, no attempt was made to call Mrs. Leep as a witness in corroboration of his story, nor his wife, who appeared as a witness but was not interrogated on this subject, and since the only time that Mrs. Leep was called as a witness was prior to the appearance of appellant, it cannot be said, in the absence of any offer of proof, that the trial court might have anticipated that she was being called upon to corroborate the story which appellant afterwards told. In fact appellant's counsel nowhere in his brief makes any claim that the purpose in calling Mrs. Leep as a witness prior to the time appellant testified was to corroborate the story afterwards told by him. Counsel's sole criticism of the trial court's ruling is that "* * * appellant was denied the testimony of Mrs. Leep to cast aside and to dispel the insinuations of the District Attorney, whose conduct in the examination of all defense witnesses was most over-bearing, tending to prejudice the Jury * * *." It would appear, therefore, that in order to reverse the judgments of conviction in actions 32,106 or 32,107 upon the ground of erroneous exclusion of testimony, it would be necessary to go entirely outside of the record on appeal and even beyond any claims made by appellant in his brief and hold that if Mrs. Leep had been permitted to testify she might have given testimony in corroboration of appellant's story. Manifestly such a reversal would be based on pure conjecture, in which, of course, we have no right to indulge.

[17, 18] In action No. 32,105 appellant was charged with assault with intent to commit robbery, wherein it was alleged also that he was armed with a weapon, to-wit, a pistol, and the jury returned two separate verdicts, one finding appellant guilty of "assault with intent to commit robbery, as charged in the information," and the second finding that "the charge of being armed with a weapon" was true. There is no direct proof that on this occasion appellant was armed with a pistol. There is evidence that he approached his victim, Burkard, menacingly; that Burkard ran, and that appellant ordered him to halt or be shot. Upon the calls of Burkard's wife for help, and the appearance of others at the scene, appellant disappeared. However, the charge of assault with intent to commit robbery is based on the provisions of section 220 of the Penal Code, and upon an examination thereof it will be found that in order to establish the crime denounced therein it is not essential to prove that the perpetrator was armed with a weapon. The charge that he was so armed was added and the separate verdict based thereon was returned to conform to the requirements of sections 969c and 1158a of the Penal Code; that is, for the benefit of the Board of Prison Terms and Paroles in fixing the minimum term of imprisonment. Therefore the insufficiency of the evidence to support the latter verdict does not serve as ground for reversal of the conviction based on said section 220. It appears, however, that after properly pronouncing sentence on this conviction, the trial court in the exercise of the authority conferred by section 669 of the Penal Code, made an order that the sentence run consecutively

to those pronounced on certain other convictions. It is ordered, therefore, that the order so made be set aside and that a new order be entered by the trial court directing whether, in view of the present state of the record, the appellant shall serve the sentence heretofore pronounced on this conviction concurrently with or consecutively to any other sentence or sentences imposed; that said new order be made and entered within sixty days after the filing of the remittitur herein in the trial court, and that a copy thereof be forwarded to the warden of the state prison wherein appellant is imprisoned.

In accordance with the views above expressed it is ordered that the judgment of conviction in action No. 32,105 be modified by striking therefrom the words "while armed with a weapon," and as so modified the judgment of conviction and the order denying the motion for new trial be and the same are affirmed. It is further ordered that the judgments of conviction and the orders denying new trials in each of the remaining actions be and the same are affirmed. It is further ordered that copy of the remittitur be served upon the Board of Prison Terms and Paroles.

KNIGHT, J., concurred.

PETERS, Presiding Justice (concurring in part).

I concur and dissent.

I agree that the consolidation for trial of the seven informations was proper. I also agree that the evidence is sufficient to sustain the respective convictions. I disagree, however, with the majority opinion in so far as it holds that the exclusion of Mrs. Leep's testimony was not prejudicial error. It is my opinion that the exclusion of this evidence requires a reversal in case 32,106 (kidnapping on July 10, 1940, of Allen F. McLean) and case 32,107 (robbery on July 10, 1940, of Allen F. McLean). I base this conclusion on the following matters disclosed by the transcript.

The record shows that defendant was charged with seven offenses. So far as the two offenses charged to have been committed on July 10, 1940, are concerned, his defense was an alibi. He testified that Mrs. Leep was his attorney in a civil suit then pending; that on July 10, 1940, he telephoned her about 11:00 a. m.; that at her direction he visited her office where he remained until 2:00 p. m.; that the two then visited San Rafael where they called on the deputy district attorney; that the two spent some time together in San Rafael and came back to San Francisco at about 5:00 or 6:00 p. m.; that they were together thereafter until 11:00 p. m. when Mrs. Leep drove him home where he arrived close to 11:30 p. m. McLean, the prosecuting witness, had testified that the offenses here under discussion had been committed by defendant just before or just after 11:00 p. m.

As pointed out in the majority opinion, at the outset of the trial the rule to exclude all witnesses was invoked. Mrs. Leep did not then disclose that she intended to testify. She had been the attorney for the defendant in a civil case and occupied a seat at the counsel table. When Mrs. Leep was called as a witness the trial court absolutely refused to permit her to be sworn—not because her testimony would be irrelevant, but because in its opinion, the witness by violating the exclusion order had rendered herself incompetent.

What is the proper rule to apply to such a situation? The majority opinion concedes that it was error to exclude her testimony. That this concession is in accordance with the law is supported not only by People v. Russell, 34 Cal.App.2d 665, 94 P.2d 400, but also by People v. Boscovitch, 20 Cal. 436; People v. Mack, 115 Cal.App. 588, 2 P.2d 209, and Mintzer v. Wilson, 21 Cal.App.2d 85, 68 P.2d 370. People v. Boscovitch, supra, is the leading case in this state. In that case the factual situation was identical with that presented in the instant case. On appeal the Attorney General confessed error. The Supreme Court held that reversible error had been committed, and, in this connection, stated:

"If the witnesses offered disregarded the rule of the court excluding their presence, until called, during the progress of the trial, the court might have punished them as for a contempt. The fact constituted no ground for the exclusion of their testimony. The defendant could not enforce the rule, and to deprive him of the benefit of their testimony for its disobedience, without fault on his part, was manifestly unjust and illegal." In Mintzer v. Wilson, supra, a civil case was reversed because a witness violating the rule was not permitted to testify.

The basis of the rule is obvious. The right of a defendant to present the facts of his defense should not be abrogated because of the misconduct of a witness over

whom he has no control. The witness who violates the order of exclusion may be guilty of reprehensible conduct, and such witness may be punishable by contempt, and such conduct may affect the witness's credibility, but it must be remembered that it is not the witness that is on trial. The issue before the court is the guilt or innocence of the defendant. In order that such issue may be properly determined, the defendant is legally and constitutionally entitled to present the facts of his defense.

The majority opinion recognizes that the trial court committed error in refusing to permit Mrs. Leep to testify, but holds that since there was no offer of proof, the conceded error was not prejudicial. It is, of course, the rule, at least since the adoption of article VI, section 4½ of the Constitution, that it is incumbent upon the appellant not only to show error, but also that the error was prejudicial. The instant case, however, is not one where the trial court erroneously refused to permit a witness to answer a question, the relevancy of which does not appear from the question (in which case an offer of proof is indispensable), but is a case where the trial court refused to permit the witness to be sworn on the ground that by violating the exclusion rule she had rendered herself incompetent. In such a case an offer of proof, although proper, is not always indispensable. The true rule is stated in 64 Corpus Juris, 123, section 141, the text being supported by many authorities, and no contrary cases noted, as follows:

"An offer of proof is unnecessary where the offer would be a useless ceremony, or the evidence is rejected as a class, or where the court indicates such offer would be unavailing. An offer of proof is unnecessary where the court rules * * * that the witness is incompetent * * *." It is to be noted that the majority opinion cites no case to the contrary.

The reason for this exception to the general rule requiring an offer of proof is obvious. Such an offer is required for two reasons. In the first place, it is required so that the trial court may have the opportunity of ascertaining the relevancy of the proffered testimony. Where the trial court absolutely refuses to permit the witness to testify, regardless of the nature of his testimony, obviously an offer of proof would not serve this purpose. In the second place, an offer of proof is required so that the appellate court can ascertain whether the error in excluding the evidence was prejudicial. If the record is completely devoid of any showing on this issue and there is no offer of proof, the error in refusing to permit a witness to testify is not prejudicial, because it is incumbent upon the appellant to show prejudicial error. But where the record shows, with reasonable certainty, the probable subject matter that would have been testified to by the witness, the failure to make an offer of proof is not fatal to the appeal.

The majority opinion purports to state the rule substantially as it is stated in this dissent, but holds that a perusal of the record demonstrates that Mrs. Leep was probably called only to corroborate the several witnesses who had testified that she did not tell them what to say on the witness stand. I agree that the exclusion of this cumulative and corroborative testimony, although error, was not prejudicial. But this is not the only thing disclosed by the record. As already pointed out, defendant's defense to the two crimes alleged to have been committed on July 10, 1940, was that he was in the company of Mrs. Leep, an attorney at law, all that day and until after the hour the crimes are supposed to have been committed. It is true that the defendant did not so testify until after Mrs. Leep had been held to be an incompetent witness, but it would be an astonishing rule of law that would hold that in determining whether prejudicial error occurred the court must stop reading the transcript at the point where the trial court committed the error. Obviously, the record must be read as a whole. In determining whether the record reasonably discloses the probable subject matter of Mrs. Leep's testimony, in order to determine whether the erroneous order holding her to be incompetent was prejudicial, we should give the benefit of the doubt to the defendant. This is so because the error was the result of an improper objection by the prosecuting attorney and the arbitrary action of the trial court. The defendant was in no sense to blame.

Tested by these standards, what is disclosed? The record shows that, as to these two crimes, defendant's defense was an alibi—that he was in the company of his attorney, Mrs. Leep, when the crimes were committed. Is it an unnatural inference that she was called to verify that statement? I think not. Under the circumstances, are we not compelled to infer that this would have been the subject of her tes-

timony? I think we are. Can we say, as does the majority opinion, that after the defendant had testified he should have again produced Mrs. Leep or made an offer of proof? I think not. Such a rule implies that the trial judge would intentionally commit error as long as he thought Mrs. Leep's testimony was of only minor importance, but would overrule himself if he knew her testimony was vital.

I believe that if we are to give more than lip service to the fundamental rule that a defendant—even a guilty one—is entitled to a fair trial, then under the circumstances of this case a reversal of the two convictions under discussion is required.

Appellant cannot successfully contend that Mrs. Leep might have testified as to issues involved in the other cases. It is incumbent upon appellant to show prejudicial error. In the absence of an offer of proof, and in the absence of a showing that the record reasonably discloses the probable nature of the testimony to be given by the witness, no prejudicial error has been shown.

It is therefore my view that the convictions of the two offenses alleged to have been committed on July 10, 1940, should be reversed.



50 Cal.App.2d 1

LAFRENZ et ux. v. STODDARD.

Civ. 11811.

District Court of Appeal, First District, Division 2, California.

Feb. 17, 1942.

Rehearing Denied March 19, 1942.

Hearing Denied April 16, 1942.

1. Automobiles ⇐160(4)

Under statute, a motorist was bound to yield the right of way to a pedestrian in a legally established cross-walk. Vehicle Code, § 560, St.1935, p. 188.

2. Automobiles ⇐160(3)

A motorist had a general duty to keep a lookout for pedestrians who might be lawfully using a legally established cross-walk.

3. Automobiles ⇐244(6)

Evidence that motorist failed to see pedestrians who were crossing street in a legally established cross-walk, that pavement was dry, that headlights on automobile were on, and that intersection where accident occurred was well lighted, warranted judgment against motorist for injuries sustained by pedestrians when struck by automobile. Vehicle Code, § 560, St.1935, p. 188.

4. Damages ⇐132(3)

$7,500 was proper for injuries sustained by a married man where injuries, which necessitated confinement in a hospital for 38 days, caused considerable pain and consisted of fractures of third, fourth, and fifth lumbar vertebrae and a tear of ligaments between fifth lumbar process and the sacrum and ilium, and injured person was deprived of 20 per cent. of motion of his lower back.

5. Damages ⇐132(7)

$21,600 was proper for injuries sustained by a married woman where injuries consisted of fractures of both bones in both legs below knees, resulting in the woman's legs becoming permanently deformed and rendering it difficult and painful for her to walk, and there was medical testimony that woman had suffered serious injury to her brain, and the woman had sustained special damages to extent of $1,968 for hospital and rest home care before time of trial.

6. Trial ⇐207

In automobile accident case where plaintiff testified that after accident defendant told plaintiff not to worry and that, "I am well insured", instructing jury to disregard quoted words and that such testimony was admitted only for purpose of tending to show an admission of liability was proper.

7. Trial ⇐127

Where a defendant makes a statement which may be fairly construed as an admission or acknowledgment of responsibility, and as a part of the same statement makes incidental reference to the fact that he carries insurance, the entire statement is admissible, not to prove the fact of insurance, but solely because reference to insurance is part of the admission.

8. Witnesses ⇐275(3)

In automobile accident case where defendant denied on direct examination that he had told plaintiff that defendant was insured and that insurance company would have to make good for plaintiff's injuries, defendant could properly be cross-examined respecting a subsequent conversation between plaintiff and defendant where purpose of

cross-examination was to elicit that in such conversation defendant did not deny that he had made the statement concerning insurance.

9. Appeal and error ⇐1048(6)

Where subject of plaintiff's inquiry on cross-examination of defendant was proper, the fact that plaintiff's counsel abandoned the inquiry in deference to trial judge's doubt as to its propriety placed counsel in no worse position than if he had pursued the inquiry.

10. Trial ⇐217

The better practice in an automobile accident case is not to go outside record to instruct that no insurance company is interested in the case.

11. Appeal and error ⇐1067

In an automobile accident case, striking out the words "or interested in" from defendant's proposed instruction reciting that no insurance company was a party to or interested in the action was not prejudicial.

12. Evidence ⇐571(1)

In action for personal injuries, the jury was not bound to accept a physician's diagnosis of plaintiff's condition.

13. Trial ⇐109

Argument of plaintiff's counsel, in opening statement in personal injury action, stating that plaintiff became for a time insane as result of injuries, was not prejudicial where evidence justified finding that plaintiff suffered from temporary insanity as result of injuries and jury was advised that opening statement was not evidence and was instructed that case was to be decided solely on evidence and that arguments of counsel were not to be taken as evidence.

14. Appeal and error ⇐1060(1)

Nothing short of bad faith in opening statement or a gross misconception of what is admissible, resulting in bringing to attention of jury matters wholly irrelevant, and of a nature calculated to create so profound an impression that charge of trial court cannot eliminate the prejudice produced, will justify an appellate court in vacating a judgment on ground of prejudicial remarks in opening statement.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Henry Lafrenz and wife against Elgin Stoddard for personal injuries sustained when plaintiffs were struck by defendant's automobile. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Robert L. Lamb, of San Francisco, for appellant.

Vincent W. Hallinan and Devine & Devine, all of San Francisco, for respondents.

DOOLING, Justice pro tem.

Plaintiffs Henry Lafrenz and Rita Lafrenz, his wife, after a jury trial recovered judgment for personal injuries of $7,500 and $21,600 respectively. We cannot agree with appellant that the question of his negligence was a close one on the evidence or that the verdicts appeared to be excessive.

[1-3] Respondents were crossing Harrison Street between Seventh and Eighth Streets in San Francisco in a legally established cross-walk at the intersection of Langton Street with Harrison. Before stepping off the curb they looked to their left toward Seventh Street, saw no vehicles approaching and waited until the traffic signal at Seventh Street turned red. When they reached the center of Harrison Street they stopped, looked to their right and saw no vehicles or headlights nearer than Eighth Street and proceeded. As they approached the south curb of Harrison Street they were struck by appellant's automobile. Appellant testified that he did not see respondents until the instant before he struck them when he jammed on his brakes, killing his engine. He left skid marks on the pavement 29 feet in length and stopped in three or four car lengths, 48 to 64 feet. The accident occurred at about 5:50 p. m. on December 9, 1939; the pavement was dry, the headlights of appellant's automobile were on and the intersection was well lighted. Appellant's only explanation for not seeing respondents sooner was that they were "apparently hurrying as fast as they could and * * * Mr. Lafrenz was apparently trying to draw Mrs. Lafrenz after him as fast as they could go under the circumstances." The testimony of the respondents and the only other eye witness is that respondents were walking. In view of the duty cast upon appellant by section 560 of the Vehicle Code, St.1935, p. 188, to yield the right of

way to a pedestrian in a legally established cross-walk and his general duty to keep a look out for persons who might be lawfully using such cross-walk, his failure to see respondents in the cross-walk under the circumstances existing in this case could hardly be attributed to anything other than negligent inattention.

On the question of damages the evidence showed as to Henry Lafrenz that he was unable to rise from the street after the accident; was confined to a hospital for thirty-eight days; during the first two weeks was unable to move and had to be fed; suffered considerable pain and still suffers pain when he walks; had fractures of the third, fourth and fifth lumbar vertebrae and a tear of the ligaments between the fifth lumbar process and the sacrum and ilium; the fifth vertebral process is now fused to the sacrum; he has been deprived of about 20 per cent of motion of the lower back; there is a tendency to pull the whole spine off balance; he suffers from an incontinence of urine which necessitates his constantly wearing a pad and clamp; and his injuries are now permanent.

[4, 5] Respondent Rita Lafrenz had fractures of both bones in both legs below the knees and her legs are now permanently deformed so that the knees practically knock together at every step rendering it difficult for her to walk. She has pain in both ankles and legs particularly when walking; she was rendered unconscious and lost all recollection until some time in March 1940, when she first realized that she was in the San Francisco Hospital; a spinal puncture on the night of the accident disclosed gross blood in her spinal fluid; she was so disoriented and irrational that she was removed to the psychopathic ward of the San Francisco Hospital for two weeks and still suffers from dizziness, pains in the head and faulty memory. Dr. Sooy who first saw her eleven months after her injuries were incurred expressed the opinion that she had suffered damage to the brain of a serious nature and that no further improvement can be expected. She was in the San Francisco Hospital over four months, and since has been at various sanitariums and the Laguna Honda Home. Her special damages for hospital and rest home care to the time of trial were $1,968. In view of the injuries received we cannot hold that the amounts of the verdict were not well justified.

Appellant cites no cases in support of his claim that the damages were excessive and we understand that he makes no contention that standing alone the damages allowed would justify a reversal. It is his position rather that in view of the closeness of the evidence on the question of liability and the amounts allowed for damages the errors which he alleges to have occurred on the trial must be held to have been prejudicial.

[6, 7] Respondent Henry Lafrenz testified that some time after the accident appellant called on him at which time he stated: "Mr. Lafrenz, I don't want you to worry too much. I am well insured and they will have to make good."

There was an immediate objection, assignment as misconduct, and motion for mistrial. The court instructed the jury to disregard the portion, "I am well insured" and admonished them that no insurance company is a party to this lawsuit, and further that the evidence was admitted only for the limited purpose of tending to show an admission of liability. This ruling was correct under the settled rule "that where a defendant makes a statement which may be fairly construed as an admission or acknowledgment of responsibility and as a part of the same statement makes incidental reference to the fact that he carries insurance, the entire statement is admissible, not to prove the fact of insurance, but solely because the reference to the insurance is part of the admission." North v. Vinton, 17 Cal.App. 2d 214, 219, 61 P.2d 950, and cases there cited; McPhee v. Lavin, 183 Cal. 264, 191 P. 23; Weiner v. Mizuta, 6 Cal.App. 2d 142, 44 P.2d 421; Bamber v. Belprez, 15 Cal.App.2d 110, 58 P.2d 1325.

On direct examination of appellant the following question was asked by his own attorney and the following answer given: "Did you ever say this to Mr. Lafrenz, 'Mr. Lafrenz, I don't want you to worry too much. I am well insured. They will have to make good.' A. I did not."

On cross-examination counsel for respondents asked appellant: "On the last trial, you heard Mr. Lafrenz testify on the witness stand that you said to him, 'Don't worry. I am well insured and they will have to make good.' "

After objection was overruled and without answer by the witness, counsel for respondents asked about a conversation between appellant and respondent Mr. Lafrenz: "Did Mr. Lafrenz say, 'One thing I am sore at you about is you are trying to make a liar out of me?' A. Yes."

After further objection and argument appellant was asked: "Q. Please state what the rest of the conversation was as to what was stated, to your knowledge: 'You tried to make a liar out of me' and what your response was."

Another objection and more argument followed and the trial judge asked counsel to discuss the matter with him in chambers. In chambers counsel for respondents stated: "At this time, in view of the court's doubt as to the admissibility of this evidence, I will withdraw the question. However, I want to state that the—and this is outside the presence of the jury, and in the court's chambers—that the purpose of asking the question was to elicit that when the plaintiff Lafrenz stated to the defendant Stoddard that he knew very well that he had made the statement that the insurance company would have to make good for his injuries, that Mr. Stoddard did not deny the accusation, but stated instead, 'Well, Mr. Lafrenz, I couldn't make them. I couldn't make the insurance company make good.'"

Upon returning to court the trial judge instructed the jury that the testimony elicited on that subject "shall be disregarded by the jury for all purposes."

[8] The inquiry for the purpose stated by counsel was within the field of legitimate cross-examination. If appellant had admitted making such a statement it would have tended to impeach his testimony on the stand and would also have been independently relevant as an additional admission of liability. If he had denied making the statement Lafrenz could properly have testified to it for both purposes. The other questions asked were stated by counsel to be preliminary and we think properly allowed, but in any event the court promptly admonished the jury to disregard them for all purposes.

[9] The fact that counsel for respondents abandoned the whole inquiry in deference to the doubt of the trial judge as to its propriety should put him in no worse position than if he had pursued it, as we believe he had a right to do. We cannot find on the record that any prejudice resulted to appellant.

Appellant proposed the following instruction from which the trial judge struck out the words which we have placed in parentheses:

"In your examination for the purpose of determining your fitness to act as jurors in this case, you were questioned concerning your interest in any casualty insurance company. This was merely for the purpose of determining your frame of mind.

"I instruct you that this is a case between the plaintiffs, Henry Lafrenz and Rita Lafrenz, on one hand and defendant, Elgin Stoddard, on the other. No insurance company is a party to (or interested in) this action."

[10, 11] While the giving of an instruction in the form proposed was held not to constitute error in Brown v. Yocum, 113 Cal.App. 621, 298 P. 845, the striking of the same words from a proposed instruction was expressly approved in Elmore v. County of Lassen, 10 Cal.App.2d 229, 51 P.2d 481. It would seem the better practice not to go outside the record to instruct that no insurance company "is interested in" the case, but in any event we cannot hold that appellant suffered prejudice by the omission. The jury must be given credit for ordinary intelligence and we can perceive no other reasonable construction that they could put on the instruction as given than that they were not to consider the question of insurance in arriving at a verdict.

Complaint is made that respondents' counsel in his opening statement was guilty of prejudicial misconduct in referring to a police report, which he knew was inadmissible, and afterwards made no effort to get into evidence, and in stating that respondent Rita Lafrenz became for a time insane as a result of her injuries and is obsessed with a terror that she may be declared insane and confined in an institution.

There was substantial proof of Mrs. Lafrenz's temporary insanity as a result of her injuries. Dr. Pinkham testified that "when she entered the ward shortly after surgery her condition was rather insane, she was completely irrational at times. * * * Later, I believe it was two months later, she was transferred to the physcopathic side because of her mental condition."

Dr. Poliak, a witness called by the defense who saw her in the psychopathic ward, found that "she was very confused and disoriented. She didn't know where she was...her talk was incoherent and irrational. She was seeing imaginary things, having hallucinations in other words ...she didn't remember how she got in the hospital or what it was all about, and also what we call confabulating, telling stories that obviously were not true."

[12] Dr. Poliak diagnosed her condition as Korsakoff's psychosis which is generally the result of alcoholism. However, the jury was not bound to accept this diagnosis. Dr. Sooy testified to a serious brain injury. Dr. Poliak's diagnosis was based on the patient's statement to him: "I asked her how much drinking she had been doing. At first she denied drinking at all; later she admitted drinking." Such an admission by a woman given to "confabulating" might well be regarded by the jury as another confabulation. There was no other evidence of Mrs. Lafrenz's addiction to the use of alcohol. Also Dr. Poliak testified that after further observation he made a few additional diagnoses. He made a diagnosis of cerebral arteriosclerosis. "Sometimes the vessels of the brain come hardened before other parts of the body,—and show a post-traumatic syndrome on her history of having been in an accident." Translated into layman's English Dr. Poliak found symptoms of traumatic effect upon the preexisting hardening of the brain arteries resulting in Mrs. Lafrenz's mental disturbance. Viewing the evidence as a whole the jury would be well justified in finding that she suffered from temporary insanity of several months duration as a result of injuries to her brain.

The jury was fully advised that the opening statement was not evidence. Counsel for respondents prefaced his statement by saying: "What I am saying is not argument or evidence.... You understand in this opening statement the plaintiff will point out what he expects the evidence will show. You understand that is the entire purpose of an opening statement."

[13] The trial court instructed the jury that they were to decide the case solely on the evidence and not to take arguments of counsel as evidence. It is hard to see how prejudice resulted. Any trial lawyer or judge at all experienced with juries knows that the making of positive claims that the evidence will show certain things followed by failure of proof on the subject is a two-edged sword apt to be more harmful to the one wielding it than to his opponent. Juries are frequently adversely impressed when proof falls short of promise, and the astute trial lawyer in his argument to the jury very often points out with telling effect the failure of his adversary to support by evidence the things which he forecast in his opening statement would be established.

It is only where the statements are inflammatory in character and calculated to blind the jury to the succeeding lack of proof that they will be found ordinarily to be prejudicial. The statements complained of here were not of that character.

[14] We think the rule applicable in such cases is correctly stated in Prentis v. Bates, 93 Mich. 234, 53 N.W. 153, 154, 17 L.R.A. 494: "It must be an exceedingly plain case of an abuse of privilege which will justify the setting aside the verdict on the ground of improper opening either in statement of the law or fact. Nothing short of bad faith or a gross misconception of what is admissible, resulting in bringing to the attention of the jury matters wholly irrelevant, and of a nature calculated to create so profound an impression that the charge of the court cannot eliminate the prejudice produced, will justify an appellate court in vacating a judgment on such grounds; and, in determining whether such an error has been committed, it is believed to be entirely safe to credit the jury with at least average intelligence."

The same rule in substance is announced in Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 737, 738, 81 P.2d 950, 118 A.L.R. 533.

We find the verdicts amply supported by the evidence and are satisfied that no prejudicial error occurred during the trial.

The judgments appealed from are affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

DRISCOLL v. EAST-WEST DAIRYMEN'S ASS'N et al.

Civ. 6433.

District Court of Appeal, Third District, California.

Feb. 11, 1942.

1. Statutes ⇐227

The word "may" used in the statute in some instances has the effect of "must" but generally the use of the word "may" carries no mandate and it is only when the context indicates or the object to be attained compels such a construction that the imperative shall be deemed the legislative intent.

See Words and Phrases, Permanent Edition, for all other definitions of "May" and "Must".

2. Agriculture ⇐6

The word "may" as used in provision of Agricultural Code that each cooperative association under its by-laws may provide for the manner of determining the value of a member's interest and make provision for its purchase by association on withdrawal of member, does not mean "must" and under the provision an association may or may not provide for immediate purchase and payment of interest of members voluntarily withdrawing. St.1933, p. 257, § 1200.

3. Agriculture ⇐6

Since cooperative marketing associations have become firmly implanted in the national scheme, courts will be reluctant to construe statute so as to destroy such an agency without the consent of the majority of its members.

4. Agriculture ⇐6

A by-law of a dairymen's cooperative marketing association which provided that interests of members in the association's property should be payable on liquidation of association was valid, and members who voluntarily withdrew from association which was a solvent, going concern and was not in process of liquidation, could not recover their share of money paid in and remaining in the funds of the association. St.1933, pp. 255–265 and p. 257, §§ 1191–1221 and § 1200.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Patricia Driscoll against the East-West Dairymen's Association and others for moneys paid to the named defendant, a cooperative association, by its members who withdrew from the association. From an adverse judgment, the plaintiff appeals.

Affirmed.

John J. Taafe, of San Francisco, C. Ray Robinson and Willard B. Treadwell, both of Merced, and George B. Harris, of San Francisco, for appellant.

J. L. Royle, of Fresno, and F. M. Ostrander, of Merced, for respondents.

PARKER, Justice pro tem.

The case was presented in the trial court upon an agreed statement of facts supplemented by evidence illustrative and in elaboration of the agreed statement. There is little dispute as to the facts, the question here presented being one of construction.

The plaintiff is the assignee of a large number of persons and her rights depend entirely upon the rights of her assignors. We will hereinafter use the term "plaintiff" without regard to any assignment, treating plaintiff as though she were pursuing her individual cause, giving to her the status of her assignors. The defendant dairymen's association is a non-profit organization created and existing under the laws of this state, the statute governing such associations being now found in the Agricultural Code, § 1191 et seq., having been taken directly from the Civil Code, section 653bb et seq. Inasmuch as there was no change other than in the creation of a separate code, we will cite the law by reference to the appropriate sections of the Agricultural Code only.

The general scheme of cooperative association is found in the Agricultural Code, constituting chapter 4 thereof, and embracing sections 1191 to 1221, inclusive, St.1933, pp. 255–264. Section 1200 provides that each association formed under the provisions of the charter shall adopt for its government and management a code of by-laws not inconsistent with the chapter. This same section 1200 provides that:

"Each association, under its by-laws, may provide for any or all of the following matters:

* * * * * *

"(j) The number and qualification of members or stockholders of the association and the conditions precedent to mem-

bership or ownership of common stock; the method, time and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members and of the shares of common stock; the conditions upon which and time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association; and the mode, manner and effect of the expulsion of a member; the manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or upon the expulsion of a member or forfeiture of his membership, or at the option of the association, the purchase at a price fixed by conclusive appraisal by the board of directors; and the conditions and terms for the repurchase by the corporation from its stockholders of their stock upon their disqualification as stockholders. In case of the expulsion of a member, and where the by-laws do not provide any procedure or penalty, the board of directors shall equitably and conclusively appraise his property interest in the association and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion."

The defendant association, here involved, did adopt by-laws. The particular by-law around which the controversy centers is as follows:

"Each person upon becoming a member of the Association shall pay to the Association one-half cent per pound on every pound of butter fat delivered by him to the Association, or marketed or disposed of through the facilities provided by this Association; said sum to become due and payable on the first day of each and every month, and said sum shall be deductible by said Association from the sums due each member for milk delivered during the preceding month."

The foregoing, with occasional addition, will serve as sufficient background from which the controversy may be reviewed.

The plaintiff had been a member of the defendant association, entitled to all privileges of membership under the by-laws. Acting within the scope of the said by-laws and in full compliance therewith, plaintiff chose to withdraw from membership and did so. While a member she had paid dues consisting of certain moneys deducted from the amounts received on her account by the association for milk which she had marketed through the association. Having withdrawn, she demands that the moneys paid in by her and remaining in the funds of the association be accounted for and her share thereof determined and paid to her.

The defendants concede that the plaintiff has some right or interest in the funds of the association, but claim that any distribution must, pursuant to the by-law hereinbefore set forth, be deferred until liquidation of the association. The trial court sustained the contention of defendants and determined that plaintiff was not entitled to any present accounting nor was she entitled to have her liquidation rights presently determined.

The question here to be determined relates to the validity of the by-law on distribution of assets and rights of withdrawing members.

It may again be noted that plaintiff here is the assignee of a large number of persons whose rights are unequal and among whom, upon distribution, differences both in sums due and in rights accruing, might arise. Many points are urged by the respective parties in support of the judgment and by way of attack thereon. But regardless of what form the attack takes, it always comes back to the one point, namely, the validity of the by-law. A determination of this point will dispose of the appeal and render unnecessary further inquiry or consideration of the many other contentions made, whether in support of the judgment or contra. It is agreed that the association is a solvent, going concern and not in process of liquidation. The by-law questioned sets forth the interest of each member in the property of the association and provides that such interest in the property shall be payable upon the liquidation of the association. The first attack on the by-law is that the same is in direct contravention of the general law, inconsistent with the provisions of the Charter and of the Agricultural Code and that it is a by-law not within the power of the association to adopt.

[1, 2] The governing section, sec. 1200, Agricultural Code, provides that each association formed under the provisions of the chapter, under its by-laws, *may provide for* "* * * the manner of determining the value of a member's interest and provision for its purchase by the association

upon the death or withdrawal of a member." Appellant argues that the permissive *"may"* becomes *"must"* and that no discretion nor alternative remains in the association in regard to its by-laws; in other words, that all associations are commanded to adopt by-laws and that such by-laws are set forth in the section quoted. It is conceded that in certain instances the word "may" has the effect of "must." But, ordinarily, the use of the permissive term carries no mandate. It is only where the context indicates or where the object to be attained compels such a construction that the imperative shall be deemed the legislative intent. The legislature, in adopting the provisions setting up a voluntary nonprofit organization, would not ordinarily cast the mandatory provisions in permissive form. If it had been the legislative intent to set up a rule of conduct for all such associations and to prescribe and limit the rights and liabilities accruing through membership therein, it would have done so without the unnecessary mechanics of separate by-laws for each organization to be thereafter formed. We note also that the subdivision of section 1200 quoted, subd. j, refers to by-laws governing expulsion and what the by-laws may provide in that respect. It is apparent that the term "may" does not mean "must" in the latter case for the obvious reason that provision is made for the expelled members in cases where the by-laws are silent. It is thus apparent that while the associations might or might not provide for immediate purchase and payment for the interests of members voluntarily withdrawing, it could not enforce expulsion without fair compensation.

We hold that the phrasing of the section does not compel or warrant the mandatory construction. We may then consider the general purposes of all such legislation and the end sought to be accomplished thereby.

[3] The general purpose is reflected in the name chosen to designate the association, viz., "Co-operative." It was the legislative plan, conforming to a then manifest public policy, to permit and encourage, without the hampering restrictions peculiar to profit corporations, the pooling of interests between those engaged in similar enterprises and the securing of united action for the common benefit. From the inception of these organizations the scheme was deemed to be for the personal benefit of the members only to the extent that the individual profited through the operation of the enterprise. Tomes have been written on the purposes of cooperative associations. But nowhere has it been argued that the paramount concern was the advancement of the individual interest, as such. There is no need to wander into history or trace the growth of the cooperative idea. Cooperative marketing associations have become an established factor in the economic plan of the country, fostered and encouraged by legislative enactment, judicial construction and administrative policy. Thus firmly implanted in our national scheme, courts will be reluctant to construe statutes so as to destroy such an agency without the consent of a majority of its members. It is conceded that the present rule of statutory construction and of judicial decisions looks toward the general policy of the law as distinguished from the rule of private property or private rights in the abstract. As far as these announced ideas may apply to the instant case, there seems to be a dearth of California authority. However, the subject has been quite fully discussed in other jurisdictions. Clear Water Citrus Ass'n v. Andrews, 81 Fla. 299, 87 So. 903; Burley Tobacco Growers' Co-op. Ass'n v. Tipton, 227 Ky. 297, 11 S.W.2d 119; Texas, etc., Cotton Ass'n v. Lennox, 117 Tex. 94, 297 S.W. 743. See, also, Hanna on Law of Co-operative Marketing Associations.

In Evans and Stokdyk on The Law of Co-operative Marketing, at page 84, we find it stated:

"The members' demand for service is responsible for the creation of them (facilities of the corporation) and any advantage he may claim is only in proportion to the use he makes of them. His purpose is not primarily that of acquiring property interest, but merely of providing a means of marketing his products during the period of his membership. There is no logical ground upon which he should be permitted arbitrarily to withdraw his interest at the expense of the life of the association."

[4] In the case before us, plaintiff and her assignors have received in full all paid dues they were entitled to receive, namely, the benefits accruing to them from the organization and collective marketing during the period of their membership. The plan of the defendant association and its members was and is to further expand to the extent of procuring or erecting perma-

nent plants and equipment, and the funds available therefor inure to the benefit of those who, at present, constitute the association and to those who may subsequently join therein. Plaintiff became a member by his own volition and submitted to the by-laws which are now attacked.

It would be a futile task to attempt any present accounting, in the absence of a right to distribution or payment, for the obvious reason that, in a going concern, the amount due upon future distribution would vary and become subject to the vicissitudes of the intervening period.

The questioned by-law, being in all respects valid and binding, is determinative of the rights of all parties to the present action.

The judgment is affirmed.

TUTTLE, J., and THOMPSON, Acting P. J., concurred.



50 Cal.App.2d 60

PEOPLE v. SHAPIRO.

Cr. 3541.

District Court of Appeal, Second District, Division 1, California.

Feb. 19, 1942.

1. Criminal law ⇐260(11)

On appeal from conviction where jury was waived and cause was submitted to court on transcript of evidence adduced at preliminary examination, every fact which the trial court could reasonably have deduced from the evidence was required to be assumed by the reviewing court in favor of the trial court's decision.

2. Criminal law ⇐552(4)

Fact that evidence is circumstantial does not impair its intrinsic value, since law makes no distinction between circumstantial and direct evidence in degree of proof required for conviction, and merely requires that guilt be established beyond reasonable doubt by evidence of the one character or the other or both.

3. Gaming ⇐98(5)

Evidence including physical facts, sustained conviction of keeping a room equipped with paraphernalia for purpose of recording bets or wagers on horse races. Pen.Code, § 337a, subd. 2.

4. Criminal law ⇐260(11)

Where evidence is as equally compatible with innocence as it is with his guilt and the trial court as trier of fact rejects hypothesis pointing to innocence, and there is evidence to support implied finding of guilt as the more reasonable of the two hypotheses, reviewing court is bound by finding of the court, and it is only where there is no substantial evidence to support conclusion reached by the trial court that the reviewing court can set aside its determination.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Mike Shapiro was convicted of violating statute making it unlawful to keep, maintain or occupy any room, apartment, etc., equipped with books, papers, devices, apparatus or paraphernalia for purpose of recording bets or wagers on horse races, and he appeals.

Affirmed.

Russell E. Parsons, Joseph L. Fainer, and Philip W. Erbsen, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, all of the above-named defendants were charged in count 1 with a violation of subdivision 2 of section 337a of the Penal Code; count 2 charged them with the offense denounced by subdivision 4 of the same Penal Code section; while in count 3 the defendants were accused of violating subdivision 1 of the same section. The defendants pleaded not guilty, waived trial by jury, and the cause was submitted to the court upon the transcript of the evidence adduced at the preliminary examination. All defendants were acquitted as to counts 2 and 3, and with the exception of appellant were found not guilty on count 1, the latter being found guilty of the offense charged in said count

1. His motion for a new trial was denied. He appeals from the judgment and the order denying his motion for a new trial.

Generally speaking, subdivision 2 of section 337a of the Penal Code, which forms the basis of count 1 upon which appellant was convicted, makes it unlawful, among other things, for any person to keep, maintain or occupy any room, apartment, etc., equipped with books, papers, devices, apparatus or paraphernalia for the purpose of recording bets or wagers on horse races.

The factual background of this prosecution may be thus summarized: Police officers entered a room located in an apartment house in the city of Los Angeles, where they found appellant seated at a table. On the table was a cash book, with $25.60 in change on top of some betting markers and collection sheets. In the cash book were found similar collection sheets. Several yellow sheets also were found on the table. At the trial it was stipulated that one of the officers was qualified to testify as an expert in connection with the business of bookmaking, and he identified the various sheets as collection sheets and totalized betting markers. Behind the davenport the officers found a file containing several papers, and under the davenport and a chair were found several scratch sheets, while additional scratch sheets were found on the premises. Certain numbers appearing on one of the prosecution's exhibits, when compared with the scratch sheet for July 30, 1941, showed that they referred to various horses racing at Rockingham and Arlington Parks, the amounts of various bets and the information whether the bettors won or lost. Other numbers on people's exhibits above referred to, when compared with scratch sheets for July 26th, showed that such numbers also referred to various race horses running on that date. As the officers were about to enter the apartment, defendant Myra Durschlag opened the door from the inside. She held a purse in her hand, which contained among other things a blue notebook and a sheet of white paper. The officers also found a scratch sheet for August 1, 1941, in a car registered to the last-named defendant parked in front of the premises. On one of the collection sheets appeared the word "Myra." This was written in pencil at the top and showed various collections from and payments to different persons, with a net balance of $25.60, which it is to be noted is the identical amount of money found on the table at which appellant was seated. The officer found similar names on the paper taken from Myra Durschlag's purse and the daily account sheets containing the names of various bettors which were found in the file. Shortly after the entry of the officers into the room defendant Joe Durschlag arrived. Police officers took a yellow collection sheet and two betting markers for August 1, 1941, from his pocket. When compared with the scratch sheet for August 1, 1941, the officer found the numbers on the markers represented race horses running at Del Mar on that day and the amounts of the various bets.

Leon Jasper, another defendant, arrived about three minutes after defendant Joe Durschlag. In the inside pocket of his coat an officer found three yellow collection sheets and betting markers. When compared with scratch sheets found on the premises for July 26th and 31st, these showed that the numbers on the betting markers referred to race horses running at Arlington, Rockingham and Hollywood Parks on those days. They also showed the amount the players had bet and the amount, if any, which they had won. In the wallet of defendant Jasper the officers found a receipt on which appeared the appellant's name and a white sheet of paper with numbers, which the defendant admitted he had written.

It is noteworthy that several of the collection cards had markings thereon resembling those used in bookmaking activities described by the police officer. In the files were also found many loose sheets of paper similar to those used in the keeping of books. At the top of each sheet was a designation, such as "Andy," "Bert," "Ed," and other names and initials. On such sheets were numerous entries of charges, credits and balances, apparently entered with a bookkeeping machine. Several of the names on these account sheets were also found in the daily cash book. Under the head "Revenue" appeared a loose-leaf sheet marked "Winning and Losing," which was opened May 20th with a credit balance of $616.30, which balance fluctuated from day to day, and the last entry, bearing date July 31, 1941, showed a charge of $173.70, a credit of $73.65, and a credit balance of $14,430.36. On another sheet, marked "Wages," was a showing of the payment of $350 per week from May 31st to July 22nd. These payments were shown

to have been made to persons identified only by their first or given names, and were in amounts ranging from $30 to $60. The names of the recipients of these wages appeared also opposite various charges, averaging about a dollar per day, on a sheet headed "Gas Expense." The first entry was May 31st and the final entry was July 31st. In other words, there was a more or less complete set of books kept and maintained.

Appellant did not take the witness stand in his own behalf to explain his presence in the room or to deny any of the testimony hereinbefore narrated. In fact, he offered no defense whatsoever.

[1, 2] Appellant urges a reversal of the judgment herein on the sole ground that the evidence is insufficient to support the decision of the trial court finding him guilty of violating the provisions of subdivision 2 of section 337a of the Penal Code. In support of this claim it is argued that the evidence fails to establish that appellant either kept or occupied the apartment in question for the purposes denounced by the cited code section. In the adjudication of a charge made in a criminal proceeding, the court is confronted with the question of whether there is present proof of two distinct propositions: first, that the offense charged was committed; and second, that it was perpetrated by the person or persons accused thereof. In the case now before us, no doubt exists as to the first proposition. That a crime was committed is practically conceded by appellant, and indeed is amply established by the evidence. In determining whether appellant committed or participated in the commission of such crime, let us refer to the record for the existence therein of evidence, if any, from which the court could have justifiably drawn the inference of appellant's guilt. Every fact which the court could reasonably have deduced from the evidence must be assumed by us in favor of the court's decision. That the evidence was circumstantial does not impair its intrinsic value, because the law makes no distinction between circumstantial and direct evidence in the degree of proof required for conviction. It merely requires that guilt be established beyond a reasonable doubt by evidence of the one character or the other, or both.

[3] A review of the record herein discloses that when the officers arrived defendant Mrs. Durschlag had just opened the door of the apartment from the inside, preparatory to departing. Appellant was seated at a table in the living room, and in front of him on the table were a cash book and several collection sheets; and in this connection it might be noted that on two of the collection sheets appeared the name "Myra," Mrs. Durschlag's first name, the same being in her handwriting. Also upon the table was $25.60 in cash, which was the exact amount of the net balance shown on one of the cards bearing the name "Myra." Shortly thereafter the two other defendants entered, each having on his person collection sheets not only similar to those marked "Myra," but to others found in the apartment. In the absence of any explanation by the defendant of his presence in the room where the paraphernalia was under the circumstances above set forth, as well as those presented by the testimony hereinabove narrated, we feel that it was a fair inference for the court to draw that the three defendants came to the apartment to see appellant and deliver collection sheets and money to him, and that the latter was in possession of and occupied the room with bookmaking paraphernalia. The physical facts to which we have referred, coupled with the conduct of the defendant in connection therewith, are in our opinion amply sufficient to support a finding not only that the room was kept for the purpose of accepting wagers on horse races, but that the defendant was occupying the same and at the time of the entry of the officers was receiving and about to receive collection sheets and money from his co-workers. Such a conclusion is justified by reason of the fact that the evidence shows, through the exhibits introduced, that such had been the regular practice, as reflected by similar collection sheets found in the room.

[4] Appellant contends that the evidence in the case at bar is as equally compatible with his innocence as it is with his guilt, and that therefore we should reverse the judgment. Such is not the law. Under such circumstances, where the court or jury by its decision or verdict rejects the hypothesis pointing to defendant's innocence, and there is evidence to support the implied finding of guilt as the more reasonable of the two hypotheses, an appellate court is bound by the finding of the triers of fact. People v. Tom Woo, 181 Cal. 315, 184 P. 389; People v. Latona, 2 Cal.2d 714, 43 P.2d 260. It is only where there is no substantial evidence to support the conclusion reached by the court below that we can set aside its determination. In other words, unless the conclusion arrived at by the trial

judge or jury does violence to reason, an appellate tribunal is without authority in law to substitute its finding as to the ultimate fact of guilt for that reached by the forum constituted as the final arbiter thereof.

For the foregoing reasons, the judgment and the order appealed from are, and each is, affirmed.

YORK, P. J., and DORAN, J., concurred.



49 Cal.App.2d 662

PEARL et al. v. FIGONI.

Civ. 11796.

District Court of Appeal, First District, Division 2, California.

Feb. 11, 1942.

1. Appeal and error ⇐930(1)

Upon appeal from a judgment in favor of plaintiff, based on conflicting evidence, the facts most favorable to plaintiff must be assumed as proved

2. Landlord and tenant ⇐274(2)

Landlord's refusal to permit tenant to remove from leased house furnishings belonging to tenant until rent, which was in arrears, was paid, constituted a "conversion" rendering landlord liable for resulting damages.

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion".

3. Landlord and tenant ⇐274(7)

Where landlord refused to permit tenant to remove from leased house furnishings belonging to tenant until rent, which was in arrears, was paid, the measure of damages for such conversion was the fair market value of the property, all of which was lost to tenant as a result of being sold or otherwise disposed of by landlord, who brought an action for unlawful detainer and obtained a summary writ of possession without notice to tenant. Code Civ.Proc. § 1166a.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by John Pearl and others against L. Figoni for the conversion of personal property. From a judgment in favor of plaintiffs, defendant appeals.

Judgment affirmed.

F. E. Hoffmann and Raymond J. Daba, both of San Mateo, for appellant.

Jerome L. Schiller and Samuel G. Holcenberg, both of San Francisco, for respondents.

DOOLING, Justice pro tem.

This is an appeal from a judgment for the conversion of personal property. Respondents Pearl rented a house from appellant Figoni. When two months in default in their rent and on February 4, 1939, Mrs. Pearl with a Mr. Metcalfe and a moving van with three movers went to the rented house to remove the furnishings and furniture belonging to the respondents Pearl. There they met appellant Figoni who was later joined by a son and four or five others. Several hours were spent in an effort to remove the personal property from the house, during which time Figoni repeatedly made such statements as: "No, don't move anything because you still owe me rent"; "You cannot do it"; "They owe me the money and you cannot touch anything"; "You cannot move"; "No, you can not take a thing"; "No, don't take a thing"; "Not one stick of furniture goes out of here, and if it does, I call the law." When asked by one of the movers if they might not take everything except a gas stove, refrigerator and washing machine which should be ample to secure the payment of the rent due Figoni said: "No dice, it is all or nothing."

Mrs. Pearl began to cry and Figoni told her that if she gave him the key to the house he would allow her to take some bedclothing and personal belongings otherwise she would not be allowed to take anything. Under pressure of this position Mrs. Pearl gave the key to Figoni, removed the personal effects that Figoni permitted and left everything else in the house. Before leaving she gave her address to Figoni.

[1] Thereafter Figoni brought an action for unlawful detainer, got a summary writ of possession under section 1166a of the Code of Civil Procedure without notice to respondents and ultimately sold

part of the contents of the house, gave some of them away and threw the balance on the city dump. While letters were addressed to respondents advising them that they could have their property upon paying accrued charges none was directed to the address given by Mrs. Pearl to Figoni and none was ever received by respondents. Many of the recited facts were contradicted by appellant and his witnesses but we assume as proved those most favorable to respondents as we are bound to do on appeal.

The case is controlled by Gruber v. Pacific States Savings & Loan Co., 13 Cal. 2d 144, 88 P.2d 137, which is not distinguishable on its facts. In that case the court said at page 147 of 13 Cal.2d, at page 139 of 88 P.2d:

"The defendant's refusal in the instant case to permit the plaintiff to have access to his equipment or to remove the same while an arrearage in rent existed constituted an improper and wrongful exercise of dominion over the plaintiff's property in violation of his rights as owner and, as shall presently be shown, amounted to a conversion rendering defendant liable for whatever damage resulted therefrom—here, the market value of such equipment all of which, as indicated, was ultimately lost to the plaintiff."

Appellant cites two cases from other jurisdictions which he claims announce a contrary rule. Even if this is true we are, of course, bound by the cited decision of our own Supreme Court.

[2, 3] It follows that a conversion occurred on February 4, 1939, and what subsequently took place is only material on the question of damages, here the market value of the property all of which, as in the Gruber case, was ultimately lost to the plaintiffs.

Judgment affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

19 Cal.2d 614

FELD v. CONTINENTAL CASUALTY CO.

L. A. 17956.

Supreme Court of California.

Feb. 27, 1942.

Rehearing Denied March 27, 1942.

1. Insurance ⇐370

In action to reinstate disability policy canceled by insurer for nonpayment of premium until after expiration of grace period, evidence sustained findings that insured was not negligent in having arranged for forwarding of his mail, that insurer did not mail the premium notice to the insured as insurer had done for 17 years, that such failure was the sole reason for nonpayment of the premium, and that insured was without fault in failing to receive premium notice.

2. Insurance ⇐388(4)

An insurer was "estopped" to declare a forfeiture of disability policy executed in Missouri for nonpayment of premium until 12 days after expiration of grace period, where delay in payment of premium was due to fact that no notice of premium date was mailed to insured, although insurer had followed a custom for 17 years of mailing such a notice prior to date premiums became due.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

3. Appeal and error ⇐173(14)

Where insurer in insured's action for reinstatement of policy conceded that insurance contract was entered into in Missouri where insured had resided, and insurer made no claim to trial court that laws of any other jurisdiction were applicable and insurer did not claim on appeal that the laws of any specific jurisdiction were different from those of Missouri, and at trial insurer apparently acquiesced in trial court's application of Missouri laws, insurer could not for the first time on appeal claim that Missouri laws were not necessarily controlling.

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Milton H. Feld against the Continental Casualty Company for declaratory relief and reinstatement of an insurance policy canceled by the defendant. From a judgment for plaintiff, defendant appeals.

Affirmed.

Crider, Runkle & Tilson, Clarence B. Runkle, and Joe Crider, Jr., all of Los Angeles, for appellant.

Herman A. Bachrack, of Los Angeles, for respondent.

HAUSER, Justice.

This appeal has been taken by the defendant insurance company from a judgment in favor of plaintiff in an action for declaratory relief and reinstatement of a policy of insurance which was cancelled by the insurer for non-payment of premium.

The question presented for determination is whether an insurer is estopped to declare a forfeiture where the premium has not been paid until after the grace period therefor has elapsed—the delay in payment having been due to the fact that no notice of the premium date was mailed to the insured, although the insurer had followed a custom of mailing such a notice prior to the date the premiums became due.

The policy was executed on March 24, 1921, in the State of Missouri. It provided for indemnity to the extent of $400 a month against "loss of time" caused by bodily infirmity and premium in the sum of $120 was due annually on or before March 24, with a thirty-one day grace period thereafter. In 1935 plaintiff, who was then residing in New York City, notified the defendant company of a change in his address to 25 Central Park West, New York City. A short time later he moved to Los Angeles, California. Before doing so, he sent a notice to the New York City Post Office requesting that mail addressed to him at 25 Central Park West in that city be forwarded to the office of the Monarch Theatres, Inc., at 1270 Sixth Avenue, in the city of New York. Plaintiff was the retiring president of that corporation and as such he instructed one of its employees to open all mail sent to him at that address, and to forward to him at Los Angeles all communications relating to insurance premiums, etc. During the ensuing three years notices of the date when premium was due each year were sent by the defendant insurer to plaintiff and were received by him at Los Angeles through those channels. However, in the year 1939, plaintiff did not receive a premium payment notice from the defendant through the mail or otherwise. He asserted that due to the defendant's failure to send him a notice for that year the matter of payment of the premium was not called to his attention until May 6, 1939,

when in looking over some of his personal papers and effects he found memoranda which reminded him of the fact that the premium for 1939 had become due on the previous March 24. Thereupon he immediately mailed his personal check to the defendant insurance company for the full amount of the 1939 premium, which, as heretofore indicated, was rejected by the insurer who shortly thereafter declared the policy lapsed. At the defendant's request plaintiff then executed an application for reinstatement, which also was rejected by the insurer. Thereafter the present action was instituted by plaintiff, who deposited in court the amount of the yearly premium for 1939.

The trial court found that plaintiff had made prompt payment of the premiums each year when due on the policy from 1921 to 1939; that ever since 1921, and for a period of 17 years, the defendant had followed the custom of sending to plaintiff each year, several weeks before the premium became due, a notice of the due date of the premium, and that plaintiff had relied on such custom in making the annual premium payments; that preceding the 24th of March, 1939, the defendant had prepared the customary premium notice for plantiff, but that it was not sent to him, nor did he receive any such notice, his failure in that respect being due to no fault of his own; and that solely as a result of the defendant's failure to mail the notice plaintiff did not make the 1939 payment within the grace period. The court also found that the defendant had not manifested an intention to depart from its custom with respect to the 1939 notice; that plaintiff's tender of the year's premium after lapse of the grace period was made within a reasonable time; and that the defendant had suffered no loss by reason of the 12 days' additional time taken by plaintiff in which to pay the premium after expiration of the grace period.

[1] The defendant insurer contends there was insufficient evidence to support the findings that (1) defendant did not mail the 1939 notice to plaintiff; (2) that such failure was the sole reason for nonpayment of the premium; and (3) that plaintiff's failure to receive notice was without fault on his part. Each of those claims has been resolved against the defendant either by an express or an implied finding of the trial court.

The evidence on which such findings were based includes the testimony of one of the defendant's employees to the effect that some time in February, 1939, there was placed on her desk a notice covering premium payment on plaintiff's policy, which she enclosed in an open-faced envelope and laid in a mailing basket on her desk; that she did not know what happened to it thereafter, although had the usual office routine been pursued the envelope would have been taken from her basket to be stamped and sealed in the mailing room and ultimately would have reached the United States mails; and that to her knowledge no such envelope was returned through the mails to the defendant's office. Another employee of the defendant testified to the routine procedure followed by the insurer in its mailing department, by which outgoing mail reached the postal channels; but there was no evidence which showed that a 1939 premium payment notice addressed to plaintiff was actually mailed at the time it was assertedly prepared, or thereafter, nor that the routine mailing procedure was followed on or about the date of such preparation for mailing of the notice. In addition thereto, the employee of the Monarch Theatres, Inc., in whose care plaintiff had placed the reforwarding of matters relating to insurance policies, etc., testified that no premium payment notice for 1939 addressed to plaintiff was received at the office of the Monarch Theatres, Inc., New York City.

With respect to the evidence adduced in support of the finding that plaintiff's failure to pay the premium was without fault on his part, the defendant contends there was no assurance that plaintiff would have received a notice had it been mailed to him; and that there was nothing to show his request for a rerouting of his mail would be carefully observed by the insurer more than three years after it had been notified of the New York address to which plaintiff desired notices to be sent,—the same period having elapsed since the time of plaintiff's notification to the postal authorities to forward his mail from such address to that of the Monarch Theatres, Inc. In that connection the defendant contends plaintiff made no showing that he had ever renewed his forwarding order with the post office and that a request to forward mail to another address is limited by postal regulation to a period of two years. However, the provisions of the regulation referred to,

as set forth in the defendant's brief, do not show the observance of a forwarding order by the postal authorities to be necessarily limited to such period of time—although they indicate that such observance is mandatory during the two-year period. In any event, whatever may be the rule or general practice of the postal authorities with respect to the observance of forwarding orders, there was evidence presented in this case that plaintiff's order was complied with by the postal authorities during 1939, and that plaintiff received mail in Los Angeles during that year which had been forwarded to him by the employee of the Monarch Theatres, Inc., in New York City. Moreover, the question whether negligence existed on the part of plaintiff in having arranged for the forwarding of his mail in the manner indicated, even if pertinent to the issues here involved, would have been one of fact for the trial court,—as were the questions whether the defendant failed to mail the notice in 1939, and whether such failure was the sole reason for nonpayment of the premium within the grace period. But the question of plaintiff's negligence (if any) in the respect referred to is not involved in this case,—the trial court having found as a fact, on substantial evidence (which to some extent was conflicting), that the defendant did not mail the 1939 notice to plaintiff, and that the insurer owed him the duty to send such notice.

[2] In that connection, the defendant's principal contention is that where, as here, the policy specifies the date when premiums are due, and there is assertedly no showing of fraud or negligence on the part of the insurer in having failed to mail a premium payment notice, such failure is not a sufficient excuse for nonpayment of the premium—even though in previous years the insurer has followed the custom of mailing notices in advance of the premium due date. Plaintiff contends the great weight of authority is to the contrary and, in particular, that such contrary rule has been followed in the State of Missouri, the laws of which jurisdiction were regarded by the trial court as controlling here—the parties having proceeded to trial on that assumption.

Plaintiff's contention in that respect is correct. The Supreme Court of the State of Missouri considered the question here in issue at considerable length in the case of Missouri Cattle Loan Co. v. Great Southern Life Ins. Co., 330 Mo. 988, 52 S.W.2d 1, at pages 9, 10, and in its opinion rendered therein the following statement was made:

"The authorities are not uniform on the question of whether or not a custom of notifying the insured when the premium will fall due, such as the insured has reasonably come to rely upon, will amount to a waiver of the requirement of payment on the precise due date or estop the insurer from declaring a forfeiture for nonpayment when the customary notice has not been given and the insured has not been notified that the custom is to be discontinued. The rule supported by the greater weight of authority, and which we think most consonant with reason and justice, is thus stated in Joyce on The Law of Insurance (2d Ed.) vol. 3, § 1332: 'If a life insurance company has been in the practice of notifying the insured of the time when the premium will fall due, and of the amount, and the custom has been so uniform and so reasonably long in continuance as to induce the insured to believe that a clause for forfeiture for nonpayment will not be insisted on, but that the notice will precede the insistence upon the forfeiture, and the insured in consequence put off his guard, such notice must be given, and if not given no advantage can be taken of any default in payment which it has thus encouraged, for the insured is entitled to expect the customary notification; and to mislead the insured by not giving such notice, and then insist upon a strict compliance with the conditions of forfeiture, constitutes, under such circumstances, a fraud upon the assured which the courts have refused in numerous cases to countenance.' Many cases are cited in support of the rule stated. * * * That an insurance company may by a course of dealing which the insured has been induced to rely upon, create an estoppel to enforce a forfeiture for the insured's failure to pay promptly, notwithstanding the policy provides for such forfeiture, is in effect held in the following cases: James v. Mutual Reserve Fund Life Ass'n, 148 Mo. 1, 49 S.W. 978; Goedecke v. Metropolitan Life Ins. Co., 30 Mo.App. 601; Hanley v. Life Ass'n of America, 69 Mo. 380; McMahon v. Supreme Tent Knights of Maccabees, 151 Mo. 522, 52 S.W. 384; Britt v. Sovereign Camp, Woodmen of the World, 153 Mo.App. 698, 134 S.W. 1073; Woolfolk v. Home Ins. Co., Mo.App., 202

S.W. 627, where the company failed to give promised notice of maturity of premium note. In the last-named case the court cites many cases in support of its holding that the company was estopped from insisting on a forefeiture for nonpayment of the note."

It is true that in the Missouri decision the court concedes it was not necessary to hold that such custom, reasonably relied on, would alone create an estoppel, for the reason that, in the factual situation there existing,—in addition to the showing that the insurer had followed the custom of mailing premium notices,—it appeared that during the course of correspondence had between the insurer and the assignee of the insured the former had also expressly promised to mail such notices to the assignee. However, the court there directed attention to the fact that in most of the cases which it cited in support of its conclusion "the estoppel was created by a custom relied upon by the insured and *without an agreement* to give notice or to waive prompt payment of premiums." (Emphasis added.) A careful reading of that case discloses the fact that the Supreme Court of Missouri intended to and did give its unqualified approval to the rule which it set forth from the text, Joyce on Insurance Law, supra. Also, in Couch, Cyclopedia of Insurance Law, volume 3, pages 2193-4, the following comment is made: "* * * the greater number of the decisions apparently support the proposition that an insurance company, which adopts and uniformly adheres to the custom or practice of giving notice of payments for such a length of time as leads those insured to believe notice will be given, cannot declare a forfeiture without giving notice, or without previously advising the persons who have relied upon receiving notice that the custom will be or has been discontinued, and, consequently, that a payment within a reasonable time after the premium becomes due is sufficient, where the custom has been to send notice, and none is given." (See cases there cited.)

The ruling in the Missouri case, on which the trial court here predicated its decision in favor of plaintiff, has not been disaffirmed since its rendition, and a review of the cases from other jurisdictions shows that the weight of authority supports the rule there recognized and applied.

[3] The defendant also makes the contention, for the first time on appeal, that the laws of the State of Missouri were not necessarily controlling here. However, the record shows that by its pleadings the defendant conceded that the insurance contract was entered into in the State of Missouri, where plaintiff then resided; and that the insurer made no claim to the trial court that the laws of any other jurisdiction were applicable to the issues presented in this case. Moreover, from the general argument set forth in the defendant's closing brief, it does not appear that the insurer is making the claim therein that the laws of any specific jurisdiction—which conceivably it might have relied on as being controlling—are or were any different from those of the State of Missouri. In the light of those circumstances and of the fact that at the trial of the issues the insurer apparently acquiesced in the trial court's application of the laws of Missouri, the defendant may not for the first time on appeal announce a change of position in that respect. 2 Cal.Jur. 239, 241; In re Estate of Hein, 32 Cal.App.2d 438, 90 P.2d 100; Miller v. Forster, 131 Cal.App. 509, 512, 21 P.2d 678.

In view of our conclusion that the trial court was correct in ruling that the defendant was estopped to declare a forfeiture of the policy, other questions raised by the defendant in connection with the application for reinstatement, which was executed by plaintiff at the insurer's request, need not here be discussed.

From the foregoing it follows that the judgment should be and it is affirmed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.

HAIME v. DE BEAULIEU et al.

L. A. 17935.

Supreme Court of California. *

Mar. 2, 1942.

Rehearing Granted April 1, 1942.

1. Trusts ⇐361

In case of a resulting trust, where purchase money is advanced by person taking title as a loan to purchaser, the conveyance being made to the lender as security, purchaser cannot demand conveyance until he has paid the money advanced for which the land is held as security.

2. Specific performance ⇐97(1)

Where defendants agreed to purchase realty for benefit of plaintiff with understanding that plaintiff could repurchase property prior to specified date, the plaintiff, while in default on her agreement to repay the defendants, could not have obtained a decree of specific performance. Civ. Code § 3391.

3. Trusts ⇐179

Where defendants agreed to purchase realty for benefit of plaintiff with understanding that plaintiff was to repurchase property and that property was to be rented in the intervening time, the action of one of the defendants in making remarks disclosing an attitude of open hostility against plaintiff and in preventing the renting of the property by wrongfully taking possession thereof without knowledge or consent of plaintiff was in violation of the defendant's duty as a trustee. Civ.Code § 2228.

4. Appeal and error ⇐172(3)

In action to quiet title, the plaintiff's failure to assert in trial court a claim to reimbursement for value of improvements did not preclude plaintiff from asserting such claim on appeal, where parties had stipulated that trial court should have jurisdiction to dispose of all issues which were shown by evidence to exist between parties and evidence disclosed that plaintiff had expended a substantial sum in making improvements.

5. Quieting title ⇐50

In action to quiet title to property which defendants had agreed to purchase for benefit of the plaintiff with understanding that plaintiff was to repurchase property, the defendants, who had refused to sign written agreement with respect to the property and who had admittedly violated one of the covenants thereof, could not insist upon enforcement against plaintiff of provision that if plaintiff failed to repurchase by agreed date she should lose all interest in property including value of improvements made by her.

6. Quieting title ⇐50

Where defendants had agreed to purchase property for benefit of plaintiff with understanding that plaintiff was to repurchase property prior to certain date, but plaintiff was unable to repay money advanced by defendants, the defendants' action in preventing rental of property, as contemplated by the parties, by taking possession thereof "estopped" them from receiving property enhanced in value by improvements placed thereon by plaintiff, who was entitled to an allowance for reasonable value of improvements as condition of quieting title in favor of the defendants. Civ.Code § 2228.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

7. Equity ⇐66

A cross-complainant seeking affirmative relief is an actor and must do equity if he would have equity.

8. Improvements ⇐4(1)

Equity grants compensation for improvements on theory that an unjust enrichment should be prevented.

9. Quieting title ⇐50

Where defendants had agreed to purchase property for benefit of plaintiff with understanding that plaintiff was to repurchase the property and that it was to be rented in the intervening time, but defendants in violation of the understanding took possession of property thereby preventing rental thereof, the plaintiff, who defaulted on her obligation, was entitled to an award of reasonable rental value of property during time defendants were in wrongful possession thereof as a condition of quieting title in favor of the defendants.

In Bank.

Appeal from Superior Court, Los Angeles County, Clement L. Shinn, Judge.

Action by Lulu G. Haime against Louis Hudon de Beaulieu and another to quiet title, wherein the defendants filed a cross-complaint asking for a decree quieting title in themselves. Judgment for the defendants and the plaintiff appeals.

Judgment reversed with directions.

* Subsequent opinion 129 P.2d 345.

Redmond & Redmond, of Los Angeles, for appellant.

Evans & Boyle, of Pasadena, for respondents.

HOUSER, Justice.

This is an appeal by plaintiff from a decree in favor of the defendants de Beaulieu by which title to certain real property was quieted in them as against plaintiff.

The record shows the following factual situation: In August, 1939, plaintiff owned a residence in San Marino, California, on which she had given a trust deed to the Mortgage Guarantee Company. She had also given a chattel mortgage to Carlton Finance Company on certain furniture which she owned. The trust deed was foreclosed in August, 1939, and the mortgage company became the purchaser at the sale. Thereafter, and on September 28, 1939, plaintiff entered into an oral agreement with the defendants Louis de Beaulieu and his wife, whereby they agreed to purchase the real property for the benefit of plaintiff, on the understanding that plaintiff was to be permitted to repurchase the property at any time prior to March 1, 1940. Pursuant thereto the de Beaulieus paid the mortgage company $1,000 on the purchase price of the realty and executed a promissory note for the balance thereof, together with a deed of trust as security therefor, in the sum of $5,115.98. It was further agreed between plaintiff and the de Beaulieus that, prior to March 1, 1940, plaintiff was to effect a release of such trust deed and pay them all moneys which they had expended in connection with their purchase of the property.

Pursuant to the purchase of the real property by the de Beaulieus a deed to them from a mortgage company was placed in escrow, but it appears that plaintiff advised the title company she claimed an interest in the property and as a result thereof no deed was delivered to the defendants.

At the time plaintiff entered into the agreement with the de Beaulieus respecting the real property, it was understood between them that plaintiff would make certain improvements and repairs to the realty, which obligation was subsequently carried out; also, that the property was to be rented and the rentals were to be applied toward the payment of interest on plaintiff's loan from the de Beaulieus, and for taxes. However, plaintiff contended the rentals were also to be applied toward the cost of repairs to the real property—if, after payment of the said interest and taxes, any funds remained for such purpose.

On December 5, 1939, at plaintiff's request, the de Beaulieus paid the amount due on the chattel mortgage and the furniture was moved into the residence. Plaintiff contended it was understood between the parties that on or before March 1, 1940, she was to reimburse them for that expenditure, whereupon she was to regain possession of the furniture.

On January 16, 1940, and in violation of the understanding between plaintiff and Mrs. de Beaulieu, the latter went into possession of the property, citing as her reason therefor that the mortgage company—under threat of foreclosing the trust deed, which would mature on April 1, 1940—had demanded that she do so. Except for the difference in the asserted understanding between the parties as to how the rentals were to be applied, the facts as heretofore related are not in dispute.

However, it is further alleged in the complaint that between the time plaintiff entered into the aforementioned agreement with the de Beaulieus respecting the real property and March 1, 1940, plaintiff attempted to effect a loan from a loan company in order to meet her obligation of March 1st, but was unsuccessful in doing so. In that connection she alleged that Mrs. de Beaulieu not only went into possession of the property, in violation of the agreement, and refused to move therefrom on plaintiff's demand,—thereby precluding the possibility of renting the property,—but that while she was in possession thereof and on an occasion when two appraisers visited the residence with respect to plaintiff's efforts to secure the loan, Mrs. de Beaulieu made certain statements in their presence which were derogatory to plaintiff's credit standing, and which, plaintiff alleged, were made for the purpose of preventing her from effecting a loan with which to make repayment to the de Beaulieus.

On March 1, 1940, plaintiff defaulted on her obligation. Thereafter, and on March 12th, she brought the present action on the theory that the agreement between the de Beaulieus and herself with respect to the real property created a resulting trust, but that, due to the alleged bad faith on their part, as heretofore referred to, a construc-

tive trust was implied by law, as a result of which she asserted the right to compel specific performance of the agreement. The defendants de Beaulieu answered and filed a cross-complaint, asserting they possessed title to the property and asking for a decree quieting title in themselves. Thereafter trial was had and, on August 7, 1940, the court made an interlocutory order in which it was recited that as a condition of having title quieted in plaintiff's favor she would be allowed a period of thirty days in which to pay to the defendants the sum of $2,002.90, which was found to be the amount that the de Beaulieus had expended in connection with the property, with interest thereon at 7 per cent. Prior to the lapse of the thirty-day period plaintiff made a motion for a new trial and modification of the decree, and on October 4th the trial court modified its former decree by reducing the amount to be paid by plaintiff to $1,662, with interest at 7 per cent, and granted plaintiff an extension of time to October 12th in which to pay such sum. Plaintiff failed to make the payment and, on November 4th, the court rendered its final decree quieting title to the real property in the defendants as against plaintiff, but adjudging plaintiff to be the owner of the personal property, on the showing that she had reimbursed the defendants for the sums expended by them, together with interest, in discharging the chattel mortgage. Thereafter the court denied a motion for a new trial, and this appeal is taken from the interlocutory decrees and final decree quieting title to the real property in favor of the defendants as against plaintiff.

Plaintiff contends that, in view of the asserted bad faith evidenced by the defendants de Beaulieu in the respects heretofore mentioned, the interlocutory decrees were excessive and erroneous in that no interest should have been allowed on the sums found by the court to have been expended by them—which plaintiff was directed to repay as a condition to having title quieted in her favor; and, in any event, that interest in excess of 6 per cent should not have been allowed, that being the rate which, as stipulated by the parties at the trial, was originally agreed on between them with respect to the moneys to be repaid to the defendants.

[1, 2] However, those contentions are grounded on the principal claim that the trial court erred in rendering its decree quieting title to the property in favor of the defendants. The rule is that in the case of a resulting trust, where the purchase money is advanced by the person taking title, as a loan to the purchaser, the conveyance being made to the lender as security, the purchaser cannot demand the conveyance until he has paid the money advanced and for which the land is held as security. Hughes v. Korntved, 218 Cal. 3, 6, 21 P.2d 417; Lamberson v. Bashore, 167 Cal. 387, 139 P. 817; Woodard v. Hennegan, 128 Cal. 293, 60 P. 769; 25 Cal.Jur. 185, 186; 17 Cal.Jur. 753. By the terms of the agreement here in issue, the date on which plaintiff was to repay the de Beaulieus was fixed as March 1, 1940, and, as heretofore indicated, the trial court allowed her additional time in which to effectuate a loan or otherwise to secure the moneys with which to pay the defendants—the final decree not having been rendered until about eight months after plaintiff's default. While she remained in default, and until her obligation to the defendants had been met, the court could not have rendered a decree of specific performance in her favor. § 3391, Civ.Code.

However, plaintiff contends that in view of the fraudulent acts and conduct of the de Beaulieus, which were inconsistent with and violative of the duties owed by a trustee to a beneficiary, she should have been allowed as a credit in her favor the reasonable rental value of the premises during the period in which Mrs. de Beaulieu was wrongfully in possession and, in addition, that she should have had credit for the amount of money expended by her in making the repairs and improvements on the property.

[3] Before proceeding to a discussion of the contentions last referred to, comment should here be made with respect to the evidence pertaining to the relationship of the parties subsequent to the time they entered into the agreement. Although after hearing the evidence adduced by the respective parties the trial judge stated it had not been established to the court's satisfaction that the defendants de Beaulieu were responsible for plaintiff's failure to meet her obligation to them, and there was no direct evidence to show that plaintiff's failure in that regard was due to any act or statement of Mrs. de Beaulieu,—nevertheless there was evidence presented which showed that both prior to and at the time she wrongfully took possession of the premises, Mrs. de Beaulieu evinced an attitude of hostility toward plaintiff. As summar-

ized in the bill of exceptions, her testimony, in part, was as follows: that "on an occasion when she was talking on the telephone two gentlemen came to appraise the real property and overheard her telephone conversation, and what she said over the telephone was not complimentary towards the plaintiff"; that "she did not make any comments to the appraisers concerning Mrs. Haime's credit standing, but on other occasions might have said something to other persons concerning Mrs. Haime's credit standing." The import of such statements, disclosing an attitude of open hostility harbored by Mrs. de Beaulieu against plaintiff, is wholly inconsistent with the duty of a trustee to "act in the highest good faith toward his beneficiary." § 2228, Civ. Code.

Moreover, the action of Mrs. de Beaulieu in wrongfully taking possession of the premises without the knowledge or consent of plaintiff, thus precluding the renting of the property, and her refusal to move therefrom at the request of the latter, were in direct violation of the duty she owed to plaintiff. The situation thereby presented is analogous to that of a mortgagee wrongfully in possession. In Mahoney v. Bostwick, 96 Cal. 53, 59, 30 P. 1020, 1021, 31 Am.St.Rep. 175, the court said: "In this case the appellant's mortgage gave him no right to the possession of the mortgaged premises, and he did not take possession with the consent of the plaintiff. * * * [A] ppellant wrongfully entered upon the premises and ousted the plaintiff from the possession thereof, and in such a case it is very clear to us that the appellant is liable to be charged for rents and profits, precisely the same as any other disseisor would be, and he is not entitled to any accounting to determine how much he may have actually realized from this wrongful occupation, after deducting the necessary expenses of carrying on the farm." See, also, Bradley Co. v. Bradley, 37 Cal.App. 268, 173 P. 1013; Estate of Piercy, 168 Cal. 750, 145 P. 88; Fricker v. Americus Mfg. & Imp. Co., 124 Ga. 165, 52 S.E. 65; Lawley v. Hickenlooper, 64 Utah 543, 231 P. 821, 36 A.L.R. 1327; Candelaria v. Miera, 18 N.M. 107, 134 P. 829, 831.

[4-6] Furthermore, contrary to the defendants' contention, we do not agree that plaintiff should be precluded from now asserting a claim to reimbursement for the value of the improvements because such claim was not specifically urged by her in the court below, where, as disclosed by the record, the parties stipulated in open court that, the proceeding being one in equity, the trial court should have jurisdiction and authority to dispose of all issues which were shown by the evidence to exist between the parties. The facts adduced by the evidence disclosed that plaintiff had performed her covenant under the agreement by making improvements and repairs to the property to the extent of a substantial sum of money, as they also showed that the defendants had violated their covenant by wrongfully entering and taking possession of the property. But the defendants further contend that by the terms of a written agreement—a copy of which was introduced in evidence—which purportedly contained the covenants originally agreed on orally by the parties, it was contemplated that if plaintiff failed to meet her obligation of March 1 to the de Beaulieus, she should lose all interest in the property, including the value of the improvements. However, the record shows that although a copy of the agreement was received in evidence, the defendants had never signed such agreement, and in view of their refusal in that regard and the further fact that by their own admission they had violated one of the covenants of the written agreement, they are not now in a position to insist that all of its provisions are legally binding on plaintiff. With respect to her claim to reimbursement for the value of the improvements, in the Bostwick case heretofore referred to, where the facts showed that the defendant mortgagee had wrongfully seized possession of the property there involved, the court said: "The possession of defendant, and all that he did upon the land, were acts hostile to the title of plaintiff, and plaintiff is not required in this action, upon any principle of law or equity, to account to defendant for the value of the improvements thus made by him." Notwithstanding the factual difference between the two cases, we think the equities which were allowed to prevail in the cited case should be applied here, where the defendants have been guilty of similar wrongful and hostile acts, but who, because of plaintiff's inability to repay the moneys advanced by them on her behalf, and despite their dereliction, ultimately will receive the benefit of the improvements placed on the property by plaintiff. Under the facts of this case, to thus permit the defendants to take the property, enhanced

in value by substantial improvements, toward the cost of which they contributed nothing, would be contrary to well-settled equitable principles.

[7, 8] Here the defendants, as cross-complainants, have applied to a court of equity for a decree quieting title as against plaintiff. The rule is that a cross-complainant seeking affirmative relief is an actor and must do equity if he would have equity. Chapman v. Hicks, 41 Cal.App. 158, 182 P. 336; Agmar v. Solomon, 87 Cal.App. 127, 141, 261 P. 1029; 10 Cal.Jur. 511; 27 Am.Jur. 279. With reference to the maxim just referred to, in O'Brien v. O'Brien, 197 Cal. 577, 584, 241 P. 861, 864, this court said: "It means that the court will not confer its equitable relief upon one seeking its interposition and aid—'unless he has acknowledged or conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adverse party, and growing out of or necessarily involved in the subject-matter of the controversy.'" The underlying theory on which equity grants compensation for improvements is that an unjust enrichment should be prevented. 27 Am. Jur. 276. Having acted in violation of their own promises and obligations under the contract, the defendants herein are estopped from claiming a right to receive the property, enhanced in value by plaintiff's act in placing the improvements on the real property in good faith and in performance of her covenants under the agreement. See 10 Cal.Jur. 515-517.

[9] From the foregoing we conclude that as a condition of quieting title in favor of the defendants de Beaulieu as against plaintiff, the latter is entitled to have awarded to her the reasonable rental value of the premises during the time the defendants were in wrongful occupation and possession thereof, together with an allowance for the reasonable value of the improvements made by her.

The judgment is therefore reversed in order that evidence may be adduced with respect to the two issues last referred to, and thereafter the trial court is directed to proceed in accordance with the views herein expressed, and to render its judgment accordingly.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

KENT et al. v. CLARK.

L. A. 17845.

Supreme Court of California.

Feb. 27, 1942.

Rehearing Granted March 27, 1942.

1. Fraud ⇐31, 34

A purchaser who has been induced to enter into a contract to purchase realty by the fraudulent representations of his vendor may elect to affirm the contract, retain the property received under it, and sue the vendor for damages in an action for deceit, and having chosen that course on discovery of the vendor's fraud, the purchaser need not continue performance but may properly withhold payments under the contract in an amount necessary to recoup the damages which he has suffered.

2. Vendor and purchaser ⇐314(2)

Since a purchaser's failure to make payments due under a contract for the purchase of realty is excused because of fraudulent representations by the vendor inducing the purchaser to enter into the contract, the purchaser may set up the vendor's fraud as a defense to an action for the balance due under the contract, by way of answer to the whole demand, or in abatement of the damages, according to the circumstances of the case.

3. Vendor and purchaser ⇐299(3)

In an action by a vendor to cancel contract for sale of realty, to quiet title to the realty, and for possession of the realty, purchaser may plead fraud of vendor in inducing purchaser to enter into the contract.

4. Vendor and purchaser ⇐335

A defrauded purchaser who has been induced to enter into a contract for the purchase of realty by the fraudulent representations of the vendor may elect to rescind the contract for fraud, restore possession of the realty to the vendor, and recover the purchase money paid less the fair rental value for the use of the realty during the occupancy, and that right of rescission is available to a purchaser in default.

5. Vendor and purchaser ⇐117

As a prerequisite to effective rescission of a contract for sale of realty, a defrauded purchaser desiring to rescind contract must restore to the vendor every thing of value which he has received from the vendor under the contract, or must offer to restore everything, on condition that the vendor

shall do likewise, unless the vendor is unable or positively refuses to do so, and the offer to surrender possession of the realty need not be unqualified but may be made conditional on the vendor's restitution of the purchase money. Civ.Code, § 1691, subd. 2.

6. Vendor and purchaser ⇐337

A purchaser who has been induced to enter into the contract for the purchase of realty by the fraudulent representations of the vendor has a right to a lien on the realty as security for the repayment of the purchase money and for the value of any improvements placed on the realty, and that lien survives a rescission of the contract. Civ.Code, § 3050.

7. Vendor and purchaser ⇐117

Where a defrauded purchaser remains in possession of realty after his conditional offer of restoration, he is not claiming under the contract for purchase of the realty, and at the same time repudiating it, but, on the contrary, he has manifested no other intent than to rescind, and his claim to possession does not rest on the terms of the contract but is asserted in connection with his right to withhold the realty as security for the payments made by him to the vendor, and for the improvements placed by him on the realty.

8. Vendor and purchaser ⇐299(1)

Where purchaser of realty, on discovery of vendors' alleged fraud, served notice of rescission of contract for sale of realty on them and offered to restore possession of the realty on condition that they return all moneys paid under the contract, less the reasonable rental value of the realty, notice and offer had the effect of rescinding the agreement, and the purchaser had the right to retain possession of the realty and to defend successfully against an action of ejectment by pleading and proving the facts establishing the fraud.

9. Pleading ⇐147

Under statute providing that whenever defendant seeks affirmative relief relating to "transaction" on which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time a cross-complaint, the facts surrounding the cause of action and not the form of the complaint are determinative of what constitutes the transaction, and if the defendant's pleading sets forth matter inextricably related to the matter forming the basis of the complaint, it meets the statutory requirements of a cross-complaint, and it is immaterial that the relief sought thereby is independent of that prayed for in the complaint. Code Civ.Proc. § 442.

See Words and Phrases, Permanent Edition, for all other definitions of "Transaction".

10. Vendor and purchaser ⇐299(3)

In action of ejectment by vendors against a purchaser in default under an executory contract of sale, the purchaser was entitled to file a cross-complaint for rescission of the contract, on ground of the vendors' fraud, and for a judgment representing the amount paid under the contract, together with reasonable value of improvements placed on the realty, less the value of its use during occupancy. Code Civ.Proc. § 442.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action of ejectment by Charles R. Kent and others against Alverda Clark, wherein the defendant filed a cross-complaint. From a judgment in favor of the plaintiffs, the defendant appeals.

Judgment reversed.

Lorrin Andrews and Wm. J. Clark, both of Los Angeles, for appellant.

Emil H. Koehl, of Hollywood, for respondents.

EDMONDS, Justice.

The question presented for decision by this appeal is whether, in an action of ejectment brought by a vendor of realty against a vendee in default under an executory contract of sale, the vendee may set up fraud in the inception of the contract, either by way of defense to the action or by way of cross-complaint for rescission or damages. The trial court answered it in the negative and rendered judgment for the respondents, who are the vendors of the property in controversy.

The appellant entered into a written contract with the respondents under which she agreed to purchase a house and lot for the sum of $4,500, of which amount $200 was paid in cash. She agreed to pay the balance in stated instalments, with interest, and also to pay the taxes upon the property. Time was of the essence of the

agreement. Although not provided for by the contract, she was given possession of the property.

Three years passed, during which the appellant made all payments required by the contract with the exception of certain taxes. Although these payments were not promptly made, the vendors accepted them. But upon the appellant's failure to pay an instalment which accrued in August, 1939, the respondents demanded, in writing, that she remedy the default immediately. Although there is some dispute as to the amount which was due at that time, the appellant admits that she was then in default so far as the payment of taxes is concerned.

A week later the respondents wrote another letter informing the appellant that unless the delinquent taxes and the balance of the instalment of principal then overdue were paid within three days, a forfeiture would be declared. The day after this letter was written, the appellant served upon the vendors a written refusal to make further payments and a notice of rescission of the contract, offering to restore to them the property upon condition that they return to her all money paid under the agreement, less the reasonable value of the use of the property. One month later, the vendors served a notice advising the appellant that her rights under the contract were thereby declared forfeited and demanding possession of the property. She made no further effort to remedy her default and refused to comply with the demand for surrender of possession. The present action followed.

The complaint alleges the making of the contract, the default thereunder, the vendee's attempted repudiation and rescission and her refusal to surrender possession after demand. These facts state a cause of action in ejectment upon which the vendors sought no further relief than possession of the property. To this complaint the appellant filed an answer, admitting execution of the agreement, her possession and default thereunder. By way of an affirmative defense, she alleged that the respondents demanded of her more than was due to them, that she was not given a reasonable time in which to remedy her default, and that she was induced to enter into the contract through the false and fraudulent representations of the vendors.

These asserted representations, all of which concern the nature, character and value of the property, are set forth with particularity. The answer also contains an allegation of the appellant's notice of rescission of the contract, her offer of restoration of the property to the respondents upon the condition that they return to her all money paid under the contract less the reasonable value of the use of the premises, and the refusal of the respondents to comply with this demand.

In a cross-complaint the appellant alleged the same representations, the fact that she had given notice of rescission, and the refusal of respondents to accept her conditional offer of restoration of the property. Under this pleading she prayed for a decree declaring the contract to be rescinded and for a judgment in the sum of $2,219.72 representing the amount paid by her under the contract, together with the reasonable value of the improvements placed upon the property by her, less the value of its use during her occupancy. As an alternative remedy, if for any reason rescission could not be had, she asked that she be awarded damages because of the vendors' representations, the amount of such damages to be set off against the purchase price of the land.

At the trial of the case upon these pleadings, when the respondents had concluded the presentation of evidence, the appellant moved for a nonsuit upon the ground that she was not in default in the sum demanded by them and also that she had not been given a reasonable time in which to remedy her default. This motion was denied. She then proceeded with the presentation of her defense and offered evidence tending to prove fraud in the inception of the contract, as alleged in her answer and cross-complaint. The respondents objected to this evidence upon the ground that the alleged fraud was neither a proper subject of defense nor cross-complaint to an action in ejectment where possession only was demanded. The court sustained this objection. The appellant then made an offer of proof, to which the respondents interposed the same objection with the same ruling.

Thereafter the court gave judgment for the respondents, based upon findings that the appellant had repudiated, and was in default under the contract of sale; that the contract was not terminated by mutual consent; that the appellant had at all times since her default refused to make further payments under the agreement; that the

respondents, as vendors, were entitled to possession of the property, but that the appellant was entitled to a reasonable time in which to remedy her default. The judgment fixed this time as not exceeding 60 days from its entry.

The appellant asserts that the ruling of the trial court in sustaining objections to evidence in support of her allegations of fraud was erroneous, and that the court also erred in failing to make findings of fact upon that issue. She also contends that it was an abuse of discretion to deny her motion for a new trial. The respondents rest their case upon the proposition that in an action of ejectment, the defendant may not set up fraud in the inception of the contract under which he took and held posssession either by way of answer or cross-complaint. More specifically, they rely upon the principle, frequently announced in the authorities, to the effect that where a vendee in possession under an executory contract of purchase has failed to perform his part of the contract and is in default with respect thereto without excuse, he may not maintain an equitable defense to an action of ejectment by the vendor.

[1] Two distinct remedies are open to a vendee who has been induced to enter into the contract of purchase by the fraudulent representations of his vendor. Notwithstanding the vendor's fraud, he may elect to affirm the contract, retain the property received under it and sue the vendor for damages in an action for deceit. Having chosen that course upon the discovery of the vendor's fraud, the vendee need not continue performance but may properly withhold payments under the contract in an amount necessary to recoup the damages which he has suffered. In other words, because of the vendor's fraud, he may avoid the obligation stated by the contract and excuse what would otherwise be a default. Field v. Austin, 131 Cal. 379, 63 P. 692; Paolini v. Sulprizio, 201 Cal. 683, 258 P. 380; Pembrook v. Houston, 41 Cal.App. 54, 181 P. 828; Palladine v. Imperial Valley Farm Lands Ass'n, 65 Cal. App. 727, 225 P. 291; 25 Cal.Jur. 560.

[2, 3] In such a situation, as the vendee's failure to make payments is excused, he may set up the seller's fraud as a defense to an action for the balance due under the contract, by way of answer to the whole demand, or in abatement of the damages, according to the circumstances of the case. Toby v. Oregon Pac. R. R. Co., 98 Cal. 490, 33 P. 550; Field v. Austin, supra; Hunter v. McKenzie, 197 Cal. 176, 239 P. 1090; Paolini v. Sulprizio, supra; Pembrook v. Houston, supra; Palladine v. Imperial Valley Farm Lands Ass'n, supra. And, for the same reason, the fraud of the vendor may be pleaded as a defense in an action by the vendor to have the contract canceled, to quiet title to the property, and for possession of the premises. The reason for this rule was stated in Nevada Land & Inv. Corp. v. Sistrunk, 220 Cal. 174, 30 P.2d 389, 390 where the court declared: "There would be little consistency or justice in a rule which, when the suit was for the payments due under the contract, would allow the buyer to set up damage caused by the fraud of the seller in answer to the demand or in abatement of damages, but, when the action was one for possession of the premises and to quiet title, would not allow the same matter to be pleaded as a defense against a forfeiture for failure to make the payments which the law says he may withhold."

[4] But the defrauded vendee has another and alternative remedy. He may elect to rescind the contract for fraud, restore possession to the vendor, and recover the purchase money paid less the fair rental value for the use of the property during his occupancy. This right of rescission is available to a vendee in default. Graham v. Los Angeles First Nat. Trust & Savings Bank, 3 Cal.2d 37, 43 P. 2d 543; Lombardi v. Sinanides, 71 Cal. App. 272, 235 P. 455.

However, by certain decisions it has been broadly and unqualifiedly held that a vendee who has elected to disaffirm the contract for fraud, may not thereafter remain in possession of the property and defend against an action in ejectment brought by the vendor. Having taken possession by virtue of the contract, it is said, the vendee may retain that possession only by faithfully performing the conditions of the contract under which he entered, and if he desires to rescind, he may do so only by a surrender of the premises to the vendor. To hold otherwise, according to this reasoning, would allow the vendee to assume the inconsistent position of repudiating the contract and at the same

time claiming under it. This analysis of the legal principles involved, at least as applied to the facts of the present case, may not be legally or logically sustained.

[5] True, as a prerequisite to effective rescission of a contract, a defrauded vendee desiring to rescind his contract "must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." Sec. 1691, subd. 2, Civ.Code. But by the express terms of this code section, the offer to surrender possession of property received under the contract need not be unqualified but may be made conditional upon the vendor's restitution of the purchase money.

[6, 7] The vendee's remedies also include a lien upon the property as security for the repayment of the purchase money and for the value of any improvements he placed upon the land. Sec. 3050, Civ.Code. This lien survives his rescission of the contract. Montgomery v. Meyerstein, 186 Cal. 459, 199 P. 800. And although it may be asserted independently of possession of the property, without possession the remedy may be valueless because of an intervening conveyance to a bona fide purchaser for value. Accordingly, when a defrauded vendee remains in possession of the property after he has given notice of rescission and the vendor has refused his conditional offer of restoration, he is not claiming under the contract and at the same time repudiating it. Nor is he attempting to retain possession of the property without paying the balance of the purchase price and at the same time disaffirming the contract by reason of the asserted fraudulent representations of the vendor. On the contrary, he has manifested no other intent than to rescind, and his claim to possession does not rest upon the terms of the contract but is asserted in connection with his right to withhold the property as security for the payments made by him to the vendor and for the improvements he placed upon the land.

In so far as the case of Los Molinos Land Co. v. MacKay, 175 Cal. 305, 165 P. 926, is contrary to these conclusions, it is overruled and Watkins v. Warren, 122 Cal. App. 617, 10 P.2d 500, and Hincksman v. Delacour, 47 Cal.App. 416, 190 P. 832, are disapproved.

[8] Applying these principles to the facts of the present case, the appellant, upon discovery of the respondents' alleged fraud, served notice of rescission upon them and offered to restore possession of the property to them upon condition that they return to her all money paid by her under the contract, less the reasonable rental value of the premises. If the respondents are guilty of the asserted fraud, this notice and offer had the effect of rescinding the agreement, and as a result of their refusal to comply with her demand, she had the right to retain possession of the property and to successfully defend against an action of ejectment by pleading and proving the facts establishing that fraud. The trial court therefore erred in refusing to permit the appellant to introduce evidence tending to prove fraud as a defense to this action.

[9] The facts relied upon by the appellant also furnish a proper basis for her cross-complaint. Section 442 of the Code of Civil Procedure provides: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time * * * a cross-complaint. * * *" The more recent cases have approved a broad and liberal interpretation of the phrase "transaction * * * upon which the action is brought." Hanes v. Coffee, 212 Cal. 777, 300 P. 963; California Trust Co. v. Cohn, 214 Cal. 619, 622, 7 P.2d 297; Nevada Land & Inv. Corp. v. Sistrunk, supra. The facts surrounding the cause of action and not the form of the complaint are determinative of what constitutes the "transaction." If the defendant's pleading sets forth matter inextricably related to the matter forming the basis of the plaintiff's complaint, it meets the statutory requirements of a cross-complaint, and it is immaterial that the relief sought thereby is independent of that prayed for in the complaint.

[10] Tested by these principles, it is clear that the alleged fraud of the respondents arose out of the identical transaction which is the basis of their cause of

action in ejectment. They demand possession of the property because of the appellant's breach of contract. She charges fraud in inducing the execution of that contract. Were it not for the contract, therefore, neither party would have had occasion to bring suit.

The judgment is reversed.

GIBSON, C. J., and HOUSER, CARTER, and TRAYNOR, JJ., concurred.



19 Cal.2d 634

LOS ANGELES COUNTY v. FRISBIE.

L. A. 18104.

Supreme Court of California.

Feb. 28, 1942.

1. Statutes ⇐181(1), 205

The object of all construction of statutes is to ascertain and give effect to the intention of the Legislature, and in ascertaining such intent regard is to be had not so much to the exact phraseology in which the intent has been expressed as to the general tenor and scope of the entire scheme embodied in the enactments.

2. Statutes ⇐184, 217, 224, 225

In construing a remedial statute, such as the one dealing with kindred's liability for charitable aid furnished by county to indigent relatives, the court is free to study history and purpose of the enactment and the previous state of the legislation on the subject as well as other statutes in "pari materia" and the benefit sought to be provided. St.1937, pp. 1099, 1100, §§ 2576–2578.

See Words and Phrases, Permanent Edition, for all other definitions of "Pari Materia".

3. Paupers ⇐39(3)

By statute it is made the mandatory duty of every county to relieve and support all indigent persons lawfully resident therein, when such persons are not supported and relieved by their relatives or by some other means. St.1937, p. 1097, § 2500.

4. Paupers ⇐43(2)

That an indigent has legally liable kindred able to maintain him does not preclude him from obtaining relief from the county, for the county's mandatory duty to relieve and support all indigents lawfully resident therein is not limited to cases where an indigent is without a responsible relative with ability to support him, but is restricted in application only to those cases where responsible relatives are actually supporting and relieving the indigent. St.1937, pp. 1097, 1099, §§ 2500, 2576.

5. Statutes ⇐231

In determining whether provisions of Welfare and Institutions Code, dealing with liability of indigent's kindred for support of indigent, authorize maintenance by county of an action against indigent's kindred for reimbursement for charity aid already furnished without having first secured a court order fixing the liability of the kindred for indigent's support and directing payment of specified sum to the county for that purpose, such code provisions must be read and considered together. St.1937, pp. 1099, 1100, §§ 2576–2578.

6. Statutes ⇐206

A statute should be so construed, if reasonably possible, as to give force and effect to every expression used by the Legislature.

7. Statutes ⇐188

Words in a statute should be given their ordinary meaning and receive a sensible construction in accord with the commonly understood meaning thereof, except when clearly otherwise intended or indicated. Civ.Code, § 13.

8. Paupers ⇐37(2), 51

The provisions of Welfare and Institutions Code, dealing with liability of kindred for support of indigents, authorized two alternative methods of procedure, under which the county may either maintain an action against responsible kindred for the recovery of money previously expended by county for charity aid furnished indigent relatives, such legislative intent being demonstrated by the use of the words "reimburse" and "reimbursement", which ordinarily mean to pay back, to make restoration, to repay that expended, or county may petition for a court order determining liability and financial ability of kindred to make specified payments in advance for aid to be furnished indigent relatives. St.1937, pp. 1099, 1100, §§ 2576–2578.

See Words and Phrases, Permanent Edition, for all other definitions of "Reimburse" and "Reimbursement".

9. Paupers ⇐37(1)

The theory underlying the extension by county of charity aid to an indigent has always been that he is without means of support either from his own efforts or those of responsible kindred, and that when the latter are available, they are primarily liable for the welfare of the indigent relative, and in applying this principle, counties have established the practice of maintaining actions against kindred of indigents to recover as a debt reimbursement for aid previously furnished. St.1937, pp. 1099, 1100, §§ 2576–2578.

10. Statutes ⇐219

The contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect, while not controlling, is given great respect by the court in construing the statute.

11. Statutes ⇐212

It is not to be presumed that the Legislature, in the enactment of statutes, intends to overthrow long established principles of law unless such intention is made clearly to appear by express declaration or by necessary implication.

12. Statutes ⇐183, 184

Whenever possible a statute is to be construed in a way which will render it reasonable, fair and harmonious with its manifest purpose, and which will conform with the spirit of the act.

13. Statutes ⇐239

The provisions of a statute in derogation of the common law must be strictly complied with.

14. Constitutional law ⇐309(1)

In county's action to recover from decedent's estate reimbursement for charity aid furnished an adult daughter of decedent, during decedent's lifetime, the fact that the executrix of decedent's estate was furnished with notice of suit and afforded an opportunity to present her case in court satisfied the constitutional requirements of "due process of law", although action was never taken by county during decedent's lifetime to secure a court order determining her liability to support adult daughter. St.1937, pp. 1099, 1100, §§ 2576–2578; Const. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

15. Abatement and revival ⇐52

Under statute, providing for the survival of an action which might have been maintained against the deceased during his lifetime, county's cause of action against decedent to recover reimbursement for charity aid furnished to an adult daughter of decedent during decedent's lifetime survived and could be maintained against decedent's estate. St.1937, p. 1099, § 2576; Probate Code, § 573.

16. Paupers ⇐51

Under provisions of Welfare and Institutions Code, dealing with liability of kindred for the support of indigent relatives, county could maintain an action to recover from decedent's estate reimbursement for charity aid furnished to decedent's adult daughter during decedent's lifetime without having first obtained a court order determining decedent's liability and financial ability to support daughter and directing payment in advance of specified sums for such purpose. St.1937, pp. 1099, 1100, §§ 2576–2578.

In Bank.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by the County of Los Angeles against Azile M. Frisbie, executrix of the estate of Mary A. Stoner, deceased, to recover from deceased's estate reimbursement for charity aid furnished by the county to an adult daughter of decedent. From a judgment of dismissal, entered after a demurrer to its complaint was sustained, plaintiff appeals.

Judgment reversed with directions.

Prior opinion, 115 P.2d 900.

J. H. O'Connor, Co. Counsel, Gerald G. Kelly, Deputy Co. Counsel, and L. K. Vobayda, all of Los Angeles, for appellant.

Holbrook & Tarr, Leslie R. Tarr, and Freda B. Walbrecht, all of Los Angeles, for respondent.

CURTIS, Justice.

By this action the county of Los Angeles seeks to recover from the estate of Mary A. Stoner, deceased, the sum of $2,236.57, together with interest thereon, for aid, hospital care, medical treatment and supplies furnished by it to one Fay Pheysey, an adult daughter of decedent, between February 26, 1937, and April 28, 1939. Mary A. Stoner died a resident of Los Angeles

County on April 28, 1939, and thereafter, upon admission of her will to probate, letters testamentary were issued to Azile M. Frisbie, defendant herein. Following the filing by such executrix of an inventory and appraisement of such estate with the probate court, the county of Los Angeles presented its amended creditor's claim in the aforementioned amount. Upon rejection of its claim, the county commenced this action for reimbursement from the decedent's estate. Defendant's demurrer to the amended complaint was by the court sustained without leave to amend, following plaintiff's refusal to plead further. From the judgment of dismissal thereupon entered plaintiff county prosecutes this appeal.

The determination of this appeal involves the construction of sections 2576, 2577 and 2578 of the Welfare and Institutions Code, St.1937, pp. 1099, 1100. Material to the consideration of this issue of statutory interpretation are the following allegations appearing in the amended complaint: that the county of Los Angeles rendered charity aid to Fay Pheysey, the indigent adult daughter of decedent, in the sum aforementioned; that all such relief was furnished during the lifetime of the mother; and that during the entire period over which such aid was extended the mother was possessed of sufficient financial ability to reimburse the county in full therefor. The trial court sustained defendant's contentions as advanced in her demurrer, which primarily challenged the sufficiency of plaintiff's amended complaint to state a cause of action because there was not alleged the filing of a petition for the judicial determination of liability pursuant to the terms of section 2578 of the Welfare and Institutions Code.

The sections of the Welfare and Institutions Code basically involved in the present controversy are the following:

Section 2576: "If any indigent has living within this State a spouse, parent, or adult child, and such kindred or any of them, or any group of them has sufficient financial ability to support the indigent, he shall not be eligible for aid under this chapter, except such emergency aid as may be extended hereunder pending a determination of responsibility for his support. Upon failure of such kindred to support the indigent, the county may extend aid, and such kindred in the order above named and to the extent of their ability shall reimburse the county for the support of the indigent by paying to the county the sums per month or per day fixed by the board of supervisors for such aid. In any case where such kindred are unable to pay the entire charge for such support, they shall reimburse the county to such an extent as may be determined under the provisions of this section.

"The board of supervisors shall, in the case of aid granted by institutional care, fix a reasonable charge therefor, which shall be the measure of reimbursement to the county, and the existence of the order fixing the charge shall constitute prima facie evidence of its reasonableness."

Section 2577: "Upon failure of the kindred, referred to in section 2576, to perform their duty to support the indigent, the board of supervisors shall request the district attorney of the county to proceed against such kindred in the order of their responsibility for support. Upon such request the district attorney shall promptly commence and prosecute proceedings for the ascertainment and enforcement of the liability and responsibility of the kindred."

Section 2578: "Such proceedings shall be begun by filing in the name of the county a petition verified in the manner of a complaint praying that the responsibility and liability of the named kindred be ascertained, and that an order be made accordingly. The provisions of Titles I to IX, inclusive, of Part II of the Code of Civil Procedure shall apply to the proceedings in such action and the court shall therein determine the liability, if any, of each of the kindred for such support. The court shall, in such action, ascertain the financial ability of the defendants and each of them, and unless it finds that a defendant is unable to pay any sum for support, either because of lack of sufficient funds or because such payment would result in the probability of the defendant becoming at some future time a public charge, the court shall order each defendant to pay to the county a proper proportion, if any, of his liability for the support of the indigent.

"If any relative or group of relatives has sufficient financial ability to support the indigent no relative beyond him or them in the order named in section 2576 shall be ordered to pay any portion of the support. The order of the court shall specify that a given sum shall be payable monthly in advance to the board of supervisors or

its designated social agency for the entire or partial maintenance of the defendant's indigent relative in accordance with the defendant's financial ability."

Appellant county contends that the foregoing sections give it two separate causes of action, to-wit: (1) an action against a responsible relative for *reimbursement* for charity aid rendered by the county to the indigent, and (2) a proceeding against the legally responsible kindred to obtain court orders for *future monthly support payments* by said kindred to the county for the aid which the county will have to furnish the indigent. In other words, appellant county urges that the two methods of collection procedure available to it under these code provisions are wholly separate and distinct: that section 2576 contemplates an action to recover *by way of reimbursement* for moneys expended for charity aid, and that sections 2577, 2578 provide an independent mode of proceeding by the filing of a petition to obtain a court order directing future periodical payments by the liable kindred to the county to be disbursed by the latter. On the other hand, respondent argues that these above-quoted code sections permit at the outset but a single type of proceeding, one summary in character for the purpose of securing a court order fixing the liability of the kindred for the support of the indigent relative, and that it is only *after* the failure of the kindred to comply with the terms of the order directing the payment of specified sums that there accrues to the county a cause of action for the recovery of these amounts. Thus, it is respondent's position that the prior adjudication of the existence and extent of decedent's liability is an essential prerequisite to the county's maintenance of the present action. Admittedly, the aid rendered by the county to the decedent's daughter was not of an "emergency character," but was of an ordinary nature consonant with the support, institutional care and medical treatment furnished during the period above mentioned.

[1, 2] Preliminary to our consideration of the questions raised by the parties relative to the meaning of the particular language employed in these code provisions, it is pertinent to observe that the object of all construction of statutes is to ascertain and give effect to the intention of the legislature. State v. Conkling, 19 Cal. 501, 512. In the analysis of statutes for the purpose of finding the legislative intent, regard is to be had not so much to the exact phraseology in which the intent has been expressed as to the general tenor and scope of the entire scheme embodied in the enactments. Palache v. Pacific Ins. Co., 42 Cal. 418, 430. While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and the obvious design of the law should not be sacrificed to a literal interpretation of such language. In re Haines, 195 Cal. 605, 612, 234 P. 883. Hence, in construing a remedial statute, like a law concerning the rendition of charitable aid to indigents and recovery therefor, reason must have its just proportion, and in interpreting the expressions employed, the court is free to study the history and purpose of the enactment and the previous state of the legislation on the subject, as well as other statutes in pari materia and the benefits sought to be provided. People v. Earl, 19 Cal. App. 69, 71, 72, 124 P. 887.

[3, 4] It is made the duty of every county in this state to "relieve and support" all indigent persons lawfully resident therein, "when such persons are not supported and relieved by their relatives" or by some other means. Sec. 2500, Welfare and Institutions Code, St.1937, p. 1097; based on Stats.1901, ch. CCX, sec. 1, p. 636; Stats.1933, ch. 761, sec. 1, p. 2005. The obligation imposed by this statute is a mandatory duty City and County of San Francisco v. Collins, 216 Cal. 187, 190, 13 P.2d 912.

By section 2576 the legislature has qualified the indigent's right to compel or mandamus the county to render aid by declaring in effect that if such person has a responsible relative with sufficient ability to support him, he shall not be eligible for aid as a matter of absolute right. The mere fact that the indigent has legally liable kindred able to maintain him does not preclude him from obtaining relief, for the county's mandatory duty (sec. 2500, supra) is not limited to cases where the indigent is without a responsible relative with ability to support him, but is restricted in application only to those cases where the responsible relative is *actually* supporting and relieving the indigent. To hold, as respondent urges, that any aid, other than that of an emergency character, rendered by the county prior to a judicial determina-

tion of the kindred's responsibility for the indigent relative's support is without statutory authority and a voluntary act on the basis of a gratuity, is to place undue emphasis upon the first sentence of section 2576 and to disregard the balance of the code provision. The opening words of the second sentence significantly read: "Upon failure of such kindred to *support* the indigent, *the county may extend aid* * * *." (Emphasis added.) This language, permissive in character and without reference to court order, plainly gives the county the discretionary right to advance such aid, that is, regular support, in the event the responsible kindred neglect to discharge the duty impressed by statute. Substantiating the county's claim to recovery for the relief so extended is the remainder of the second sentence of section 2576: "and such kindred in the order above named and to the extent of their ability shall *reimburse* the county *for the support* of the indigent by paying to the county the sums per month or per day fixed by the board of supervisors for such aid." (Emphasis added.) The primary and ordinary meaning of the word "reimburse" is "to pay back, to make restoration, to repay that expended." Webster's New International Dictionary, Second Edition; Funk & Wagnall's Standard Dictionary. The actual amount due depends upon the sums determined by the board of supervisors to be representative of the county's expense for the relief granted. This section then continues with a third sentence declaring that where such kindred, remiss in their obligation to support the indigent, "are unable to pay the entire charge for *such support* [the support by the county], they shall *reimburse* the county to such an extent as may be determined under the provisions of *this section.*" (Emphasis added.) Thus, the amount of partial recovery for support furnished the indigent is governed by the ability of the responsible kindred to reimburse the county. The fourth and final sentence of this section then treats the question of recovery for institutional care extended, by prescribing as follows: "The board of supervisors shall, in the case of aid granted by institutional care, fix a reasonable charge therefor, which shall be the *measure of reimbursement* to the county * * *." (Emphasis added.)

[5] Section 2577 provides that upon failure of the kindred, as specified in section 2576, to perform their duty to support their indigent relative, the district attorney shall, upon request of the board of supervisors, "promptly commence and prosecute proceedings for the ascertainment and enforcement of the liability and responsibility of the kindred." This language envisages and authorizes the county's pursuit of a distinct type of procedure to compel future contributions by responsible kindred who neglect to discharge their legal obligation, as created by statute (section 2576, supra). The precise limits and fundamental aim of the prescribed action is outlined in section 2578, which, after declaring that such proceedings shall take the form of a petition praying for the ascertainment of the responsibility and liability of the specified kindred of the indigent, provides that the court shall "ascertain the financial ability of the defendants and * * * the court shall order each defendant to pay to the county a proper proportion, if any, of his liability for the support of the indigent." Thus, the extent of the kindred's liability is declared to rest upon the court's finding as to financial ability. Section 2579 then provides for proceedings to be taken in the event of such kindred's non-compliance with the court's order directing payments for the maintenance of the indigent relative. Undoubtedly, the express terms of these three sections establish a distinct right and furnish a complete remedy for its enforcement, but there still remains the question of whether the availability of this method of collection procedure negatives the propriety of appellant county's prosecution of the instant action in reliance upon the language of section 2576. To determine the intent of the legislature in this respect, the provisions of all of these code sections must be read and considered together.

[6, 7] In arriving at the proper construction of these code provisions relative to the responsibility of kindred for support of their indigent relatives, certain cardinal principles of statutory interpretation must be observed. A statute should always be so construed, if reasonably possible, as to give force and effect to every expression used by the legislature. Brainard v. Brainard, 17 Cal.App.2d 520, 62 P.2d 403; 23 Cal.Jur. 780, sec. 157. Excepting when clearly otherwise intended or indicated, words in a statute should be given their ordinary meaning and receive a sensible construction

in accord with the commonly understood meaning thereof. Universal Pictures Corp. v. Superior Court, 9 Cal.App.2d 490, 50 P.2d 500. Section 13 of the Civil Code provides: "Words and phrases are construed according to the context and the approved usage of the language; * * *."

[8] Tested by these canons of statutory construction, it is manifest that the code provisions here subject of analysis extend to the county alternative methods of collection procedure. Section 2576, after its introductory direction pertaining to the eligibility of an indigent for relief, gives the county an independent cause of action against the responsible kindred for the recovery of money previously expended by it for aid furnished the indigent relative. Three separate times the legislature has so demonstrated its intent in this section: twice by the use of the term "reimburse" and once by the use of the term "reimbursement." As so employed, these words, referable to the recoupment of sums already paid, indicate the legislature's intention by this enactment to provide the county with authority to prosecute an ordinary cause of action for the recovery of money and negative the requirement of a judicial decree to determine the measure of the debt as the basis for the maintenance of such action. Sections 2577 and 2578 outline a wholly different type of procedure, whereby the county is permitted to file a petition, not to reimburse itself for money already expended, but to compel the responsible kindred to contribute to the *future* support of the indigent who is not eligible for county relief, other than that of an emergency character, as a matter of right. That these last-mentioned code provisions contemplate a proceeding entirely independent of the action for reimbursement, subject of section 2576, is indicated by the fact that they refer to section 2576 only in one respect, that is, the order in which the liability of the kindred is fixed by the latter provision. By virtue of sections 2577 and 2578 the county may, prior to rendering non-emergency charity aid to an applicant indigent who has responsible kindred pecuniarily able to maintain him, commence a proceeding for a judicial declaration of the *extent* of the kindred's liability in accordance with the court's finding as to financial ability and for an order directing the responsible relatives to discharge their statutory duty of support of the indigent by the payment in advance of certain fixed sums to the county for that purpose. Such adjudication, of course, would have only *prospective* operative force.

[9-12] The above construction of these code provisions is in complete accord with the system of county aid established by the relief statutes of this state. The theory underlying the extension of such aid to an indigent has always been that he is without means of support either from his own efforts or those of responsible kindred, and that when the latter are available, they are primarily liable for the welfare of the indigent relation. In accordance with this basic principle, the original relief act of 1901, Stats. 1901, ch. CCX, page 636, made specified kindred of an indigent liable for *reimbursement* to the county for the aid it extended to the latter person. Pursuant to the authority of this statute, the various counties of this state have prosecuted actions to recover, as a debt, money representative of the aid so advanced. Then in 1933 this first act was repealed in conjunction with the enactment of a second relief statute (Stats. 1933, ch. 761, page 2005), wherein was inserted the language now embodied in sections 2576–2579 above mentioned. Under the provisions of this 1933 law the counties continued, as they had under the prior act, to file like actions for reimbursement for charity aid granted. In 1937, upon the repeal of former relief statutes, all legislation on this subject was codified and incorporated into the newly created Welfare and Institutions Code. Since then sections 2576–2579 have been interpreted by county officials engaged in the administration of the charity laws in this state in the same manner as the corresponding provisions in the 1933 act were regarded, and accordingly the counties proceeded, as before, to file suits predicated upon the theory of a cause of action for reimbursement from responsible kindred for charitable aid rendered to indigent relations. Thus is established a course of conduct followed without interruption for forty years. The contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect, while not controlling, is given great respect People v. Southern Pacific Co., 209 Cal. 578, 290 P. 25; Riley v. Thompson, 193 Cal. 773, 227 P. 772; Riley v. Forbes, 193 Cal.

740, 227 P. 768; 23 Cal.Jur. 775, sec. 151. As was said in United States v. Philbrick, 120 U.S. 52, 59, 7 S.Ct. 413, 417, 30 L.Ed. 559: "A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and, since it is not clear that that construction was erroneous, it ought not now to be overturned." Furthermore, it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication. Lowe v. Yolo County Consolidated Water Co., 8 Cal.App. 167, 174, 96 P. 379; 23 Cal.Jur. 782, sec. 158.

Wherever possible, a statute is to be construed in a way which will render it reasonable, fair and harmonious with its manifest purpose, and which will conform with the spirit of the act. Uhl v. Badaracco, 199 Cal. 270, 284, 248 P. 917. "Therefore," as is stated in People v. Merrill, 24 Cal.App. 206, 210, 140 P. 1075, 1077, "when a suggested construction of a statute in any given case necessarily involves a decided departure from what may be fairly said to be the plain purpose of the enactment, such construction will not be adopted to the exclusion of a possible, plausible interpretation which will promote and put in operation the legislative intent."

Several reasons bearing on the practical administration of county relief suggest themselves in support of our construction of these statutory enactments as expressive of the legislative intention to provide alternative modes of collection procedure. The abandonment of the county's long-authorized cause of action predicated upon the reimbursement theory, in favor of the exclusive remedy of requiring its filing of a petition for the adjudication of the extent of liability of relatives before the institution of a suit against the kindred of the indigent, not only would have disastrous consequences upon the applicant for aid, as well as upon the county, but likewise would be repugnant to the entire legislative scheme referable to relief in this state. The granting of public aid would be slackened pending the county's search for and investigation of responsible kindred who might be judicially declared liable to the county for the payment of certain sums. As the kindred's financial ability changed or the requirements of the recipient of aid varied, the county would be faced with the necessity of petitioning for further court orders to correspond with these altered circumstances. Also of significance is the fact that whereas under the reimbursement theory the county may attach, as in any action for the recovery of money in this state, the assets of defendant kindred of the recipient of relief without actually locating such responsible relatives (subd. 1, sec. 537, Code Civ. Proc.), a like procedure would not be so available if it were necessary to have a prior judicial finding as to pecuniary ability and the measure of liability of defendant kindred. That such increased amount of litigation incident to the county's exercise of the remedy of attachment in its proceeding to recover for aid furnished an indigent would aggravate and hamper the operation of the established county relief system is not debatable. Akin to these considerations is the additional fact that the code provisions relative to the maintenance of juvenile delinquents and to the care of blind, mentally disordered and aged persons authorize actions against responsible relatives for *reimbursement* for aid extended by the county, an observation indicating that the legislature intended the same right of recovery to exist in all types of charitable relief, and that the aforementioned sections of the Welfare and Institutions Code applicable to the support of indigents should be so interpreted when the language therein contained is susceptible of such construction.

[13, 14] Respondent argues that the due process of law guaranty of the Constitution of this state (art. I, sec. 13, California Constitution) prohibits the maintenance of an action such as here instituted by appellant county. In this connection she urges that the decedent was entitled in her lifetime to notice and opportunity to be heard as to her liability and financial capacity to render aid to her adult daughter, and that without such hearing the decedent's estate may not be adjudged responsible for the relief furnished by the county as above outlined. It is her contention that since one of the direct purposes of the code provisions above quoted is to create, as between a parent and an adult child, a legal obligation to furnish support, maintenance and relief, a duty which at common law was

only a moral one, resting on close blood relationship and humanitarian considerations, the statutory procedure to be followed in enforcing the liability imposed by the legislative enactment must be rigidly observed. This well-defined rule referable to the necessity of strict compliance with the provisions of a statute in derogation of the common law is, of course, indisputable. But likewise it should be added that appellant county's maintenance of the present action is not inconsistent with this settled principle, since in our opinion its action based upon the reimbursement theory is expressly authorized by section 2576 of the Welfare and Institutions Code, as above construed. The fallacy of respondent's argument is her assumption that sections 2576–2578 contemplate not two types of action, but only one method of procedure, the filing of a petition for and the securing of a court order judicially declaring the responsibility of the specified kindred as a prerequisite to the county's commencement of a suit for the recovery of money expended in aid of the indigent relation. The fact that respondent as defendant in the county's action for reimbursement was furnished with notice of suit and afforded an opportunity to present her case in court satisfies the requirements of due process of law. This precise point was recently so determined in the Estate of Stobie, 30 Cal. App.2d 525, 529, 530, 86 P.2d 883, wherein the state was suing for reimbursement for the care furnished an insane person under a statute making the estate of the incompetent liable.

[15] Furthermore, with respect to the estate's liability upon the county's claim, it should be noted that section 573 of the Probate Code specifically provides for the survival of an action such as the instant one, which "might have been maintained" against the deceased during her lifetime.

[16] For the reasons above expressed it is our opinion that the county's amended complaint herein states a cause of action under the provisions of section 2576 of the Welfare and Institutions Code. Accordingly, the judgment from which this appeal was taken is reversed, with directions to the trial court to overrule the demurrer and permit the respondent to answer if she so desire.

GIBSON, C. J., and SHENK, HOUSER, and CARTER, JJ., concurred.

50 Cal.App.2d 22

PORTNOY v. HOHMANN, Chief of Police et al.

Civ. 13283.

District Court of Appeal, Second District, Division 1, California.

Feb. 17, 1942.

Constitutional law ⇐235, 292

A city ordinance, providing no person shall upon a public street or sidewalk solicit the sale of or distribute any handbill or other advertising matter relating to photographs taken of passers-by on the public way, set up an arbitrary and unreasonable classification and violated the constitutional guaranties of "equal protection of the law" and "due process of law". Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law" and "Equal Protection of the Law".

Appeal from Superior Court, Los Angeles County; Hartley Shaw and B. Rey Schauer, Judges.

Action to enjoin the enforcement of an ordinance by Irving Portnoy against Arthur C. Hohmann, Chief of Police, and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for appellant Hohmann, Chief of Police.

J. F. Rosen and H. Wolpin, both of Los Angeles, for respondent.

DORAN, Justice.

Plaintiff in the court below petitioned for an injunction restraining the enforcement against him of a certain ordinance of the city of Los Angeles, upon the ground of the unconstitutionality thereof, to which petition the defendant chief of police of the said city interposed a general demurrer. The said defendant waived the right to file an answer to the complaint in the event his demurrer was not sustained; and upon the overruling of the demurrer judgment

was entered against the said defendant, in his official capacity as chief of police, the judgment being in the form of a permanent injunction restraining enforcement of the ordinance against plaintiff. From this judgment the defendant chief of police appeals.

The ordinance involved is section 42.16 of the Los Angeles Municipal Code, which reads as follows: "Sidewalk Photographers—Soliciting Prohibited. No person shall upon or along any public street, sidewalk, alley, park, or parkway, or in any doorway or entranceway to any building abutting thereon, solicit the sale of, or distribute any handbill or other advertising matter relating to photographs taken of passersby on or along said public way or place."

In his complaint for injunction plaintiff alleges that he "is now and for more than five years last past has been engaged in the candid camera business and in connection therewith has maintained and is now maintaining a place of business * * * in the City of Los Angeles. That in connection with said business the plaintiff on or about the 2nd day of August, 1940, employed twelve camera men who took snapshots of pedestrians on the sidewalk as they walk towards said camera men and to each of said pedestrians whose photograph has been taken, who voluntarily accepted the same, the said camera men would deliver a card advising the said pedestrian that his or her photograph had just been taken and could be secured upon sending the price thereof to the place of business of the plaintiff." Plaintiff alleges that as to his business the ordinance in question is discriminatory in character, unconstitutional and void in that it does not prohibit the distribution of handbills or other advertising matter relating to anything else, such as shows, theatres, ball games or political advertising but merely prohibits the distribution of handbills or other advertising matter relating to the photographs taken of passersby on or along such public way or place; and that the ordinance is unconstitutional as an unreasonable and unwarranted exercise of the police power which arbitrarily and without due process of law deprives the plaintiff of his property, in violation of the Fourteenth Amendment of the Constitution and of article 1, section 13, of the Constitution of the State of California.

Among other points in his brief appellant chief of police contends that the ordinance is a proper enactment for the prevention of littering the streets; that the ordinance is a proper method of preventing the use of the streets for commercial purposes, and a proper method of protecting the right of privacy of persons using the public streets. The only question necessary for determination here is whether the ordinance unjustly discriminates against respondent by seeking to set up an unreasonable and arbitrary classification of persons soliciting sales and distributing advertising matter upon the public streets. It is to be noted that the ordinance in question does not prevent the taking of candid camera photographs upon the streets but merely seeks to prevent solicitation of the sale of such photographs and the distribution of advertising matter relating thereto. Upon the basis of solicitation of sales and the distribution of advertising matter there appears to be no substantial distinction between respondent's type of business and any other type of business which employs or which might employ such solicitation and distribution upon the streets, nor has appellant pointed out any reasonable distinction. Upon its face the ordinance sets up an arbitrary and unreasonable classification of persons soliciting sales and distributing advertising matter upon the public streets, not based upon any natural or constitutional difference, and therefore violates the constitutional guaranties of equal protection of the law and against deprivation of property without due process of law. No question is here involved as to a distinction between commercial and non-commercial use of the streets for solicitation and advertising. The contentions of appellant as to the insufficiency of the complaint are without merit.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concurred.

50 Cal.App.2d 25

PITTSFORD et al. v. CITY OF LOS ANGELES et al.

Civ. 13391.

District Court of Appeal, Second District, Division 1, California.

Feb. 17, 1942.

Hearing Denied April 16, 1942.

1. Constitutional law ⇐90

The conduct of strictly commercial activities may, under certain circumstances, involve the exercise of free speech and a free press, and under such circumstances prohibition of the commercial practices might be an abridgment of the constitutional rights.

2. Constitutional law ⇐90

There is a real basis for distinction between the exercise of constitutional rights of free speech and free press when in connection with ordinary business activities and the exercise of the same rights when in relation to public expressions of opinion upon political, religious, social, and economic questions, so far as regulation and control thereof under police power is concerned.

3. Constitutional law ⇐92

There is no vested right to do business upon public streets.

4. Constitutional law ⇐90

The public at large has vested right to exercise of constitutional right of freedom of speech and freedom of press in public places.

5. Municipal corporations ⇐703(1)

The fact that regulation of business conducted upon public streets may adversely affect certain individuals whose commercial welfare is peculiarly dependent upon such uses affords no argument against the validity of the ordinance otherwise bearing a reasonable relation to the public health, safety, and general welfare if the ordinance adopts a sound method of classification.

6. Evidence ⇐5(2)

In determining validity of ordinance prohibiting distribution of commercial advertising matter upon public streets and thoroughfares as applied to "candid camera" photographer who gave order blank to person whose picture had been taken, it could be recognized as a matter of common knowledge that, after a brief perusal or glance at the order blank, many of the persons receiving order blank would be apt to cast it into the street.

7. Constitutional law ⇐90, 235, 274

Municipal ordinance prohibiting distribution of commercial advertising matter upon public streets and thoroughfares, but not prohibiting the distribution of handbills upon religious, political, and scientific subjects, is not unconstitutional as denying right of "freedom of press", "freedom of speech", "equal protection of the laws", or "due process of law". Const.Cal. art. 1, §§ 9, 13, 21; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law", "Equal Protection of the Laws", "Freedom of Press", and "Freedom of Speech".

8. Municipal corporations ⇐63(1)

In determining the validity of a municipal ordinance, the judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful.

9. Municipal corporations ⇐703(1)

A municipal ordinance prohibiting the distribution of commercial advertising matter upon public streets and thoroughfares, but not prohibiting the distribution of handbills upon religious, political, or scientific subjects, is not invalid on ground that the object of the ordinance, which was to prevent littering of streets, did not bear a reasonable relation to public health and general welfare.

Appeal from Superior Court, Los Angeles, County; Hartley Shaw, Edward T. Bishop, and W. Turney Fox, Judges.

Action to enjoin the enforcement of an ordinance by Marion J. Pittsford and others against the City of Los Angeles and others. From an adverse judgment, defendants appeal.

Reversed and remanded with directions.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and Clyde P. Harrell, Jr., and John L. Bland, Deputy City Attys., all of Los Angeles, for appellants.

Mott & Grant and A. A. Goldstone, all of Los Angeles, for respondents.

DORAN, Justice.

This action arose under circumstances similar to those in Portnoy v. Hohmann,

Cal.App., 122 P.2d 533, but the ordinance sought to be enforced against plaintiffs in the instant action is section 28.01.1 of the Los Angeles Municipal Code. The defendant city and its chief of police here appeal from the judgment granting a permanent injunction against enforcement of the ordinance in question as to respondents, which judgment was entered after demurrer to respondents' complaint was overruled and appellants had waived the right to answer. The complaint prayed for the relief granted upon specific allegations as to the unconstitutionality of the ordinance, towit: That it constitutes a denial to plaintiffs of the right of free press and the right of free speech, in violation of the First and Fourteenth Amendments to the Constitution of the United States, and section 9 of article I of the Constitution of the State of California; that it denies plaintiffs the equal protection of the laws and grants privileges to one class of citizens not accorded to all citizens similarly situated, in violation of the Fourteenth Amendment of the United States Constitution and of section 21 of article I of the Constitution of the State of California; that it constitutes an unreasonable, unwarranted, arbitrary and discriminatory regulation having no substantial relation to the public health, morals, safety, or welfare, in violation of the Fourteenth Amendment of the Constitution of the United States; and that it deprives plaintiffs of their property and their property rights without due process of law, in violation of the Fourteenth Amendment to the United States Constitution and section 13 of article IV(sic) of the Constitution of the State of California.

Respondents' business was the same as that of the respondent in Portnoy v. Hohmann, supra, and in their complaint respondents described the operation of their business as follows: "* * * plaintiffs employ photographers, the number of whom varies from time to time, and said photographers are equipped by plaintiffs with motion picture cameras; that pictures are taken by said photographers of pedestrians on the sidewalks of the City of Los Angeles, and simultaneously with the taking of a picture of a pedestrian the photographer offers to the person whose picture has been taken an order blank in the form of a card, together with an envelope bearing the address of plaintiffs' place of business * * * that each card bears a serial number for the purpose of enabling plaintiffs to identify the picture which has been taken, and the person whose picture has been taken and to whom the card is handed is informed by the printing on said card that by inserting his or her name and address on said card and mailing the same in the envelope accompanying it, together with twenty-five cents and three cents postage, said person will receive from plaintiffs an enlargement of the picture which has been taken. * * * That said order blanks and envelopes are not thrown on the sidewalks or streets, nor are they offered or handed to pedestrians promiscuously by said photographers, but are offered and handed to those persons only whose pictures have been taken and who are willing to and voluntarily accept the same."

Section 28.01.1 of the Los Angeles Municipal Code, by virtue of which the city sought to prevent distribution of the order blanks and envelopes in question, reads as follows:

"(a) No person shall, upon any street, sidewalk or park, cast, throw or deposit, or distribute among pedestrians or to persons in vehicles, any commercial advertising handbill, or any handbill distributed for the purpose of advertising any merchandise, commodity, property, business, service, art, or skill, offered, sold or rendered for hire, reward, price, trade or profit.

"(b) This section shall not be deemed or construed to prohibit or restrict the distribution of written or printed matter devoted to the expression of views, opinions, beliefs or contentions relating to religious, political or sociological subjects, or to public or civic affairs, or to labor disputes or other controversies, or to community, state, regional, national or international affairs, or which treat of any social or economic order, or which relate to the arts or sciences; or which are aimed to redress any grievance, or which otherwise are not distributed for the purpose of soliciting business, trade or custom; nor shall the terms of subsection (a) be deemed to include the printed notice of an event which is not arranged for profit or to stimulate the business, trade, or traffic of the person who causes the dissemination of the notice, even though a monetary contribution of an admission fee be requested or accepted in connection with such event."

Appellants contend that a municipality may prohibit the distribution of commercial advertising matter upon its streets, and that failure to prohibit distribution of handbills upon religious, political and scientific subjects does not render such an ordinance invalid; that the ordinance in question does

not take the property of plaintiffs and respondents without due process of law; and, further, that plaintiffs and respondents have no constitutional right to conduct their business upon the public streets. Respondents here raise substantially the same objections to the ordinance as those set forth in their complaint, noted above, and state that the question is whether a municipality may, by ordinance, prohibit the distribution upon its streets of commercial advertising of a lawful business to persons willing to accept it. That is a correct statement of the question involved. It is to be noted that the ordinance in question does not seek to classify commercial interests or enterprises in the use of the city's streets for distribution of advertising matter; the distinction is expressly drawn between commercial and non-commercial use of the streets for that purpose. It is for this reason, no doubt, that respondents strongly rely upon their contention that the ordinance abridges the exercise of free speech and a free press. In fact, respondents contend that the prevention of the use of the city streets for business activities is not an issue in the case at bar. Respondents' argument that the ordinance denies equal protection of the laws is based upon the claim that the attempted distinction between commercial and non-commercial handbills is arbitrary; and while they concede that a municipality under its police power may enact ordinances regulating the use of the streets, respondents contend that the boundaries of control of municipalities over the distribution of handbills upon the public streets are clearly stated in Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Hague v. C. I. O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; and Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 60 S. Ct. 146, 84 L.Ed. 155; that under those cases the control is limited to regulating the exercise of the right to prevent its abuse, but the right itself cannot be denied. In all of these cases so-called handbill or similar ordinances were held invalid upon the ground that they violated the constitutional guaranties of freedom of speech and freedom of the press. Each of these cases was concerned with an attempted exercise of either a political, civic, social or other closely related right; and in none of the cases cited were the individuals in question engaged or connected with any commercial activity. The ordinances in these cited leaflet cases were broad in scope and made no distinction between commercial and non-commercial handbills. Respondents rely particularly upon Lovell v. City of Griffin, supra. That case was concerned with an ordinance which prohibited the distribution of literature of any kind, anywhere, at any time, without a permit, and involved a prosecution thereunder of a person distributing religious literature. The United States Supreme Court held the ordinance invalid on its face because of its scope, stating [303 U. S. 444, 58 S.Ct. 669, 82 L.Ed. 949]: "There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets." Nothing is contained in the opinion in the Lovell case, either expressly or by inference, to aid in the determination of the question here at bar. Certain statements in the opinion in Schneider v. State, supra [308 U.S. 147, 60 S.Ct. 150, 84 L.Ed. 155], are more significant. It is there stated:

"Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.

"Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak,

write, print or distribute information or opinion. * * *

"We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it." (Italics added.)

One of the ordinances involved in the Schneider case required a permit to solicit or express views from door to door. Of this the court said: "We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires." In this instance the petitioner's motive in calling from door to door was religious. Of petitioner's activities the court stated: "We do hold, however, that the ordinance in question, as applied to the petitioner's conduct, is void, and she cannot be punished for acting without a permit." This may be taken as indicating that the United States Supreme Court recognized a distinction between commercial and non-commercial solicitations, at least as far as requirements for a permit are concerned. Moreover, the court in the Schneider case clearly held that as to the petitioner's religious activities the ordinance, in requiring a permit therefor, abridged freedom of speech. Since the court saw fit to draw a distinction between petitioner's actions and those of commercial canvassing, it is proper to conclude that the ordinance there involved would not be held to abridge freedom of speech when applied to commercial solicitations.

[1] The conduct of strictly commercial activities may under certain circumstances involve the exercise of free speech and a free press, and under such circumstances prohibition of certain commercial practices might conceivably be held to abridge these constitutional rights. People v. Osborne, 17 Cal.App.2d, Supp., 771, 59 P.2d 1083, concerned an ordinance which prohibited the advertising of prices of barbers' services or the posting of a price list in a barber shop so as to be seen from the street. The appellate department of the superior court held that the ordinance violated the right of property and of contract and impaired freedom of speech and of the press. However, People v. Osborne, supra, was concerned with the validity of restrictions on the posting or publication of prices, a question which has different ramifications than that of the use of public streets for the distribution of commercial handbills. Moreover, regardless of what particular constitutional right or freedom was involved in the case last cited the ordinance there in question obviously bore no reasonable relation to the public morals, peace, safety, health or general welfare, and, on that ground alone, constituted an unreasonable exercise of police power. It does not follow that where an ordinance regulating or prohibiting the transaction of business, or certain practices in connection with the transaction of business upon the public streets may be said to bear a reasonable relation to the public welfare, such an ordinance may be set aside upon the ground that it encroaches upon liberty of speech and of the press. Such liberties in connection with commercial activities may ordinarily be exercised in some other manner than upon the public streets.

[2-5] It may be seen then that there is a real basis for distinction between the exercise of such constitutional rights when in connection with ordinary business activities and the exercise of those same rights when in relation to public expressions of opinion upon political, religious, social and economic questions, in so far as regulation and control thereof under the police power is concerned. As far as general expressions of opinion are concerned, public places frequently afford the only forum where free speech may be exercised. Under such circumstances, prohibition of use of the streets for this purpose at once constitutes an abridgment of the right of free speech and a violation of its constitutional guaranty. On the other hand, prohibition of the use of public places for purposes of commercial advertising, assuming without deciding that such advertising embodies principles of free speech and a free press, may not so readily be said to abridge constitutional rights in this respect. Other channels of expression of equal value may still be left open to the commercial advertiser. Consequently, what would constitute actual prohibition of expressions of opinion when applied to the public at large might only serve as a reasonable regulation when applied to matters of commercial advertising. The place for the conduct of a private business is upon private property; and it has been said that there is no vested right to do business upon the public streets. "* * * the highways of the state are public property. They are established and maintained at public expense for the use of the whole people, primarily as avenues of communication for their pri-

vate uses, and their use for private gain is 'special and extraordinary.' Having that consideration in mind, it is not only within the power of the state, but its imperative duty to so regulate their use for private gain, that it may not materially impair or destroy their usefulness as avenues of communication adequate and available for the use of all citizens for their own proper and private purposes." Parlett Co-operative v. Tidewater Lines, 164 Md. 405, 165 A. 313, 317, citing Stephenson v. Binford, 287 U.S. 251, 264, 53 S.Ct. 181, 77 L.Ed. 288, 294, 87 A.L.R. 721. And more appropriately, see: State v. Barbelais, 101 Me. 512, 64 A. 881; Ex parte Bradshaw, 70 Tex.Cr.R. 166, 159 S.W. 259, and the dissenting opinion In re Thornburg, Court of Appeals, Ohio, Cuyahoga County, 55 Ohio App. 229, 9 N.E.2d 516. Because of the conditions generally attendant upon the exercise of free speech and freedom of the press, and in the light of the recent decisions of the United States Supreme Court, above cited, it may well be said that the public at large has a vested right to the exercise of these constitutional freedoms in public places; but there is sufficient basis, both in logic and in reality, for declining to extend such a doctrine to the protection of purely private commercial activities conducted upon public property. "Nor is it an objection to the validity of such an ordinance regulating the use of the streets, that the acts prohibited would not in and of themselves necessarily obstruct travel, or in any way create a nuisance. The carrying on of trade or business in the public streets by one, or by a few persons, might not be of sufficient consequence to materially obstruct the public travel, while, if the same thing should be done by many, it might create a serious obstruction and nuisance, and what may be done by one in this respect, all must have an equal right to do." State v. Barbelais, supra. Though a regulation of business conducted upon the public streets may adversely affect certain individuals whose commercial welfare is peculiarly dependent upon such usage, this circumstance affords no argument against the validity of an ordinance otherwise bearing a reasonable relation to the public health, safety and general welfare, if the ordinance in question adopts a sound method of classification. See: San Francisco Shopping News Co. v. City of South San Francisco, 9 Cir., 69 F.2d 879, at page 890.

[6, 7] Appellants concede that the purpose of the ordinance in question is to prevent the littering of the streets. Respondents point out that their distribution of forms and envelopes was limited to persons willing to receive the same. The fact that the order blanks in question were handed to persons willing for the moment to accept them is of little or no importance here, since it may be recognized as a matter of common knowledge that after a brief perusal or glance at the card or blank many of the persons receiving such a card would be apt to cast it into the street. Nor, under the circumstances here presented, could it be a valid argument to contend that the proper remedy would be to arrest and punish those who threw the cards away. It should again be pointed out that the instant case does not involve the question of the general right of persons to express their views and opinions on all subjects in public places. The question here involved is the narrower one of the right to distribute commercial advertising matter upon public streets and thoroughfares. It is difficult to see how the distribution of commercial order blanks and return envelopes for the purchase of photographs embodies the principles of freedom of speech and freedom of the press; but, as already indicated above, the assumption that such principles are involved would have little effect upon the determination of the question presented.

In Mutual Film Corp. v. Industrial Comm. of Ohio, 236 U.S. 230, 35 S.Ct. 387, at page 391, 59 L.Ed. 552, at page 560, it is said, in speaking of cases upholding the police power in granting or withholding licenses for exhibition of motion pictures: "It seems not to have occurred to anybody in the cited cases that freedom of opinion was repressed in the exertion of the power which was illustrated. The rights of property were only considered as involved. It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion."

Respondents attempt to distinguish the question of the right to distribute their order blanks on the streets from that of regulating or prohibiting the photographic or any other business upon the public streets. This distinction is attempted because the ordinance does not seek to prevent the taking of photographs on the street, but only

has the effect of preventing the distribution of literature on the streets in connection with the pictures taken. However the situation may be viewed, the effect of the ordinance is to regulate business conducted on the streets. As far as respondents' business is concerned respondents are permitted to take pictures upon the streets but are not permitted to distribute literature, applications or order blanks in connection therewith. The distribution of the order blanks and cards in the case at bar must necessarily be viewed as an incident to the enjoyment of an interest in property, the property being the "candid camera" business. In the final analysis the problem here presented should be approached from that standpoint rather than from any consideration of the principles of freedom of speech and of the press, which, as already pointed out, are not material to the question, nor particularly relevant. It is to be noted that in all the cases, cited by the parties herein or found upon review of the question, which concern the validity of a handbill ordinance as applied to a strictly commercial activity, the courts have considered the question in the light of a regulation or prohibition of a property right rather than that of freedom of speech or press.

One possible exception may be found in Chrestensen v. Valentine, 2 Cir., 122 F.2d 511, in which case, however, the United States Supreme Court granted certiorari in November, 1941, 62 S.Ct. 301, 86 L.Ed. 486; and that case has not yet been heard by the Supreme Court. The question there involved is somewhat different from that in the case at bar. The ordinance there was a section of the Sanitary Code of New York City to the same effect as the ordinance here; but the handbill in the Chrestensen case was one containing a purely commercial notice on one side, advertising the exhibition of a submarine, coupled with a notice on the other side of the bill protesting the refusal on the part of city authorities of the use of a certain dock for the exhibition. The United States Circuit Court held in the majority opinion that the hybrid nature of the handbill, when not shown to be a subterfuge, prevented its falling within the prohibition of the ordinance. The majority of the court also expressed the opinion that absolute prohibition of commercial handbills seemed to be of doubtful validity, but preferred to rest its decision on the ground first stated. Circuit Judge Frank, however, in a strong dissent, was of the opinion that the handbill in question, though embodying a protest in the nature of an exercise of free speech, actually constituted two separable matters; and that the portion of the handbill which was of a purely commercial nature came within the prohibition of the ordinance; and that the constitutional guaranty of free speech does not render unconstitutional the prohibition of the distribution on the city's streets of such a purely commercial advertisement merely because it is deliberately coupled with a totally distinct and easily separable exercise of the privilege of free speech.[1]

In re Thornburg, Court of Appeals of Ohio, Cuyahoga County, 55 Ohio App. 229, 9 N.E.2d 516, 520, concerned the application of a handbill ordinance to the same business as that of respondents here. The court considered the ordinance as applied to such a business as one attempting to regulate property rights. The majority of the court held that a city may not prohibit distribution of handbills, etc., which are merely an incident to the conduct of a lawful business. But the opinion concedes that if the purpose of the ordinance were to regulate traffic, and so stated, it would represent a valid exercise of police power. The court held the ordinance valid insofar as it prohibited distribution of drugs, patent medicines, samples of foodstuffs, etc., on the streets, because such an application related to public health. Judge Terrell, dissenting, observed that it is not necessary

[1] In McKay Jewelers et al. v. Bowron, Cal.Sup., 122 P.2d 543, recently argued and submitted November 6, 1941, there is raised the same question in connection with solicitation of business in front of a jewelry store by the proprietors or employees thereof. The ordinance there involved is section 42.00 of the Los Angeles Municipal Code prohibiting such solicitation. The court below (the same court which passed on the cases at bar) sustained a demurrer, without leave to amend, to a complaint seeking to enjoin enforcement of the ordinance as invalid and unconstitutional. The appellant there contends that the ordinance violates the guaranty of freedom of speech, which it is claimed applies as well to commercial transactions as to expressions of general opinions. It appears that when appellants there made solicitations they were standing on their own property, but in front of their store.

in an ordinance to state the purpose for which it is enacted, or the evils sought to be overcome, and if from a reading of the ordinance it can be gathered that the purpose thereof is for the general safety and health of the citizens, it is within the exercise of the police powers of the city. He stated: "No person has an inherent right to conduct his business upon the public streets and sidewalks of a city. The distributing of advertising circulars and cards is part of a business. The city council in the exercise of its police power may prohibit the carrying on of such business on the public streets and highways." The dissent in the Thornburg case follows a line of reasoning more in accord with the views herein expressed.

A significant case upon the subject at hand, and one regarded as leading, is that of San Francisco Shopping News Co. v. City of South San Francisco, cited above, certiorari to United States Supreme Court denied, 293 U.S. 606, 55 S.Ct. 122, 79 L.Ed. 697. The city of South San Francisco enacted an ordinance prohibiting the distribution in the city of any handbills or printed or written advertising matter on any porch or in any yard not in possession or under the control of the person distributing such matter. It was further provided that the ordinance shall be inapplicable to any newspaper or any publication printing news of a general nature and keeping advertising space therein open to the public, and the publishing of general advertising matter therein. In a decision replete with citations of compelling authority, drawn from the United States Supreme Court, the Ninth Circuit Court of Appeals upheld the validity of the ordinance.

In Murphy v. California, 225 U.S. 623, 32 S.Ct. 697, 698, 56 L.Ed. 1229, 41 L.R.A., N.S., 153, cited in San Francisco Shopping News Co. v. City of South San Francisco, supra, it is said: "The 14th Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or locaton, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many nonuseful occupations which may or may not be harmful to the public, according to local conditions, or the manner in which they are conducted."

In People v. St. John, 1930, 108 Cal.App., Supp., 779, 288 P. 53, the appellate department of the Superior Court of Los Angeles County considered the validity of an ordinance prohibiting distribution of commercial advertising on streets, other public places and private yards. The case concerned the distribution of an advertising publication like that in the San Francisco Shopping News case. The shopping news in question was left upon the private porches of persons requesting the same. The validity of the ordinance was upheld as applied to distribution of the shopping news, though doubt was expressed as to the validity thereof if applied to instances where such a paper was handed at their homes to persons willing to receive the same; but when, as in the St. John case, the paper was thrown on the porch, where such distribution was likely to litter the streets, the court was of the opinion that the method employed did not constitute such personal distribution. It should be noted that there is a marked distinction between handing a paper to an individual who wants it, at the door of his home, and handing a paper to a person upon the public street, insofar as the likelihood of littering the streets is concerned.

In Sieroty v. City of Huntington Park, 1931, 111 Cal.App. 377, 295 P. 564, the ordinance was like that in the San Francisco Shopping News case, and prohibited distribution of advertising matter by placing or causing the same to be placed in any automobile, or in any yard, on any porch, or in any mailbox, not in the possession or under the control of the party distributing the same. The ordinance was held to be regulatory and not prohibitive and its validity was sustained. A hearing in the California Supreme Court was denied, Mr. Justice Shenk and Mr. Justice Preston dissenting.

It is significant that in the San Francisco Shopping News case, People v. St. John and in the Sieroty case a distinction between a commercial advertising sheet and a newspaper printing news of a general nature was recognized as reasonable; and in none of these cases was it considered that anything more than an interest in property was involved.

Respondents attempt to distinguish these three cases last mentioned upon the ground that the ordinances there considered pro-

hibited distribution on private property, whereas the ordinance here in question seeks to prohibit distribution of advertising matter upon the public streets. But in all three cases the ordinances were viewed as intended to prevent littering of the streets. Can it be said that a city may prohibit or regulate the distribution of advertising matter on private property in order to prevent littering public streets, but may not enact a similar ordinance as to distribution on the streets themselves?

It is true that in People v. Taylor, 33 Cal. App.2d, Supp. 760, 85 P.2d 978, the appellate department of the Superior Court of San Diego County has stated that the attempt to prohibit mere handing of advertising matter to persons on streets or other public places has often been held an unlawful and unwarranted invasion of private rights, but, of the cases there cited as authority for such a proposition, all were concerned with ordinances so broad as to include any and all types of literature, at once rendering the ordinances invalid; and all of such cases directly involved the exercise of freedom of speech or of the press in connection with political, religious, social, economic or related matters, as did the case of People v. Taylor itself. It is to be noted that among the cases so cited, People v. Johnson, N.Y., Gen.Sess., New York County, 117 Misc. 133, 191 N.Y.S. 750, expressly draws a distinction between distribution of commercial and non-commercial matter in this respect. The court there was of the opinion that the ordinance in question was only intended to apply to commercial advertising matter, and, within such limits, was a proper police regulation. A distinction between distribution of commercial advertising and freedom of expression of views in general has also recently been drawn by lower New York courts in People v. La Rollo, Mag. Ct. N. Y. City, Municipal Term, Bronx County, 1940, 24 N.Y.S.2d 350, and People v. Passafume, Sp. Sess. New Castle, Westchester County, 1940, 22 N.Y.S.2d 785. Under the circumstances, the statement in People v. Taylor, above referred to, must be taken as intended to apply only to attempts at prohibiting all advertising matter without respect to reasonable distinctions or classifications, and is therefore inapplicable to the instant situation.

[8, 9] It is thus demonstrated that the distinction drawn by the ordinance here in question, between commercial and non-commercial matter distributed on the public streets, is reasonable and possesses a sound basis in reality; nor could it be contended that the ordinance does not apply equally to all persons of the same class. But one question remains. Does the ordinance bear a reasonable relation to the public health and general welfare? In a populous metropolitan area such as Los Angeles it cannot be said that any ordinance, framed like the present one, intended to prevent littering of the streets, does not bear a direct connection with the maintenance of public health and safety. Reasonable minds might differ, but "The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense." Williams v. Baltimore, 289 U.S. 36, at page 42, 53 S.Ct. 431, at page 433, 77 L.Ed. 1015, 1022; and see San Francisco Shopping News Co. v. South San Francisco, supra. There is no sound basis for setting aside the ordinance as invalid, nor any grounds for restraining its enforcement as applied to respondents. Upon the facts alleged the cause of action herein is unfounded, and it follows that appellants' demurrer to respondents' complaint should have been sustained; nor does it appear that any cause of action could possibly be stated in the situation here presented. It should be noted that respondents have not attempted to distinguish their order blanks and envelopes from "any commercial advertising handbill, or any handbill distributed for the purpose of advertising any merchandise," as these terms are used in the ordinance in question; and it is clear, both from the apparent purpose of the ordinance and from respondents' allegations as to the manner of distribution, that such a distinction would not be possible.

The judgment is reversed and the cause remanded with directions to the court below to sustain the demurrer interposed by defendants and thereupon enter judgment in favor of defendants.

YORK, P. J., and WHITE, J., concurred.

19 Cal.2d 595

McKAY JEWELERS, Inc., et al. v. BOWRON et al.

L. A. 17933.

Supreme Court of California.

Feb. 26, 1942.

1. Injunction ⇐85(2)

Where the enforcement of an ordinance may cause irreparable injury, the injured party may attack its constitutionality by an action to enjoin its enforcement.

2. Pleading ⇐214(1)

Allegations of plaintiffs' complaint were admitted by defendants' demurrer.

3. Injunction ⇐118(3)

Complaint alleging that jewelers engaged in practice of approaching passers-by who paused to inspect merchandise on display in jewelers' windows, that the jewelers did not step off their respective premises to address passers-by, that substantial portions of sales of the respective jewelers were derived from sales secured in such manner, and that defendant enforcement officers were threatening to institute proceedings against jewelers and arrest them and their employees for violation of ordinance prohibiting use of entrances, hallways, or doorways of places of business to solicit passers-by to enter for purpose of purchasing merchandise, was sufficient to show irreparable injury so as to authorize maintenance of injunctive action attacking constitutionality of ordinance.

4. Municipal corporations ⇐589

A municipality may, within its limits, exercise police powers equal in extent to those of the state. Const. art. 11, § 11.

5. Constitutional law ⇐81

The term "police power" is an attribute of sovereignty and is founded on the duty of the state to protect its citizens and provide for the safety, good order, and well-being of society, and it includes the general welfare which embraces regulation to promote economic welfare, public convenience, and general prosperity of the community.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

6. Municipal corporations ⇐625

A prohibition or regulation under police power of municipality must be reasonably related to public health, safety, morals, or general welfare.

7. Constitutional law ⇐70(1), 81
Municipal corporations ⇐63(1), 611

A business may be inherently lawful and still subject to police regulation, but, when such lawful business is regulated, it is a judicial question whether the law or ordinance is a lawful exercise of the police power.

8. Constitutional law ⇐45
Municipal corporations ⇐63(2)

If a statute or ordinance purporting to be enacted to protect the public health, safety, morals, comfort, convenience, or general welfare has no real or substantial relation to any of those objects, it is the duty of the court to so declare, since a legislative body may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.

9. Municipal corporations ⇐611

Municipal ordinance prohibiting use of entrances, hallways, or doorways of places of business to solicit or importune passers-by to enter for purpose of examining or purchasing merchandise, could not be sustained on theory that it was enacted to protect public health or morals. Const. art. 11, § 11.

10. Municipal corporations ⇐625

Municipal ordinance prohibiting use of entrances, hallways, or doorways of places of business to solicit or importune passers-by to enter for purpose of examining or purchasing merchandise cannot be sustained as having reasonable relation to general public welfare. Const. art. 11, § 11.

11. Constitutional law ⇐87, 296(1)

Municipal ordinance prohibiting use of entrances, hallways, or doorways of places of business to solicit or importune passers-by to enter for purpose of examining or purchasing merchandise, violates the state constitutional provision that all men have right of acquiring, possessing, and protecting property, and prohibiting taking of property without "due process of law" and violates the Fourteenth Amendment of Federal Constitution as applied to jewelers who while standing on their own premises in quiet, dignified and peaceful manner, made solicitation without pressure or undue influence. Const. Cal. art. 1, §§ 1, 13; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

12. Constitutional law ⇐48

In considering the constitutionality of the enactment of a legislative body, no presumption of invalidity will obtain and every intendment will be indulged in favor of its validity, but the presumption of validity is not conclusively binding on the court.

13. Constitutional law ⇐90

Municipal ordinance prohibiting use of entrances, hallways, or doorways of places of business to solicit or importune passers-by to enter for purpose of examining or purchasing merchandise, violates the constitutional guarantee of "freedom of speech".

See Words and Phrases, Permanent Edition, for all other definitions of "Freedom of Speech".

In Bank.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Edward T. Bishop, and W. Turney Fox, Judges.

Action by McKay Jewelers, Incorporated, and others, against Fletcher Bowron and others, to enjoin the enforcement of an ordinance. From a judgment of dismissal, plaintiffs appeal.

Reversed with directions.

Rollin L. McNitt and Edythe Jacobs, both of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., W. Joseph McFarland and F. von Schrader, Asst. City Attys., and Robert H. Patton, Deputy City Atty., all of Los Angeles, for respondents.

CURTIS, Justice.

Plaintiffs appeal from a judgment of dismissal after an order sustaining a demurrer to an amended complaint without leave to amend. The action was brought to enjoin the enforcement of an ordinance of the city of Los Angeles, on the ground that, as applied to plaintiffs, it violated certain articles of both the state and federal constitutions.

Plaintiffs and appellants are owners of duly licensed businesses conducted at ten respective addresses between Third and Ninth Streets on South Broadway in Los Angeles, a district included in the ordinance hereinafter referred to. They are all engaged in the business of selling jewelry, radios, certain types of electrical appliances, and other miscellaneous articles. Each owner carries merchandise of the value of $20,000 and over, and fixtures and equipment of $5,000 and over. The stores all abut on South Broadway and all have display windows in front. Two of the stores are set back two or more feet from the street line, so that a pedestrian or passer-by pausing to inspect the merchandise in the display windows may stand entirely on the premises of the owners. The other store fronts extend to the street line so that a pedestrian or passer-by must stand on the sidewalk when pausing to inspect the window displays. The stores all have entrances immediately abutting on the street and some of these are of sufficient size to contain display cases to display articles sold in the places of business.

The ordinance in question—Ordinance No. 77,000 and the amendments thereto—is entitled "Soliciting and Begging." This ordinance is a portion of the Municipal Code of the City of Los Angeles, Chapter 4, article 2, sections 42.00 to 42.16, inclusive. The particular sections and subdivisions under attack are section 42.00 (d), prohibiting, with certain exceptions, the sale of goods on any street, sidewalk or park in the districts defined; section 42.00 (e), prohibiting the "crying" or "soliciting" of merchandise on any street or sidewalk or in any doorway or entrance to any building opening into any such street or sidewalk in the districts defined; section 42.01, prohibiting, with certain exceptions, the use of any area in front of any building occupied by a sidewalk or used or intended for use for sidewalk purposes and extending eighteen feet back of the curb line for any purpose other than for the free and unobstructed passage of pedestrians thereon; and section 42.02, as amended in 1940, which makes it unlawful "for any person to use the street or sidewalk in front of or adjacent to any place of business where goods, wares or merchandise is sold or services offered for gain, or any entrance, doorway or hallway immediately abutting upon any public way, for the purpose of importuning or soliciting passers-by, by word of mouth or gesture, or by any sound making device, to enter such place of business for the purpose of examining or purchasing any goods, wares or merchandise or of hiring or bargaining for any services therein."

In the first cause of action plaintiffs allege that they engage in the practice of approaching pedestrians or passers-by, standing on the premises of plaintiffs, who

pause to inspect the merchandise on display in the windows, and endeavor to engage them in conversation and to further interest such pedestrians or passers-by in such merchandise for the purpose of making a sale. Plaintiffs deny that any sound-making devices or gestures are used or physical force, pressure or undue influence is exerted to induce prospective customers to enter their places of business. They affirmatively allege that all solicitation or importuning of prospective customers to enter the stores is done in a quiet, dignified and peaceful manner. It is further alleged that all such conversations are conducted in the set-backs or recesses to the doorways within the respective property lines; that at no time do the plaintiffs or their employees step off of the private premises upon which their businesses are being conducted to engage in such conversations; and that no sales are conducted from any display cases in the entrances, but all sales are made inside the stores. The second cause of action contains the allegation that in addition to the conversations conducted entirely on the private premises, plaintiffs also engage in the practice of addressing pedestrians or passers-by, standing on the street adjacent to plaintiffs' display windows and inspecting the contents thereof, and endeavor to and do engage such pedestrians or passers-by in conversations in order to further interest them in such merchandise for the purpose of effecting sales. It is again alleged that in these latter instances neither the plaintiffs nor their employees step off the respective premises of plaintiffs to address or converse with such pedestrians or passers-by.

Each of the causes of action contains the further allegations that a substantial portion of the sales in the respective businesses of plaintiffs is derived from the conduct of the businesses as alleged in the complaint; that the defendants, as enforcement officers of the city of Los Angeles, have threatened to institute proceedings against plaintiffs and to arrest plaintiffs, their officers, agents and employees, for alleged violations of the sections of the Municipal Code previously referred to; and that the threat of defendants to prosecute and the prosecution of plaintiffs, their officers, agents and employees under the ordinance will result in great and irreparable injury to plaintiffs and their businesses, property and other rights.

Defendants demurred generally on the ground that the ordinance complained of was a valid exercise of the police power of the city and was not arbitrary, unreasonable or discriminatory. Defendants also demurred specially on the grounds of uncertainty, indefiniteness and ambiguity. As previously stated, the demurrer was sustained without leave to amend.

[1-3]Respondents first question the propriety of the injunctive relief sought by plaintiffs. It is well settled that where the enforcement of an ordinance may cause irreparable injury, the injured party may attack its constitutionality by an action to enjoin its enforcement. Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14; San Diego Tuberculosis Ass'n v. City of East San Diego, 186 Cal. 252, 200 P. 393, 17 A.L.R. 513; Abbey Land, etc., Co. v. San Mateo County, 167 Cal. 434, 139 P. 1068, 52 L.R.A.,N.S., 408, Ann.Cas. 1915C, 804, 2 McQuillin on Municipal Corporations, 2nd ed., sec. 851. The allegations of the complaint, which are necessarily admitted by defendants on demurrer, are sufficient to show the irreparable injury which would be suffered by the plaintiffs and their businesses if the threatened arrests were made or if they discontinued the method of conducting the businesses as alleged because of fear of arrest and prosecution.

Before discussing the constitutional questions generally, it should be noted that although the validity of many of the sections of the "Soliciting and Begging" ordinance are attacked in the plaintiffs' briefs, the discussion must be confined to those sections which prohibit soliciting from entrances, doorways or hallways immediately abutting upon any public way. The discussion must be so confined because the allegations in the complaint specifically allege that all of the activities of plaintiffs and their employees are carried on in the set-backs, doorways, hallways or recesses to the doorways of their respective places of business and within their respective private property lines. Because of these allegations the constitutionality of those sections of the ordinance which prohibit sale or solicitation on streets or sidewalks cannot now be questioned by the plaintiffs. Attention will therefore be directed only to that portion of section 42.00 (e) which prohibits the "crying" or soliciting" of the sale of goods in any doorway or entrance to any

building opening into the street or sidewalk and that portion of section 42.02 which makes it unlawful for any person to use any entrance, doorway or hallway immediately abutting upon any public way, for the purpose of importuning or soliciting passers-by, by word of mouth or gesture, to enter such place of business for the purpose of examining or purchasing any goods, wares or merchandise. The latter section also prohibits the use of sound-making devices, but it is alleged that no such devices were used; therefore, the question of the power of the city to prohibit such use is not now before this court.

[4-8] The question to be determined is whether it is within the police power of the respondent city to prohibit the solicitation of the sale of goods by appellants on their own property in the manner alleged in the complaint. It is, of course, undisputed that a municipality, under article XI, section 11, of the state Constitution, may, within its limits, exercise police powers equal in extent to those of the state. The term "police power" as defined in the case of Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 702, 22 P.2d 5, 17, is an attribute of sovereignty and is founded on the duty of the state to protect its citizens and provide for the safety, good order and well-being of society. In that case it was noted that although in its inception the police power was closely concerned with the preservation of the public peace, safety, morals and health, under modern conditions it includes the general welfare which embraces regulation "'to promote the economic welfare, public convenience, and general prosperity of the community.' Chicago, B. & Q. R. Co. v. Illinios, 200 U.S. 561, 592, 26 S.Ct. 341, 50 L.Ed. 596, 4 Ann.Cas. 1175." In the case of Wholesale T. Dealers v. National, etc., Co., 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486, this court observed that although the police power has not expanded, changed social, political and economic conditions have enlarged the field of conduct which may properly be subjected to regulation in order that the general welfare may be adequately protected. It should be kept in mind, however, that even though the field of conduct which may be regulated has been enlarged, the requirement that the prohibition or regulation be reasonably related to the public health, safety, morals or general welfare remains the same. A business may be inherently lawful and still subject to police regulation, but when such lawful business is regulated, it is a judicial question whether the law or ordinance is a lawful exercise of the police power. People v. Hawley, 207 Cal. 395, 279 P. 136; Ex parte Whitwell, 98 Cal. 73, 32 P. 870, 19 L.R.A. 727, 35 Am.St.Rep. 152. If, in the opinion of the court, a statute or ordinance purporting to be enacted to protect the public health, safety, morals, comfort, convenience or general welfare has no real or substantial relation to any of those objects, it is the duty of the court to so declare. A legislative body may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. Skalko v. City of Sunnyvale, 14 Cal.2d 213, 93 P.2d 93; Ganley v. Claeys, 2 Cal.2d 266, 40 P. 2d 817; Ex parte Hayden, 147 Cal. 649, 82 P. 315, 1 L.R.A.,N.S., 184, 109 Am.St. Rep. 183. Innumerable authorities might be cited wherein different standards or tests have been applied in determining whether there has been a valid exercise of the police power.

[9] Referring to the instant case, we find that by sections 42.00 (e) and 42.02 appellants are absolutely prohibited from using the entrances, hallways or doorways of their places of business to solicit or importune passers-by to enter for the purpose of examining or purchasing merchandise. It is shown by the allegations in the complaint that the owners of the businesses are not wandering peddlers who set up their wares in doorways or entrances for "one night stands." They have established businesses with investments of over $25,000. No sales are made until the prospective customers are inside the stores. It is alleged that appellants obtain a substantial portion of their respective businesses and make a substantial sale of their merchandise as a result of such solicitation. If appellants were prohibited from so conducting their businesses, it must be assumed that the burden would be a heavy one. Such prohibition obviously has no relation to health or morals. It is possible that there might be some relation to safety of the public generally if there were evidence to show that as a result of appellants' activities, crowds of such proportion gathered as to impede or obstruct traffic on the sidewalk. But respondents do not urge that the prohibition is justified on the basis of traffic regulation. Futhermore,

that is an evidentiary matter, the determination of which was precluded by the sustaining of the demurrer.

[10, 11] If the prohibition may be justified at all, then it must be under the general welfare clause. However, we find the prohibition has no reasonable relation to the general public welfare. It is alleged that the solicitation is done in a quiet, dignified and peaceful manner, and it is further alleged that no pressure or undue influence is exerted. The passer-by may stop and listen to what is being said or he may freely and without any interference continue on his way. Such solicitation, confined as it is to private property, differs little from window displays which passers-by may pause and inspect or disregard entirely if they so desire. It is conceivable that some hypersensitive individuals may find this type of solicitation offensive. However, that is not sufficient to justify the prohibition of an otherwise lawful method of conducting a business. As stated in Ex parte Whitwell, supra, 98 Cal. at page 83, 32 P. at page 874, 19 L.R.A. 727, 35 Am.St.Rep. 152: "There are many unpleasant, and even annoying, things which must be borne by persons living in a state of organized society, in order that others may also enjoy their equal rights under the law." The fact that a major part of appellants' business is gained from such solicitation is proof that the majority of the public does not disfavor upon such methods. The moment the conduct of appellants becomes offensive to the public generally it will cease, for it would be a poor business policy to carry on a practice which resulted in a loss of business rather than a gain. Those who now find the practice distasteful must tolerate it as many other characteristics of a business district must be tolerated. The burden placed upon appellants by such prohibition far outweighs the benefit, if any, to the public generally. Therefore, we are of the opinion that the restriction as applied to appellants under the facts disclosed in the complaint is an unwarranted and unreasonable interference with a lawful business and is violative of article I, sections 1 and 13, of the state Constitution and of the Fourteenth Amendment of the federal Constitution. See State of California v. Marin Mun. W. Dist. 17 Cal.2d 699, 111 P.2d 651; Skalko v. City of Sunnyvale, supra; Skaggs v. City of Oakland, 6 Cal.2d 222, 57 P.2d 478; Ganley v. Claeys, supra.

In support of the contention that the ordinance is valid under the police power respondents cite two New York cases decided by courts of inferior jurisdiction—People v. Phillips, 147 Misc. 11, 263 N.Y.S. 158 and People v. Patrick, 171 Misc. 705, 14 N.Y.S.2d 249. In these cases ordinances similar to section 42.02 of the Los Angeles Municipal Code were upheld. In the Phillips case it is not disclosed whether the defendant confined his activities to his own premises, and in a brief opinion the court concludes: "In our opinion the regulation as provided in this subdivision appears to be a reasonable provision, and tends to provide against such conduct and acts which may lead to disorder and disturbance." [147 Misc. 11, 263 N.Y.S. 159.] In the Patrick case the defendant set up a counter in a vestibule. The counter was situated on the building line of the premises and gloves were sold over the counter to people standing on the sidewalk. The facts of this latter case differ materially from the facts of the instant case as disclosed by the allegations of the complaint. It is doubtful whether the New York court would have reached the same conclusion under a similar set of facts. If the Phillips case may be interpreted to mean that a municipality under its police power may prohibit the type of solicitation engaged in by appellants here, then for the reasons already discussed this court does not feel constrained to follow that decision.

Respondents also cite and rely on the cases of Williams v. Arkansas, 217 U.S. 79, 30 S.Ct. 493, 54 L.Ed. 673, 18 Ann.Cas. 865, and In re Barmore, 174 Cal. 286, 163 P. 50, L.R.A.1917D, 688. The Williams case upheld legislation prohibiting drummers from soliciting business on trains. The Barmore case upheld an ordinance prohibiting the solicitation of business for the transportation of persons or baggage in depots. This brief reference to those cases is sufficient to distinguish them from the situation now under consideration. Travelers would have no alternative but to face and endure the persistent solicitation on trains or in depots, and legislation prohibiting such activity is undoubtedly of great benefit to the peace and convenience of the traveling public. On the other hand, in the instant case, if a person does not desire to listen to the importunities of appellants, he need only pass on, as appellants confine their activities to their own private properties.

[12] This court is well aware of the rule recently reiterated in the case of Hart v. City of Beverly Hills, 11 Cal.2d 343, 79 P.2d 1080, to the effect that in considering the constitutionality of a statute no presumption of invalidity will obtain and every intendment will be indulged in favor of its validity. However, the presumption of validity is not conclusively binding on the courts. As previously stated, a legislative body may not impose restrictions that are unnecessary and unreasonable upon the use of private property, and it is for the court to determine the reasonableness of restrictions imposed. It should be noted that in the Hart case, supra, the court observed that the statute there in question tended to provide the general public with greater safety "not only from a standpoint of protection of its members from physical injury, but also from the possibility of their being the individual victims of fraud or crime." In the instant case respondents have made no showing of nor do they claim a like justification for the enactment of the ordinance in question.

[13] An additional argument made by appellants is worthy of note. Referring to the cases of Carlson v. People of State of California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; Thornhill v. State of Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, and other cases which have declared ordinances prohibiting peaceful picketing invalid as in violation of the constitutional guarantee of freedom of speech, appellants contend that if a person may stand outside a place of business and orally urge one not to enter, no loud noise or disorderly conduct being involved, certainly an owner of a business may say something in an orderly way, importuning a person to enter his premises to engage in business. In this regard appellants present the following query: "If it is the constitutional right of an employee to stand on the street in front of his employer's place of business and solicit or importune the public not to enter and trade with his employer, is it not also his constitutional right, as well as that of his employer, when conditions of employment are satisfactory to the employee, to stand on the premises of his employer's business and importune or solicit patrons to enter and trade, thus promoting trade and commerce in aid of his employment and in aid of the general welfare?" These contentions are primarily directed against those sections prohibiting activities on streets or sidewalks, and as previously pointed out, the constitutionality of such sections is not directly involved in the present case because of the allegations in the complaint. However, the argument becomes even stronger if it is confined to those parts of the sections prohibiting solicitation from doorways and entrances. If a person because of his constitutional guarantee of freedom of speech, can stand on the sidewalk in front of a place of business and peacefully solicit the general public to refrain from entering because of a labor dispute, then surely a person can stand in his own doorway and solicit the general public to enter his place of business to purchase merchandise. Respondents attempt to dismiss this contention with the statement that "regulations and prohibitions bearing upon solicitation of trade are not to be measured by rules relating to freedom of speech." Such contention cannot be so easily dismissed. The right to conduct a private business free from unreasonable regulation is just as sacred as the right of the members of a labor organization to conduct a campaign for better labor conditions and should receive equal protection under the constitutional guarantees. To permit peaceful solicitation by a picket on the sidewalk and prohibit peaceful solicitation from a doorway abutting on the sidewalk would be gross discrimination. It may be said, therefore, that the prohibition in the instant case is in violation of the constitutional guarantee of freedom of speech.

For the foregoing reasons the judgment is reversed with directions to the trial court to overrule the demurrer and permit the defendants to answer if they are so advised.

GIBSON, C. J., and SHENK, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

19 Cal.2d 580

STEPHENS v. STATE BAR OF CALIFORNIA.

L. A. 18091.

Supreme Court of California.

Feb. 24, 1942.

1. Attorney and client ⇐44(1)

Gross carelessness and negligence constitute a violation of attorney's oath to discharge his duties faithfully to the best of his knowledge and ability, and involve "moral turpitude" in that they are breach of fiduciary relation which binds him to the most conscientious fidelity. Code Civ.Proc. § 278; St.1939, p. 357, §§ 6103, 6106.

See Words and Phrases, Permanent Edition, for all other definitions of "Moral Turpitude".

2. Attorney and client ⇐38

Acts of dishonesty, acts involving moral turpitude, and violation of oath of an attorney are all grounds for disbarment. St.1939, p. 357, §§ 6103, 6106.

3. Attorney and client ⇐54

The fact that all the attorneys constituting local administrative committee which investigated charges against attorney were members of the city attorney's staff and were not otherwise engaged in practice of law did not render the proceeding objectionable on ground that the committee was not a representative body of practicing attorneys.

4. Attorney and client ⇐44(1)

Record showing that attorney was guilty of gross negligence and carelessness in certain lawsuits, and that he was guilty of misrepresenting facts to his clients and making statements to them concerning their lawsuits which he knew to be false, required disbarment of the attorney for breach of his oath as attorney and for commission of acts involving "moral turpitude". St.1939, p. 357, §§ 6103, 6106.

In Bank.

Proceeding by John Randolph Stephens against the State Bar of California, to review a recommendation of the State Bar that the petitioner be disbarred.

Petitioner disbarred.

W. Verne Ahrens, of Los Angeles, for petitioner.

W. Eugene Craven, of Merced, for respondent.

PER CURIAM.

This is a proceeding to review the recommendation of the Board of Governors of the State Bar that the petitioner be disbarred. The recommendation was made pursuant to findings and conclusions of the local administrative committee in accordance with two charges brought against the petitioner. The petitioner was admitted to practice law in California on October 11, 1927. He had previously practiced law in the State of Illinois, having been admitted to practice in that state in 1912. He is about 53 years of age.

On the first charge against petitioner Alvin Douglas was the complaining witness. In February, 1940, the petitioner was employed by Douglas to handle a divorce proceeding. It was agreed that his fee in this matter would be $35. This fee was paid to the petitioner in installments and payment was completed by June 17, 1940. A complaint for divorce was verified by Douglas before a notary public on March 4, 1940, but the complaint was not filed or summons issued until September 6, 1940. Before the complaint had been filed or summons issued, and about July 12, 1940, the petitioner gave the complaining witness a copy of the complaint and of what purported to be a copy of summons for service on the defendant. These papers were served on the defendant on July 13, 1940. The purported original summons with affidavit of service was returned to the petitioner about the 24th day of July, 1940. Between March 4, 1940, and September, 1940, Douglas called petitioner several times and inquired concerning the status of his lawsuit. The petitioner advised him that his trial would soon be coming up notwithstanding the fact that the complaint had not then been filed or summons issued. When the complaining witness discovered that the action had not been filed until September 6, 1940, he reported the matter to the State Bar. The petitioner then took some action in the case and the summons was re-served on September 28, 1940. A default was entered and the case was set for trial for November 14, 1940. The case was continued until November 19, 1940, because the testimony of the corroborating witness was insufficient. The interlocutory decree of divorce was granted at this later date.

The second charge was brought by Randolph Lowell. The petitioner on June 2, 1937, filed an action in Los Angeles County on behalf of Lowell against the Humboldt

Malt & Brewing Company. An agreement was entered into on June 16, 1937, between the petitioner and Lowell whereby the petitioner agreed to prosecute the action and receive 25 per cent of any amount recovered. In the event no settlement was made and the case was tried the petitioner was to be paid $150 win or lose. The $150 was paid although the action was never tried. A motion for a change of venue was made and granted. The case was ordered transferred to San Francisco. The petitioner was present when this motion was granted. During the following year the petitioner told Lowell on several occasions that the action had been set for trial. Almost a year after the motion for a change of venue was granted, Lowell became suspicious and inquired at the Los Angeles County Clerk's office. He discovered that the action had never been transferred because the transfer fee had not been paid. At this time there were eleven days left to pay the fee. Lowell went to the petitioner and asked why the fee had not been paid and the petitioner told him it was the plaintiff's duty to pay this fee. The petitioner then asked Lowell for $30 expense money which Lowell gave him. About three months later Lowell discovered that the transfer fee had not been paid, and he persuaded the petitioner to pay the fee although the year had already elapsed. The action was dismissed on motion of the defendant on the ground that the action had not been transferred within one year after the order therefor had been made. The petitioner did not appear at the hearing on this motion. He did file points and authorities in opposition to the motion for dismissal. At the time of the dismissal the statute of limitations had run on the cause of action. The complaining witness, Lowell, then tried to recover his fee of $150 from the petitioner. After unfulfilled promises to pay he gave Lowell a note for the amount secured by a set of Corpus Juris. The note was never paid. He later had one Ogg give Lowell a check for $150, but the check was dishonored and never paid. Finally payment of the $150 was made on July 2, 1941, after proceedings in disbarment were well under way.

[1, 2] The petitioner claims that the recommendation of the board is contrary to law, and urges various reasons. He claims, first, that there is an attempt to disbar him upon grounds other than those enumerated in the California statutes or the rules of professional conduct. Considering the facts of the case in the light most favorable to the petitioner his acts show gross carelessness and negligence. In Waterman v. State Bar, 8 Cal.2d 17, 63 P.2d 1133, 1134, this court stated at page 20: "Gross carelessness and negligence constitute a violation of the oath of an attorney to 'faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability' (Code Civ.Proc. § 278) and involve moral turpitude in that they are a breach of the fiduciary relation which binds 'him to the most conscientious fidelity.'" Acts of dishonesty, acts involving moral turpitude, and the violation of the oath of an attorney are all grounds for disbarment. §§ 6103, 6106, State Bar Act, St.1939, p. 357.

The petitioner claims that there was no preliminary investigation as required by rule 10 of the Rules of Procedure of the State Bar. The record recites, however, that a preliminary investigation was had at which petitioner was given an opportunity to be present. The petitioner presents no evidence to the contrary.

The petitioner claims that he had no opportunity to subpoena witnesses in his own behalf. But the record discloses that the petitioner made no request for a subpoena. It appears that he had every opportunity to produce or subpoena any witnesses he desired.

[3] There is no merit in the claim that the local administrative committee was not a representative body of practicing attorneys because all the attorneys were members of the City Attorney's staff and not otherwise engaged in the practice of law.

[4] The petitioner contends that no acts of dishonesty or moral turpitude are shown by the findings. Under the rule of Waterman v. State Bar, supra, above quoted, acts of gross carelessness and negligence involve moral turpitude and also breach the oath of an attorney. In addition to gross negligence and carelessness on the part of petitioner the record here also shows that he was guilty of repeatedly misrepresenting facts to his clients and making statements to them concerning their lawsuits which he knew to be false. This conduct certainly involved moral turpitude.

The recommendation of the Board of Governors is justified by the evidence and the proceedings appear to be regular in all respects.

It is hereby ordered that the petitioner, John Randolph Stephens, be and he is hereby disbarred from the further practice of

law in this state, and that his name be and it is hereby stricken from the roll of attorneys and counselors at law of the State of California.

HOUSER, Justice (concurring).

I concur in the judgment of disbarment, but in my opinion the judgment should be based upon the findings of the local administrative committee involving the conduct of petitioner in connection with his handling of the case of Randolph Lowell v. Humboldt Malt & Brewing Company pending in the Superior Court of Los Angeles County. In this proceeding the local administrative committee found the petitioner guilty of conduct involving moral turpitude and dishonesty within the meaning of section 6106 of the State Bar Act and recommended disbarment. The Board of Governors adopted the findings and recommendation of the local administrative committee in this proceeding and recommended to this court that petitioner be disbarred. In addition to the above-mentioned findings, said committee made the following comment with respect to petitioner:

"The committee feels that it should point out to the Board of Governors that the respondent (petitioner) in this case did not show any disposition whatsoever to cooperate with the committee in attempting to ascertain the truth of the charge set forth in the notice to show cause. His conduct on the stand was evasive. He either deliberately lied to the committee concerning his belief on questions of law, or displayed a gross ignorance of the knowledge of law. That he has demonstrated to the committee either that he is an accomplished liar or has an absolute incapacity to practice law."

In view of the facts found by the local administrative committee with reference to petitioner's conduct in connection with the Randolph Lowell case, and the conclusion reached by said committee that such conduct amounted to moral turpitude and dishonesty coupled with the above-quoted comment of the committee, which findings of fact and conclusion were adopted by the Board of Governors of the State Bar of California, I am persuaded that petitioner does not possess either the moral character or the legal ability requisite to a member of the legal profession of this state, and for this reason he should be disbarred.

But, I do not agree that petitioner should be disciplined for his conduct in connection with the Alvin Douglas divorce proceeding as the local administrative committee found him not guilty of the matters charged in the complaint against him and recommended dismissal of the charges against him arising out of the Douglas case. The Board of Governors refused to approve the finding of the local administrative committee "that the delay in bringing said action and in obtaining said interlocutory decree was caused by the illness of the respondent (petitioner)," and also refused to adopt the conclusion and recommendation of the committee finding the petitioner not guilty and recommending dismissal of the charges against him. I agree with the conclusion reached by the local administrative committee in connection with the Douglas case, and in my opinion, petitioner should not be disciplined for his conduct in connection with this case.

The majority opinion is predicated upon the proposition that carelessness and negligence of a member of the bar in the handling of his client's legal matters may be made the basis of a disciplinary proceeding against him. I do not agree with this theory, and in this connection I adhere to the views expressed by me in the dissenting opinions which I prepared in the cases of Trusty v. State Bar of California, 16 Cal.2d 550, 107 P.2d 10; and In re McKenna, 16 Cal.2d 610, 107 P.2d 258.

In the case at bar there is no basis for the application of the so-called negligence theory as petitioner was not found guilty of mere negligent conduct, but of conduct involving moral turpitude and dishonesty. Such conduct amounts to moral delinquency which is not comprehended in any accepted definition of mere negligence.

For the reasons above stated with respect to petitioner's conduct in connection with the Randolph Lowell case, I am of the opinion that petitioner should be disbarred.

19 Cal.2d 586

SPENCER KENNELLY, Limited, v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

L. A. 17953.

Supreme Court of California.

Feb. 25, 1942.

1. Replevin ⇐78

Where plaintiff prevails in a claim and delivery action, and the personalty involved has diminished in value, depreciation is a proper element of compensatory damages to be awarded. Code Civ.Proc. § 667.

2. Appeal and error ⇐1011(1)

Whether bank, which held a conditional sales contract of purchase of an automobile, a certificate of ownership of automobile as security for performance of contract, and a note which buyer had executed to cover repair charges on automobile, lost its lien on automobile by informing dealer that it would accept amount due under contract as a condition to releasing certificate, was for the trial court under conflicting evidence.

3. Tender ⇐12(4)

Where an action has been begun, an offer to compromise the litigation should be an offer to allow judgment to be taken for the amount due at the time of the commencement of the action with costs incurred.

4. Estoppel ⇐88(1)

The rights of parties to an action are not affected by an attempt and failure to compromise the litigation, irrespective of the cause which produced the failure.

5. Damages ⇐182

Where bank, holding conditional sales contract of purchase of automobile and certificate of ownership as security for performance of contract, sent to dealer, after dealer had instituted claim and delivery action to recover possession of certificate and before bank filed a cross-complaint, a written demand asserting that bank legally owned automobile, demanding possession thereof or payment of a stated sum, and advising that on receipt of that sum it would release certificate, the document, though offered in evidence, should not have been considered by the trial court as imposing a duty on dealer to have accepted its terms as a means of avoiding accrual of further damages. Code Civ.Proc. § 997.

6. Attorney and client ⇐86

An attorney may not impair his client's substantial rights by making an unauthorized oral declaration.

7. Attorney and client ⇐86

Where uncontradicted evidence showed accrual of damages to automobile dealer by reason of bank's retention of ownership certificate held by bank as security for performance of conditional sales contract, trial court had indicated that it would award dealer damages in its claim and delivery action, and dealer's attorney had no authority to make statement that if damages were awarded dealer would be willing to pay sum demanded by bank, attorney's statement should not have been allowed to operate to dealer's detriment on issue of allowance of damages.

8. Replevin ⇐65

Under proper circumstances, relief may be sought by the filing of a cross-complaint in a claim and delivery action, and new parties may be brought in under a cross-complaint where it appears that their presence is essential to the complete determination of the controversy already before the court. Code Civ.Proc. § 442.

9. Replevin ⇐65

Where a cross-complaint which is not otherwise objectionable is filed in a claim and delivery action, it is not demurrable if it contains a prayer for damages for conversion in addition to other relief sought.

10. Sales ⇐475

Where bank, sued in claim and delivery by automobile dealer to recover possession of certificate of ownership held by bank as security for performance of conditional sales contract of purchase of automobile, joined dealer and buyer as cross-defendants seeking to recover balance due under contract, judgment against buyer and in favor of bank in amount due under contract was proper in view of agreement between buyer and dealer that if buyer made that payment he would be entitled to a net credit on a new automobile of amount allowed for old automobile, less amount due under contract.

11. Appeal and error ⇐1122(1)

Where it appeared that the trial court acted contrary to the uncontradicted evidence in failing to make a finding and award in favor of plaintiff on issue of damages in claim and delivery action to recover posses-

sion of certificate of ownership of an automobile, the reviewing court would modify the findings by adding in lieu of trial court's finding to the contrary a finding that by reason of defendant's wrongful detention of certificate plaintiff was damaged in a stated sum, since to affirm a judgment an appellate court may make a necessary finding under such circumstances.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action in claim and delivery by Spencer Kennelly, Limited, against the Bank of America National Trust & Savings Association, to recover possession of a certificate of ownership of an automobile, wherein defendant filed a cross-complaint joining plaintiff and Glenn Goss as cross-defendants and seeking to recover the balance due on a conditional sales contract and a note, a declaration of rights, a decree quieting title, and damages for conversion of the automobile. From the judgment, plaintiff and Glenn Goss appeal.

Judgment modified and, as modified, affirmed.

A. J. Getz and J. R. Myers, both of Los Angeles, for appellants.

Edmund Nelson and G. L. Berrey, both of Los Angeles, and Louis Ferrari, of San Francisco, for respondent.

HOUSER, Justice.

The plaintiff corporation brought an action in claim and delivery in the municipal court against the defendant Bank of America Trust & Savings Association to secure possession of a certificate of ownership of an Oldsmobile coupé, the plaintiff dealer having accepted the coupé from one Glenn Goss as part payment of the purchase price of a new automobile. The bank was the holder of a conditional sales contract of purchase of the Oldsmobile coupé wherein Goss was the vendee, and the certificate of ownership thereof was held by the bank as security for the performance of the contract.

The controversy here involved arose in the following manner: In the latter part of April, 1940, Goss effected the purchase of the new automobile from the plaintiff company, intending to exchange in part payment therefor the Oldsmobile coupé, on which there was a balance still owing. The final payment under the conditional sales contract amounted to the sum of $376.12 and was due on May 7, 1940. At the time of such negotiations between Goss and the plaintiff automobile dealer, Goss arranged to give the latter a written authorization to pay to the bank the balance due under his contract, in order that the plaintiff might obtain possession of the certificate of ownership of the coupé. Pursuant thereto, an employee of the plaintiff company telephoned the bank concerning the balance necessary to be paid in order to receive the ownership certificate, and was informed by one of its clerks that the amount due was $376.12. The court found that on being so advised the "plaintiff accordingly agreed with said Glenn Goss to purchase said automobile for $760.00, allowing * * * [him] a net credit on a new automobile * * * of $760.00 less $376.12, or a total net credit of $383.88"; that thereafter, on May 1st, the plaintiff tendered to the bank Goss's authorization, together with a certified check in the sum of $376.12, which the defendant bank refused to accept upon the ground that the amount secured by the title to the automobile was the sum of $376.12 plus an unpaid balance on a promissory note (which had been executed by Goss to cover an expenditure for repairs to the automobile and which had been subsequently assigned to the bank), or a total of $421.97, which the bank thereupon demanded as a condition to releasing the ownership certificate.

The plaintiff company refused to pay the sum demanded by the bank and, treating the refusal of its tender of $376.12 as a waiver of the bank's lien on the automobile (Walker v. Houston, 215 Cal. 742, 12 P.2d 952, 87 A.L.R. 937; Moskovitz v. LeFrancois, 121 Cal.App. 310, 8 P.2d 1049; Sondel v. Arnold, 2 Cal.2d 87, 39 P.2d 793; Wagner v. Shoemaker, 29 Cal.App.2d 654, 85 P.2d 229), brought the instant action in claim and delivery to secure possession of the ownership certificate. The defendant bank cross-complained, plaintiff and Goss being joined as cross-defendants, seeking payment of the unpaid balance on the conditional sales contract, together with the balance due on the promissory note; a declaration of its rights, including a determination that the bank possessed a lien on the automobile; a decree quieting title, and damages for conversion of the automobile.

Having become a cause in equity the matter was transferred to the superior court where Goss's demurrer to the cross-complaint was overruled and trial was had by the court. Judgment was rendered directing the bank to deliver the ownership certificate to the plaintiff and awarding the plaintiff costs as against the defendant bank. Also, by the terms of the judgment Goss was directed to pay to the bank the said sum of $376.12 and cost of suit incurred subsequent to the filing of the cross-complaint. From that judgment the plaintiff and Goss have appealed.

[1] The plaintiff's appeal is on the sole ground that the trial court erred in refusing to award compensatory damages in its favor. It was claimed that during the time the certificate was held by the bank the plaintiff was unable to sell the automobile due to lack of evidence of title, and that, as a consequence, the automobile was kept in storage until the ownership certificate could be secured. Evidence was adduced to show that during such period the automobile suffered a depreciation in value in the amount of $155—which evidence was not contradicted. The plaintiff contends that since the trial court found it was entitled to the possession of the certificate both prior to and after the bringing of the action, and where, as here, compensatory damages were proved, an award therefor should have been made as a matter of course. Such is the general rule. Sec. 667, Code Civ.Proc.; Drinkhouse v. Van Ness, 202 Cal. 359, 374, 260 P. 869; 5 Cal. Jur. 206. Moreover, it has been held that in a claim and delivery action where plaintiff prevails and the personal property involved has diminished in value, depreciation is a proper element of damages. 5 Cal. Jur. 207; Anglo-California Trust Co. v. Collins, 192 Cal. 315, 317, 219 P. 982; Berry v. Bank of Bakersfield, 177 Cal. 206, 170 P. 415; Morris v. Allen, 17 Cal.App. 684, 121 P. 690.

The question to be determined is whether there were facts or circumstances presented herein by the evidence which justified the trial court in disallowing damages.

[2] The evidence showed that at the time of the conversation between the respective employees of the plaintiff dealer and the bank concerning the amount of money necessary to be paid to secure the ownership certificate, the bank was the holder also of the promissory note heretofore referred to, in an amount covering repair charges on the automobile. Goss had incurred such expense and had executed the note about a year after the bank had become the assignee of the contract for the purchase of the automobile. The conditional sales contract contained a provision that title to the automobile was to be reserved in the bank until the payments on the purchase price of the automobile and any charges for repairs were paid. The note was being paid by monthly installments which were not consolidated with the monthly payments made on the purchase price of the automobile, and the bank kept its account of the note transaction separate from that pertaining to the contract for purchase of the automobile. No payment was due on the note at the time the conversation was had between the plaintiff company and the bank respecting the amount the latter would require to release the certificate, and the evidence conclusively showed that the note was not even mentioned at that time. However, there was some conflict in the evidence as to what was said on the occasion of the telephone conversation just referred to. The plaintiff's employee testified that she telephoned to the bank and asked a clerk thereof for the amount of the "pay-off" on the Goss account; that "he very particularly said $376.12"; that she then asked, "The net payoff is $376.12, is that correct?"—to which the defendant's clerk replied, "Yes, and it is due May 7th"; that she then asked whether the bank would accept the plaintiff's certified check therefor and he replied "Yes, in that amount"; and that nothing whatever was said with regard to any repair bill or any other account Goss might have had with the bank. As heretofore stated, the evidence was in conflict as to what was said during that conversation. Nevertheless, in making its findings favorable to the plaintiff, the trial court concluded that the bank had in fact informed the plaintiff it would relinquish the ownership certificate on payment of the sum of $376.12—and, by implication, that in so doing the bank had thereby waived its security for the unpaid balance on the promissory note, and thereafter was estopped from demanding the payment of such additional sum as a condition to releasing the ownership certificate. Parenthetically, it may here be said that Goss was not in default with respect to either of his transactions with the

bank, and that he continued to and prior to trial did make payment of the entire balance owing on the note.

The defendant bank, in effect, now argues that under the facts and circumstances heretofore related, the trial court was in error in finding that the bank had lost its lien on the automobile by informing the plaintiff it would accept the sum of $376.12 as a condition to releasing the certificate. However, the bank has not appealed from the judgment rendered herein, and in view of the conflict in the evidence in a material particular, this court would not be inclined to disturb the findings in that respect in any event.

[3-5] The record further shows that after the plaintiff company had instituted this action, and before the filing of the defendant's cross-complaint, the bank sent to the plaintiff a written demand, or statement, asserting it was the legal owner of the automobile, demanding possession thereof or the payment of the sum of $376.12, and advising that on receipt of such sum it would release the ownership certificate. That statement was introduced in evidence by the plaintiff, and the purpose it was intended to serve is not made clear. However, it has become the subject of considerable controversy between the parties to this appeal. The defendant asserts that the document constituted evidence which showed that the plaintiff could have mitigated the amount of damages which accrued during the period following its receipt by the plaintiff if the latter had immediately paid to the defendant the sum therein demanded. The plaintiff's reply thereto is that the defendant cannot set up, as a defense to an allowance of damages against it, a claim that the plaintiff was under a duty to accept the offer in order to mitigate damages, where the defendant has invoked the equity powers of the court and by that tribunal has been adjudged to be the wrongdoer. Moreover, the plaintiff asserts, the document here under discussion amounted to an unaccepted offer of compromise, within the import of section 997, Code of Civil Procedure, which was made after the commencement of suit and, as such, should not have been considered by the trial court in connection with the question of allowance of damages. The plaintiff points out that not only was such offer made by the defendant after the action had been instituted, but it contained no offer by the defendant to pay the plaintiff's costs theretofore incurred. In that regard, in 5 California Jurisprudence, at page 406, it is said: "If a suit has been begun, the offer should be to allow judgment to be taken for the amount due at the time of the commencement of the action, with costs incurred." (Emphasis added.) Rottman v. Hevener, 54 Cal.App. 485, 490, 202 P. 334; McCoy v. Buckley, 11 Cal.App. 241, 244, 104 P. 705; Fell v. Frierson, 171 Cal. 351, 352, 153 P. 229. It has been ruled that "The rights of the parties to an action are not affected by an attempt and failure to compromise the litigation, irrespective of the cause which produced the failure." 5 Cal.Jur. 408; see, also, McCallion v. Hibernia S. & L. Soc., 70 Cal. 163, 12 P. 114. Section 997, Code of Civil Procedure, provides that an unaccepted offer of compromise "cannot be given in evidence upon the trial." Under the foregoing authorities, it is our conclusion that, although the document was offered in evidence—in the light of the circumstances surrounding the making of such offer—it should not have been considered by the trial court as imposing a duty on the plaintiff to have accepted its terms as a means of avoiding the accrual of further damages. The trial court made a finding on such offer, and therefore we cannot say that in refusing to award damages to the plaintiff the court was not erroneously influenced by the document in question.

[6, 7] The record also shows that after most of the evidence had been adduced the trial court stated it would award damages to the plaintiff in the sum of $155. Thereafter, during the course of argument by counsel, the plaintiff's attorney made the statement that if such judgment should be awarded the plaintiff the latter would be willing to pay the sum of $376.12—whereupon the trial judge said that in view of such statement no damages would be awarded to the plaintiff. However, we find nothing objectionable in that statement sufficient to warrant a refusal to award damages, in view of the fact that the trial court had previously indicated it would make such an award. Insofar as the statement purported to express a willingness on the plaintiff's part to pay the $376.12, there was evidence to show, and, as heretofore indicated, the trial court found that "plaintiff * * * [had] agreed with said Glenn Goss to purchase said automobile for $760.00, allowing to the said Goss a net credit on a new automobile then purchased by

Goss from plaintiff at $760.00 less $376.12, or a total net credit of $383.88"; and therefore it would seem immaterial whether Goss paid the sum of $376.12, or whether the plaintiff offered to make such payment. Moreover, the record shows that the plaintiff's attorney possessed no authority from his client to make any declaration of the nature of that here involved, and the rule is that an attorney may not impair his client's substantial rights by the making of an unauthorized oral declaration. Price v. McComish, 22 Cal.App.2d 92, 97, 70 P.2d 978; 3 Cal.Jur. 667. That the statement of plaintiff's counsel had such an effect on the trial judge who decided the issues here involved is evidenced by his response thereto. In view of the uncontradicted evidence showing the accrual of damages to the plaintiff by reason of the defendant's retention of the ownership certificate, neither the statement referred to nor the so-called offer of compromise previously discussed should have been allowed to operate to the plaintiff's detriment on the issue of an allowance of damages.

[8, 9] Appellant Goss claims the trial court erred in overruling his demurrer to the cross-complaint. He contends a cross-complaint may not be filed in an action for claim and delivery—asserting that such action is limited to the issue whether the plaintiff was entitled to possession of the specific personal property involved. He claims that proposition is particularly true in an instance such as the present one, where, as a third party, he was brought into the controversy for the first time by the cross-complaint. However, it has been held that under proper circumstances relief may be sought by the filing of a cross-complaint in a claim and delivery action. See Ackerman v. Schultz, 178 Cal. 190, 172 P. 609; Moskovitz v. LeFrancois, 121 Cal.App. 310, 313, 8 P.2d 1049; 5 Cal.Jur. 193. Also, it is the rule that new parties may be brought in under a cross-complaint where it is made apparent that their presence is essential to the complete determination of the controversy between parties already before the court. Sec. 442, Code Civ.Proc.; 21 Cal.Jur. 82, et seq. And, contrary to Goss's further contention, we do not understand that where a cross-complaint which is otherwise not objectionable is filed in such an action, it is vulnerable to a demurrer if it contains a prayer for damages for conversion in addition to other relief sought. See Moskovitz v. LeFrancois, supra; Ackerman v. Schultz, supra.

[10] Although appellant Goss has challenged the imposition of the judgment against him in favor of the bank in the sum of $376.12, it does not appear he is claiming that as between himself and the plaintiff it was understood the latter was primarily liable for the payment of such sum. By the terms of the agreement which existed between them it evidently was the understanding that if Goss made such payment he was to be entitled to the gross credit heretofore referred to. We find no error, therefore, in the judgment which was rendered against him on the cross-complaint.

We deem it unnecessary to discuss other points argued in the briefs.

[11] As heretofore has been indicated, in failing to make a finding and award in favor of the plaintiff upon the issue of damages, the trial court has acted contrary to the uncontradicted evidence adduced on that issue. It is settled, however, that in order to affirm a judgment an appellate court may make a necessary finding under such circumstances. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970. Therefore, the findings hereby are modified by adding thereto the following in lieu of the trial court's finding to the contrary: "It is found that by reason of the defendant's wrongful detention of the certificate the plaintiff has been damaged in the sum of one hundred and fifty-five dollars."

The judgment is therefore modified to show an allowance of damages to the plaintiff in the sum of $155. As so modified the judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

19 Cal.2d 605

NEET et al. v. HOLMES et al.

L. A. 17955.

Supreme Court of California.
Feb. 26, 1942.

1. Venue ⇐72

On motion for change of venue, question of transitory or local character of causes of action was to be determined from allegations of complaint on file at time motion was made and from nature of judgment which might be rendered, assuming the truth of the allegations.

2. Venue ⇐22(1)

Where complaint contained a statement of four causes of action, one being for money had and received, two being for an accounting and the fourth for the appointment of a receiver, but all were based mainly on alleged fraud and misrepresentations of defendants in connection with operations of mines in which plaintiffs had an interest the action was a proceeding in equity and was essentially a "personal action" which was properly brought in county of defendants' residence rather than in county where mines were situated. Code Civ.Proc. §§ 392, 395.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Action".

3. Venue ⇐46

If action for an accounting based upon alleged fraud and misrepresentations of defendants in connection with operations of mines in which plaintiffs had an interest had been brought in county in which mines were located, the defendants would have been entitled to have action removed to county of their residence. Code Civ.Proc. § 395.

4. Venue ⇐4

An action is "transitory" rather than "local" where right to any real property sought by plaintiffs depends upon outcome of the controversy concerning a personal obligation of the defendants, and the judgment rendered thereon would be one to enforce such an obligation. Code Civ.Proc. § 392.

See Words and Phrases, Permanent Edition, for all other definitions of "Local Action" and "Transitory Action".

5. Venue ⇐5(1)

The nature of action is "local" and action must be tried in county where land is situated where it turns on title to property as distinct from the personal obligation, and decree operates ex proprio vigore on the title. Code Civ.Proc. § 392.

6. Pleading ⇐34(4)

Where defendant seeks change of venue from county in which realty is located to county of his residence, allegations of complaint will be strictly construed against the pleader to ascertain whether he has joined a personal or transitory cause so as to entitle defendant to a trial in county of his residence. Code Civ.Proc. § 395.

7. Venue ⇐22(3)

A plaintiff may not join as defendants those who are not real parties in interest merely for purpose of obtaining a trial in the county of their residence. Code Civ.Proc. § 395.

8. Venue ⇐5(5), 22(1)

Where action for an accounting and for a declaration of trust of certain mining property was essentially to enforce a personal obligation arising from alleged fraud and misrepresentations of defendants in connection with operations of mines in which plaintiffs had an interest, the existence of a claim for damages for alleged injuries to the mines did not require that action be maintained in county in which mines were located rather than in county of defendants' residence. Code Civ.Proc. §§ 392, 395.

9. Pleading ⇐45

The pleader is required to frame his complaint to show clearly that he is entitled to retain the trial of the action in the county in which it was commenced.

10. Venue ⇐72

The matter of inconveniences in respect to introduction of evidence, books and records, and convenience of witnesses if case were retained in county of defendants' residence was not cognizable on motion for change of venue under codal provision relating to venue of actions involving realty. Code Civ.Proc. § 392.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Suit by Thomas Porter Neet and others against Kenneth A. Holmes and others for an accounting, for a declaration of trust of certain mining property and for other relief, wherein some of the defendants filed mo-

tions for a change of venue. From orders denying the motions, the moving defendants appeal.

Orders affirmed.

Ralph D. Brown, of Los Angeles, for appellants.

William Ellis Lady and W. I. Gilbert, both of Los Angeles, for respondents.

SHENK, Justice.

The plaintiffs sued the defendants for an accounting, for a declaration of trust of certain mining property, and other relief. The action was commenced in Los Angeles County which was the county of the defendants' residence. Mining claims referred to in the complaint were situated in Imperial County. Certain of the defendants moved for a change of venue to Imperial County. The motions were denied and this appeal is prosecuted by the moving defendants from the orders denying their motions.

The appellants, who will be referred to as the defendants, assert that they are entitled to have the action tried in Imperial County for either of two reasons: (1) that all of the causes of action alleged in the complaint are local in character; (2) that if one of the causes of action is local in character the plaintiffs, by joining a transitory cause of action, cannot defeat the right of the defendants to have any question of title of real property or of injuries to real property tried in the county where the real property is situated.

[1] The question of the transitory or local character of the causes of action must be determined from the allegations of the complaint on file at the time the motion was made and from the nature of the judgment which might be rendered thereon, assuming the truth of the allegations. Sheeley v. Jones, 192 Cal. 256, 219 P. 744; Eckstrand v. Wilshusen, 217 Cal. 380, 18 P.2d 931.

The complaint in form contains a statement of four causes of action. The first is a common count for money had and received in the sum of $550,000. The second in substance alleges that in 1896 Mary E. Greathouse became the owner of 55/100ths interest in three mining claims, the Padre, Madre and Cargo Muchacho, located in what is now Imperial County; that Mary E. Greathouse died in the State of Kentucky in 1906 and that the plaintiffs in time succeeded to all of her interest in these mining properties. In 1896 Kate S. Wright became the owner of the remaining 45/100ths interest in said mining claims. She died in 1938 and her surviving husband as a joint tenant became the owner of that interest. The defendant, Ray H. Fitzgerrell, an attorney, was married to a niece of Kate S. Wright. The defendants Holmes and Nicholson were associates and partners in the mine ventures. They investigated the value of the Padre, Madre, and Cargo Muchacho mines, looked up the owners, and represented to Fitzgerrell that the mines were valuable. It is then alleged that the three formed an unlawful conspiracy to obtain possession and control of the mines for their own use and benefit and to defraud the owners of gains therefrom. In January, 1935, they discovered that Mary E. Greathouse was still the owner of record of the 55/100ths interest, that she had died in Versailles, Kentucky, and that her estate in California was without administration. Fitzgerrell obtained a conveyance in trust of the 45/100ths interest of the Wrights. He journeyed to Kentucky by airplane, using funds furnished by Holmes and Nicholson, and made representations in person and by correspondence to the Greathouse heirs, none of whom lived in California, that the mining properties were of no substantial value, that he knew of no one who was interested in the mines, and that he was making the investigation and trips at his own expense to preserve the properties in contemplation of some future possibility of development.

In April, 1935, Fitzgerrell organized a corporation called the Rayfitz Company, had himself elected as president, and his daughter, a girl of college age, as secretary-treasurer. An agreement was then entered into pursuant to which the Greathouse heirs, the plaintiffs herein, transferred to the Rayfitz Company their 55/100ths interest in the mines in exchange for 55 shares of stock. Fitzgerrell conveyed the Wright interest for 45 shares of stock of the company. A lease of said mining properties was then executed by the Rayfitz Company as lessor, and by Holmes and Nicholson as lessees, for a term of five years from August 7, 1935. The complaint contains allegations of details in which the lease is claimed to have been unfair to the lessor. The consideration for the lease is alleged to have been $700 and certain royalties. Holmes, Fitzgerrell acting as his attorney, had himself appointed by the court in California as administrator with the will annexed of the estate of Mary E. Greathouse. During the

term of the lease Holmes, Nicholson and Fitzgerrell caused twenty mining claims to be located in the public domain of the United States contiguous and adjacent to the Padre, Madre, and Cargo Muchacho mines. The cost and expenses of making such locations and acquisitions were paid with funds received from ores recovered from the leased mining properties. It is then alleged that the acquisition of the adjacent mining property was and is necessary to the efficient operation of the leased property, but that all of said adjacent mining claims were located for the personal benefit of Holmes, Nicholson and Fitzgerrell, contrary to the plaintiff's instructions to Fitzgerrell to locate those claims for the benefit of the lessor, and in furtherance of the alleged unlawful plan and conspiracy. Then follow statements of alleged misrepresentations of Fitzgerrell in connection with his attempt to obtain consent to the execution of a second lease of said properties by the Rayfitz Company to the same lessees for a period of twenty years, "and as long thereafter as gold, silver" or other metals are mined. The plaintiffs set forth the alleged small amounts of royalties accounted for by the lessees and the decrease in the amounts thereof after Fitzgerrell's unsuccessful attempt to obtain consent to the twenty year lease. The lessees then over a period of months attempted to obtain an additional five year lease, at the same time representing that there were no operations at all on the leased properties. In November, 1938, the plaintiffs rescinded the lease of August, 1935, on statutory grounds, Civil Code, section 1689, whereupon the operations on said property produced greatly increased amounts of ore. It is then alleged that the defendants failed to protect said property by proper timbering and the surface of the Padre and Madre mines caved in, making it impossible to remove ore still remaining in said mines alleged to be of the value of $200,000; that the defendants withheld and converted to their own use royalties belonging to the lessor and that the plaintiffs are entitled to an accounting of the value of all ore extracted and all moneys received from the operations of all the mining properties mentioned in the complaint; that on July 5, 1939, the Rayfitz Company reconveyed to the plaintiffs their 55/100ths interest in the Padre, Madre and Cargo Muchacho mining claims, the certificates of stock issued to the plaintiffs were surrendered by them and that the plaintiffs are the owners and in possession of said mining properties. Similarly the successors of the Wright 45/100ths interest obtained a conveyance thereof from the Rayfitz Company. The plaintiffs allege the total damage suffered by them and the other owners of the Padre, Madre, and Cargo Muchacho mines to be $1,000,000.

By the second cause of action the plaintiffs ask for an accounting of their 55/100ths percentage of the moneys received from the operations of all the property by the defendants and of the $200,000 damages sustained by reason of the occupation of the three mining claims. The statement of the second cause of action covers nearly 70 pages of the typewritten transcript and contains 46 numbered paragraphs.

The third cause of action reincorporates all 46 paragraphs of the first cause of action, with the additional allegations that more than $400,000 was received by the defendants after the rescission of the lease by the plaintiffs, which sum has been retained by the defendants with the exception of a comparatively small amount; that the plaintiffs are entitled to an accounting of all moneys received from operations from the date of the rescission to the date of the surrender of the leased properties and to a judgment not only for said receipts but for all receipts from the date of the making of the lease to the date of the surrender thereof.

The fourth cause of action realleges by reference all the numbered paragraphs of the second cause of action and in addition realleges the confidential relationships existing as grounds for the allegation that the location and acquisition of the adjacent twenty mining claims by the defendants for their own benefit was a constructive fraud upon the plaintiffs; that the defendants hold said mining claims as constructive trustees for the plaintiffs; that defendants have removed valuable ores from said mines without any accounting thereof to the plaintiffs and that they will so continue to remove ores from said mines unless enjoined from so doing or unless a receiver be appointed. In this cause of action the plaintiffs expressly reallege the loss in possible ore production to the value of $200,000 caused by the cave-in of the Madre and Padre mines as the basis for allegations of necessity for the appointment of a receiver for the mines, including the adjacent twenty mining properties. This cause of action also contains the formal allegation that the defendants claim some right, title and in-

terest in the twenty mining claims which is adverse to the plaintiffs, but that all such claims, except those of the Wright and Greathouse estate interests (their representatives having been made defendants) are invalid.

[2] It is apparent that the granting of the major relief sought by the plaintiffs will depend upon proof of facts constituting such a fraud as to entitle them to any relief pursuant to the alleged second cause of action. Without proof of sufficient facts pursuant to that cause of action, the plaintiffs will not have shown any cause for the major relief asked under the first, third and fourth causes of action. All are based mainly on the alleged fraud and misrepresentations of the defendants in connection with the operations of the Padre, Madre, and Cargo Muchacho mines. Title or ownership of those properties is not involved inasmuch as there is no allegation that the defendants claim any interest therein adverse to the plaintiffs. The principal relief sought by the plaintiffs is an accounting of operations in the leased property and in the additional twenty mines located by the defendants, and a judgment based on the fruits thereof including title to the additional mines, of which the plaintiffs have been deprived by the alleged fraud of the defendants. Such an action is a proceeding in equity and is essentially a personal action. Smith v. Smith, 88 Cal. 572, 26 P. 356; Bardwell v. Turner, 219 Cal. 228, 25 P.2d 978; Weygandt v. Larson, 130 Cal. App. 304, 308, 19 P.2d 852. See, also, Vaughan v. Roberts, 45 Cal.App.2d 246, 113 P.2d 884.

[3-5] Therefore, even if we ignore the inclusion of the common count, it cannot be said that all of the causes of action are local in character so as to require the application of section 392 of the Code of Civil Procedure in accord with the first contention of the defendants. In other words, if the action had been brought in Imperial County, the defendants would have been entitled to have it removed to Los Angeles County. Section 395, Code of Civil Procedure; Smith v. Smith, supra; Sheeley v. Jones, supra; Howe v. Tucker, 219 Cal. 193, 25 P.2d 832; Turlock Theatre Co. v. Laws, 12 Cal.2d 573, 86 P.2d 345, 120 A.L.R. 786. In Turlock Theatre Co. v. Laws, supra, it was pointed out that an action is transitory rather than local where the right to any real property sought by the plaintiffs depends upon the outcome of a controversy concerning a personal obligation of the defendants, and the judgment rendered thereon would be one to enforce such an obligation. The nature of the action here is essentially transitory, that is, the defendants would be entitled to have it tried in the county of their residence, if the determination of an estate or interest in land is merely incidental to the determination of a cause for equitable relief in trust, fraud, or contract. The nature of the action is local, and must be tried in the county where the land is situated, where it turns on the title to property as distinct from the personal obligation, and the decree operates ex proprio vigore on the title. State v. Royal Consolidated Mining Co., 187 Cal. 343, 351, 202 P. 133. In Booker v. Aitken, 140 Cal. 471, 74 P. 11, an action to recover real property on the ground that a deed of said property was invalid for fraud, was deemed to be local and an order denying a motion for a change of venue to the county of the defendant's residence was affirmed. The principles hereinabove stated were recognized and it was expressly pointed out that in that case neither a personal accounting nor a money judgment was sought, and that the substantial and only specific appropriate relief related to the title of the land deeded to the defendant. Similar cases are Eckstrand v. Wilshusen, 217 Cal. 380, 18 P.2d 931, and State v. Royal Consolidated Mining Co., supra.

In the present case it is obvious that the action turns principally on the personal obligation, as distinct from the title, and that judgment for any mining properties not now owned by the plaintiffs would follow if at all, merely as an incident of the judgment establishing the personal obligation.

The foregoing answers the first contention of the defendants that the action is entirely local in character. It also answers in part their second contention that if any alleged cause of action is local in character, the plaintiffs cannot deprive the defendants of a trial in the county where the property is situated.

[6, 7] In cases where the action has been commenced in the county of the location of the real property and the defendant moved for a change of venue to the county of his residence, it has been declared to be the policy of the law jealously to guard the right of the defendant to have a trial in the county where he resides and that the allegations of a complaint will be strictly construed against the pleader to ascertain

whether he has joined a personal or transitory cause so as to entitle the defendant to a trial of the action in the county of his residence. Section 395 Code of Civil Procedure; Ah Fong v. Sternes, 79 Cal. 30, 21 P. 381; Smith v. Smith, 88 Cal. 572, 575, 26 P. 356; Turlock Theatre Co. v. Laws, supra. For similar reasons a plaintiff may not join as defendants those who are not real parties in interest merely for the purpose of obtaining a trial in the county of their residence. Section 395, Code of Civil Procedure.

[8] Here it is not disputed that all the defendants living in Los Angeles County are real parties in interest and were not joined solely for the purpose of having the action tried in that county, and it may not be said that the plaintiffs have framed the allegations of their complaint so that their action will be considered transitory solely for the purpose of having it tried in the county of the defendant's residence rather than in the county where the mining property is situated. We have concluded that the action is essentially to enforce a personal obligation arising from the alleged fraud of the defendants. But it is said that there is the claim for damages for alleged injuries to the Padre and Madre mines. It should be noted that the relief prayed for in this respect is not the principal relief sought; that the property alleged to have been injured is the property of the plaintiffs, and that any disadvantage resulting from a trial in a county other than that in which the property is situated is theoretically at least, a disadvantage inuring to the plaintiffs rather than to the defendants.

[9] The pleader is required to frame his complaint to show clearly that he is entitled to retain the trial of the action in the county in which it was commenced. Sheeley v. Jones, supra. What we have said is sufficient to demonstrate that the complaint herein clearly shows that the plaintiff is entitled to retain the trial of the action in Los Angeles County.

The defendants' attempt to find support in the case of Brown Materials Co. v. Angus, 20 Cal.App.2d 32, 66 P.2d 470, for their contention that when local and transitory causes of action are joined, the defendant has the choice of where the action shall be tried. In that case the action was concededly brought in an improper county, which was neither the county of the defendant's residence nor the county of the situs of the real property. The trial court granted the defendant's motion for a change of venue to the county of the location of the real property. The decision in that case cannot be construed as a holding that a defendant would have a right to have an action transferred to the county where the property was situated where the action was otherwise commenced in a proper county.

[10] The defendants also refer to inconveniences which they say are sure to arise in the trial of the action in Los Angeles County, in respect to introduction of evidence, books and records, and convenience of witnesses. These are not matters which are cognizable on a motion seeking the application of section 392 of the Code of Civil Procedure.

The orders are affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.



ANDERSON v. ANDERSON.

L. A. 18117.

Supreme Court of California.

Feb. 24, 1942.

Rehearing Granted March 23, 1942.

1. Appeal and error ⇐627(2)

Where no printed transcript of the record was filed with the clerk of the Supreme Court within 40 days of the filing of the engrossed bill of exceptions in the trial court, as required by court rule, appeal was dismissed. Rule 1 for the Supreme Court and District Courts of Appeal.

2. Appeal and error ⇐662(3)

Failure of appellant to apply to the trial court for relief on any legal grounds existing to set aside or modify engrossed bill of exceptions, which had been filed in trial court, precluded appellant from raising objection to the engrossed bill of exceptions on motion by respondent in Supreme Court to dismiss the appeal on ground that printed transcript had not been filed in Supreme Court within 40 days of the filing of the engrossed bill of exceptions in trial court. Code Civ.Proc. § 473.

3. Appeal and error ⇐938(1)

Legal grounds existing in appellant to set aside or modify engrossed bill of exceptions which had been filed in the trial court must be presented to trial court, and trial court's refusal to act is subject to review by Supreme Court. Code Civ.Proc. § 473.

4. Exceptions, bill of ⇐50

Where appellant had taken no action to have his first bill of exceptions settled, and had filed a second proposed bill of exceptions, the first bill of exceptions was "abandoned".

See Words and Phrases, Permanent Edition, for all other definitions of "Abandon"

5. Exceptions, bill of ⇐39(1)

Bill of exceptions filed long after time fixed by rules of Supreme Court was a nullity.

6. Appeal and error ⇐554(2)

Where appellant had abandoned her first proposed bill of exceptions, and her second proposed bill of exceptions was filed too late, there was no proceeding for settlement of bill of exceptions pending on appeal and appeal was dismissed.

7. Courts ⇐85(3)

The purpose of the provision in the Supreme Court Rules that any showing in opposition to a motion noticed for hearing before the Supreme Court shall be in writing and unless time on the notice of motion has been shortened, shall be served and filed at least ten days before the hearing is to give moving counsel and the court an opportunity to give advance consideration to the grounds of opposition and to expedite the work of the court. Rule 20, § 3, for the Supreme Court and District Courts of Appeal.

In Bank.

Appeals from Superior Court, Los Angeles.

Suit by Frain R. Anderson against Mary M. Anderson for partition. From a decree of partition, and from an order confirming sale of property, defendant appeals.

Appeal dismissed.

Marcus L. Roberts, of Los Angeles, for appellant.

Von Herzen & Woods, C. P. Von Herzen, and Geo. C. Woods, all of Los Angeles, for respondent.

CURTIS, Justice.

Motion to dismiss two appeals on the ground that the transcript on appeal in each instance was not filed within the time required by the Rules of the Supreme Court and District Courts of Appeal. One of said appeals was taken from a decree of partition and the other of said appeals was taken from an order of court confirming a sale made by the referee of a portion of the property described in said decree of partition.

No printed transcript of the record on either appeal has been filed with the clerk of this court.

[1-3] The certificate of the clerk of the trial court shows that on the appeal from the judgment of partition an engrossed bill of exceptions was filed in his office on August 19, 1941. Rule I of this court provides that the printed transcript of the proceeding on appeal in a civil action must be filed, in case proceedings for the settlement of a bill of exceptions are pending, within forty days after the filing of the engrossed bill of exceptions with the clerk of the trial court. As this time had expired before the notice of said motion to dismiss said appeal, the motion must be granted.

Appellant, by the affidavit of her attorney filed in this court at the hearing of said motion, states that there never had been any hearing set, notice given or hearing held to settle said bill of exceptions on the appeal from the judgment of partition, and that in the absence of appellant and her attorney, and without notice to either of them, the trial court undertook to settle said bill of exceptions. It does not appear by said affidavit or otherwise that appellant instituted any proceedings in the trial court under section 473 of the Code of Civil Procedure, or under any other provision of law, to set aside or vacate the order of the trial court settling said bill of exceptions, or made any attempt in the trial court to correct, modify or amend said engrossed bill of exceptions. Had appellant any legal grounds to set aside or modify said engrossed bill of exceptions, application to that end should have been first made to the trial court, and in the event of the refusal of that court to grant the relief sought, its action upon said application would have been subject to review by this court. In Moultrie v. Tarpio, 147 Cal. 376, at page 378, 81 P. 1112, at page 1113, it is stated: "Ordinarily, this

court would not undertake to determine, on a motion to dismiss an appeal, whether or not a party had so failed to comply with the requirements of the law in regard to the settlement of a bill of exceptions that his pending proceeding for such settlement must ultimately fail, but would leave that question to be determined by the trial judge, subject to review on appeal." That case is cited by this court in the case of Dernham v. Bagley, 151 Cal. 216, 218, 90 P. 543, where the language set out above is quoted and approved.

As the engrossed bill of exceptions on the appeal from the judgment of partition was properly filed in the trial court and no printed transcript of the record was filed with the clerk of this court within the time provided by the rules of this court, the motion to dismiss the appeal from the judgment of partition on the grounds stated should be granted.

As to the appeal from the order confirming the sale made by the referee of a portion of the property distributed, the certificate of the clerk of the trial court shows that a proposed bill of exceptions was timely served and filed on July 1, 1941, and that on July 23, 1941, "proposed additions and corrections to defendant's bill of exceptions was filed" by respondent. Undoubtedly, this document was understood by all parties and the trial court as respondent's proposed amendments to appellant's proposed bill of exceptions. On August 4, 1941, a second proposed bill of exceptions was filed by appellant. This latter document was not filed within the time prescribed for the filing of a proposed bill of exceptions, nor was it served on respondent. The certificate of said clerk does not show that there is on file in his office any engrossed bill of exceptions on the appeal from this order or that the trial court has taken any action whatever to settle the first proposed bill of exceptions filed by appellant within the time fixed by the rules of this court.

[4-6] As near as we can understand from the somewhat confused record before us, consisting of two certificates of the clerk of the trial court and affidavits of the attorneys of the respective parties to these appeals, a proposed bill of exceptions was prepared by appellant to be used on each of the two appeals involved herein and proposed amendments to each of the proposed bills were filed by respondent. Said proposed bills and proposed amendments were all timely filed and served on the attorneys of the opposite party. A hearing was duly set and noticed for the settlement of each of said two matters. At said hearing the trial court settled each of said bills and ordered the attorney for respondent to engross the same. The attorney for respondent complied with this order, and the engrossed bills were filed with the clerk of said court on August 4, 1941. On August 19, 1941, the judge signed the engrossed bill of exceptions on the appeal from the judgment of partition, but for some unexplained reason did not sign the engrossed bill on the appeal from the order confirming the sale of property, and said engrossed bill has never been signed by the trial judge. Appellant has made no effort to have the trial judge sign this engrossed bill. On the other hand, on August 4, 1941, the day the engrossed bills of exceptions were filed by the attorney for respondent, appellant filed the second proposed bill of exceptions on the appeal from the order confirming the property sale. We are warranted in assuming that by filing her second proposed bill of exceptions and by taking no action to have settled her first bill, appellant has abandoned the prior bill of exceptions. As the second bill of exceptions was filed long after the time fixed by the rules of this court for filing the same, it must be regarded as a nullity. Having abandoned her first proposed bill and her second proposed bill having been filed too late, it must be held that there is no proceeding for settlement of a bill of exceptions pending on the appeal from the order confirming the property sale. It follows, therefore, that the motion to dismiss the appeal from said order must be granted.

The motion to dismiss said appeals is granted, and each of said appeals is hereby dismissed.

[7] We think it but proper to call the attention of counsel and of the profession to the provisions of section 3 of rule XX of this court, and particularly to the last sentence of said section, providing that any showing in opposition to a motion noticed for hearing before this court "shall be in writing, and, unless the time on the notice of motion has been shortened, shall be served and filed at least ten days before the hearing." The purpose and object of this provision of the section is apparent. The practice has become all too prevalent for the opposing attorney, as he did at the hear-

ing of the present motion, to present his opposition to the motion at the time of the hearing of the motion, thus depriving moving counsel and the court of any opportunity to give any advanced consideration to the grounds of opposition. This situation often renders it necessary to delay the decision of the motion and imposes additional labor on the court. This court is in hearty accord with the object and purpose of the rule just stated and is of the opinion that its strict enforcement will contribute materially to the prompt administration of justice, as well as expedite the work of this court.

GIBSON, C. J., and SHENK, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.



19 Cal.2d 570

OLIVERA v. GRACE et al.

L. A. 17343.

Supreme Court of California.

Feb. 20, 1942.

1. Appeal and error ⇐917(1)

On appeal from judgment for defendant after an order sustaining general and special demurrer to plaintiff's third amended complaint without leave to amend, the allegations of such complaint must be regarded as true.

2. Judgment ⇐297, 340

The general common-law power that courts had to control their own judgments during the term at which they were rendered has been continued in the form of statutory authority, and under such statutes the court which rendered the judgment has power in its discretion for a definite period of time and upon specified grounds, to open, vacate, or modify its own final judgment. Code Civ. Proc. §§ 473, 663.

3. Judgment ⇐306, 307

Apart from statutory authority, all courts have an inherent power to correct their records so as to make them speak the truth, and, under such inherent power, courts have frequently corrected their final judgments when because of clerical errors or omissions the judgments actually rendered were not the judgments intended to be rendered. Code Civ.Proc. §§ 473, 663.

4. Judgment ⇐346

A court has inherent power apart from statute to correct its records by vacating a judgment which is void on its face for such judgment is a "nullity" and may be ignored. Code Civ.Proc. §§ 473, 663.

See Words and Phrases, Permanent Edition, for all other definitions of "Nullity".

5. Judgment ⇐435, 443(3)

Equity's jurisdiction to interfere with final judgments is based upon the absence of a fair "adversary trial" in the original action, as, for example, where one party has been prevented from presenting his case to the court by extrinsic fraud or extrinsic mistake.

See Words and Phrases, Permanent Edition, for all other definitions of "Adversary Trial".

6. Judgment ⇐454

One who has been prevented by extrinsic factors from presenting his case to the court may bring an independent action in equity to secure relief from the judgment entered against him, and, where the court that rendered the judgment possesses a general jurisdiction in law and in equity, the jurisdiction of equity may be invoked by means of a motion addressed to that court.

7. Insane persons ⇐95

Where one has not been judicially declared of unsound mind and no guardian has been appointed, personal service upon such person is sufficient to give the court jurisdiction of the person, and a judgment rendered against such person is not void for want of jurisdiction.

8. Insane persons ⇐94(1)

"Incompetency" which renders a person wholly devoid of understanding and incapable of transacting business of any nature is a condition which exists independently of a judicial determination of that fact, and, where a defendant is under such legal disability and the plaintiff has knowledge of it, a duty rests upon the plaintiff to disclose such matters to the court and have a guardian appointed for the purpose of the proceeding.

See Words and Phrases, Permanent Edition, for all other definitions of "Incompetency".

9. Insane persons ⇐100

If the plaintiff knows of the defendant's incompetency but conceals such information from the court, and to prevent a true adversary hearing proceeds to default judgment by taking advantage of defendant's condition, his conduct constitutes a "fraud" upon the court as well as upon the incompetent defendant, since the direct effect of such concealment is to prevent the incompetent from presenting whatever defense he has to the court, and such fraud is "extrinsic" in nature.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud" and "Fraud".

10. Judgment ⇐443(3)

Where an adversary hearing has been held, a cause of action for relief in equity can be stated upon the ground that extrinsic fraud prevented a fair adversary proceeding.

11. Insane persons ⇐100

Where there has been no adversary proceeding, the right of the incompetent defendant to equitable relief from a default judgment may be established if the plaintiff's ignorance of defendant's legal disability prevented a true adversary hearing, as well as where the plaintiff's fraud prevented such hearing.

12. Insane persons ⇐100

Where there has been no adversary hearing in action against an incompetent defendant, if the plaintiff's ignorance of defendant's legal disability prevented a true adversary hearing there exists an "extrinsic mistake" which is a recognized ground for the intervention of equity where the mistake has prevented a fair adversary hearing.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Mistake".

13. Judgment ⇐447(1, 2)

It is a general rule that equity will not interfere with a judgment which is unjust unless it appears that the one whose interests were thus infringed can present a meritorious case, but a "meritorious case" does not require an absolute guarantee of victory; it being enough if the complaint presents facts from which it can be ascertained that the plaintiff has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary hearing.

See Words and Phrases, Permanent Edition, for all other definitions of "Meritorious Case".

14. Insane persons ⇐100

In action to have a judgment set aside on ground that plaintiff knew of defendant's legal incompetency but concealed the fact from the court, a complaint, alleging that but for such concealment the court in the former action would have considered the testimony of additional witnesses and would have reached a different conclusion, sufficiently showed a "meritorious case", and the admissibility of such evidence would be for the court to determine upon a trial of the issues.

15. Insane persons ⇐100

In action to set aside judgment obtained against defendant who subsequently died, complaint, alleging that such defendant was incompetent at the time, that such fact was known to the person obtaining the judgment and was concealed from the court, that a default judgment was obtained against defendant, and that but for such concealment testimony of additional witnesses would have been considered and a different conclusion reached, stated a cause of action for relief in equity.

16. Pleading ⇐225(2)

Where both a general and a special demurrer were filed against complaint and the parties have stressed only the question whether the complaint states a cause of action and the complaint is sufficient against a general demurrer, trial court ought not to sustain the special demurrer without leave to amend.

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Marguerite Olivera, as administratrix, etc., against Rosaline Grace, as administratrix, etc., and others, to set aside a judgment rendered against plaintiff's decedent. From a judgment for defendants, the plaintiff appeals.

Judgment reversed.

For prior opinion, see, Cal.App., 116 P.2d 146.

Harold M. Davidson, V. A. Morgan, and Morgan & Davidson, all of Alhambra, for appellant.

Daniel A. Knapp, of Los Angeles, for respondents.

GIBSON, Chief Justice.

The plaintiff brought this action as administratrix of the estate of Emilie Rust,

deceased, to set aside a judgment rendered against Emilie Rust prior to her death. The judgment was in favor of defendant as administratrix of the estate of Hattie Haas in an action to reform a deed in which Hattie Haas and Emilie Rust were named as joint tenants. The plaintiff, Marguerite Olivera, and Hattie Haas were daughters of Emilie Rust, and the defendant, Rosaline Grace, is the daughter of Hattie Haas. After the death of Hattie Haas on April 23, 1936, the defendant obtained a default judgment against Emilie Rust which reformed the joint tenancy deed so as to provide for the conveyance of the fee to Hattie Haas and the conveyance of a life estate only to Emilie Rust.

[1] Plaintiff brings this appeal from a judgment for defendant entered after an order sustaining a general and special demurrer to plaintiff's third amended complaint without leave to amend. The allegations of the complaint must therefore be regarded as true. Prior to March 21, 1933, Emilie Rust was the owner in fee simple of the real property involved in the present action. On or about that date she conveyed the property to John and Marie V. Zell, husband and wife, who immediately reconveyed it to Emilie Rust and Hattie Haas, as joint tenants. It is alleged that Emilie Rust sought legal advice in connection with these conveyances and determined upon that advice to provide for a joint tenancy between herself and her daughter.

During the year 1934, Emilie Rust sustained a serious head injury which resulted in a complete loss of mentality. The injury rendered her wholly devoid of understanding and incapable of transacting business of any nature. After the death of Hattie Haas, the defendant, as administratrix of her estate, commenced an action to reform the joint tenancy deed. Emilie Rust was personally served and upon her failure to appear in the action defendant secured a default judgment granting the relief sought. Plaintiff alleges that the defendant knew that Emilie Rust was incompetent prior to the commencement of the action and throughout its prosecution but, notwithstanding such knowledge, failed to secure the appointment of a general guardian or a guardian ad litem for her and failed to inform the court of her condition. It is also alleged that before the commencement of the action defendant talked with the two men upon whose advice Emilie Rust had relied in making the joint tenancy deed, but that defendant failed to call either of these men as witnesses in the hearing held at the time the default judgment was rendered. The complaint alleges that the default judgment reforming the joint tenancy deed would not have been rendered if the court had been advised of Emilie Rust's mental condition and had heard the testimony of the two persons who advised her concerning the disposition of her property. On April 8, 1938, Emilie Rust was judicially declared to be incompetent and the plaintiff was appointed guardian of her person and estate. The default judgment entered on August 14, 1936, was not discovered by plaintiff until January 4, 1939, after the death of Emilie Rust and after plaintiff's appointment as administratrix of her estate. The present action to set aside the default judgment was instituted immediately thereafter.

Plaintiff argues that the complaint states a cause of action and consequently that the judgment must be reversed. It is contended that under the facts alleged the default judgment should be set aside either upon the ground that the court lacked jurisdiction over Emilie Rust for failure to make a proper service or upon the ground that the judgment was obtained by extrinsic fraud on the part of defendant which prevented a fair hearing of the case.

[2-4] Courts frequently set aside judgments rendered against incompetent defendants where it is probable that injustice has resulted. 34 A.L.R. 221, et seq.; Spurlock v. Noe, 19 Ky.Law Rep. 1321, 43 S.W. 231, 39 L.R.A. 775; Cooper v. Greenleaf, 84 Kan. 499, 114 P. 1086, 35 L.R.A., N.S., 1090. In determining the applicability of these cases to the present situation, however, it is necessary to consider the source of the authority under which relief was granted. In many states, including California, the general common law power that courts had to control their own judgments during the term at which they were rendered has been continued in the form of statutory authority. Wiggin v. Superior Court, 68 Cal. 398, 400, 9 P. 646; 31 Am.Jur. 268; 14 Cal.Jur. 1009. Under such statutes the court which rendered the judgment has power, in its discretion (O'Brien v. Leach, 139 Cal. 220, 72 P. 1004, 96 Am. St. Rep. 105; 31 Am.Jur. 267; 14 Cal. Jur. 1072), for a definite period of time and upon specified grounds to open, vacate or modify its own final judgment.

Code Civ.Proc., sec. 473; Code Civ.Proc., sec. 663; 31 Am.Jur. 277. Apart from statutory authority, all courts are said to have an inherent power to correct their records so as to make them speak the truth, and under this inherent power courts have frequently corrected their final judgments when, because of clerical errors or omissions, the judgments actually rendered were not the judgments intended to be rendered. Robson v. Superior Court, 171 Cal. 588, 154 P. 8; Wiggin v. Superior Court, supra, 68 Cal. page 402, 9 P. 646; People v. Curtis, 113 Cal. 68, 45 P. 180; Bastajian v. Brown, 19 Cal.2d 209, 120 P.2d 9; 14 Cal.Jur. 993, 1002, 1019. Similarly, a court has inherent power, apart from statute, to correct its records by vacating a judgment which is void on its face, for such a judgment is a nullity and may be ignored. People v. Greene, 74 Cal. 400, 16 P. 197, 5 Am.St.Rep. 448; 126 A.L.R. 968; 31 Am. Jur. 298; 14 Cal. Jur. 1023, 1024.

Many of the cases in which judgments against allegedly incompetent defendants have been set aside involved an exercise of the general common law power that courts possessed during the term at which the judgment was rendered, or the analogous power which now exists in many states by virtue of statutes similar to Code of Civil Procedure, section 473. Judd v. Gray, 156 Ind. 278, 59 N.E. 849; Brothers v. Brothers, 71 Mont. 378, 230 P. 60; Bucholz v. Harthun, 61 N.D. 547, 239 N.W. 161; Bond v. Neuschwander, 86 Wis. 391, 57 N.W. 54; cf. Farmers' & M. Bank v. Duke, 187 N.C. 386, 122 S.E. 1, 34 A.L.R. 215. These cases would furnish persuasive authority if the attack upon the judgment sought to be set aside in the present action had been made under section 473, Code of Civil Procedure, but they cannot be relied upon to support an independent action in equity. Similarly, cases which depend upon special statutes enacted in certain states for the benefit of allegedly incompetent defendants are also unavailing in the present action. Montagne v. Cherokee County, 200 Iowa 534, 205 N.W. 228; Watson v. Horner, 178 Iowa 499, 159 N.W. 1032; Crawford v. Thomson, 161 Ill. 161, 43 N.E. 617; cf. Abbott v. Ind. Acc. Comm., 12 Cal. App.2d 478, 480, 55 P.2d 927; Western Pipe & Steel Co. v. Ind. Acc. Comm., 79 Cal.App. 215, 249 P. 34.

[5] In addition to the situations already discussed, where courts have set aside final judgments under statutory authority or under their inherent power to correct their own records, there exists a well-recognized jurisdiction in equity which has been utilized to relieve incompetent defendants from judgments taken under circumstances of unfairness and injustice. Equity's jurisdiction to interfere with final judgments is based upon the absence of a fair, adversary trial in the original action. "It was a settled doctrine of the equitable jurisdiction—and is still the subsisting doctrine except where it has been modified or abrogated by statute * * * that where the legal judgment was obtained or entered through fraud, mistake, or accident, or where the defendant in the action, having a valid legal defense on the merits, was prevented in any manner from maintaining it by fraud, mistake, or accident, and there had been no negligence, laches, or other fault on his part, or on the part of his agents, then a court of equity will interfere at his suit, and restrain proceedings on the judgment which cannot be conscientiously enforced. * * * The ground for the exercise of this jurisdiction is that there has been no fair adversary trial at law." 5 Pomeroy, Equity Jurisprudence (Equitable Remedies, 2d Ed.), p. 4671, 4672. Typical of the situations in which equity has interfered with final judgments are the cases where the lack of a fair adversary hearing in the original action is attributable to matters outside the issues adjudicated therein which prevented one party from presenting his case to the court, as for example, where there is extrinsic fraud (Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194; McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110; (1921) 9 Cal.L.Rev. 156; (1934) 23 Cal.L.Rev. 79; 15 Cal.Jur. 14, et seq.; 3 Freeman, Judgments [5th ed.], p. 2562, et seq.) or extrinsic mistake. Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Sullivan v. Lumsden, 118 Cal. 664, 50 P. 777; Antonsen v. Pacific Container Co., 48 Cal. App.2d 535, 120 P.2d 148; 15 Cal.Jur. 23; 3 Freeman, Judgments [5th ed.], 2593, et seq.

[6] One who has been prevented by extrinsic factors from presenting his case to the court may bring an independent action in equity to secure relief from the judgment entered against him. Caldwell v. Taylor, supra; Purinton v. Dyson, 8 Cal. 2d 322, 65 P.2d 777, 113 A.L.R. 1230; Dunlap v. Steere, 92 Cal. 344, 28 P. 563, 16 L.R.A. 361, 27 Am.St.Rep. 143. Where

the court that rendered the judgment possesses a general jurisdiction in law and in equity, the jurisdiction of equity may be invoked by means of a motion addressed to that court. McGuinness v. Superior Court, supra; Crescent Canal Co. v. Montgomery, 124 Cal. 134, 144, 56 P. 797; Estate of Estrem, 16 Cal.2d 563, 571, 107 P. 2d 36; Ex-Mission L. & W. Co. v. Flash, 97 Cal. 610, 631, 32 P. 600; Cohen v. Home Life Ins. Co., 273 Mich. 469, 263 N.W. 857; Home Life Ins. Co. v. Cohen, 278 Mich. 169, 270 N.W. 256; Jarman v. Saunders, 64 N.C. 367; Demelt v. Leonard, 11 Abb.Prac., N.Y., 252. In view of the foregoing cases, the statement in Tinn v. U. S. District Attorney, 148 Cal. 773, 84 P. 152, 113 Am.St.Rep. 354, to the effect that equity jurisdiction can be invoked only by means of an independent action, and not upon motion, is no longer an accurate statement of the law. In determining whether the complaint in the present proceeding states a cause of action, therefore, we may consider those cases in which equitable relief has been granted in favor of an incompetent defendant, whether the jurisdiction of equity was invoked by motion before a court of general jurisdiction or by an independent action in equity.

[7] Plaintiff contends that the complaint states a cause of action upon the ground that the court was without jurisdiction. Emilie Rust, however, had not then been judicially declared of unsound mind, and no guardian had been appointed for her. Under such circumstances, it is settled that personal service upon the alleged incompetent is sufficient to give the court jurisdiction of her person (Sacramento Sav. Bank v. Spencer, 53 Cal. 737), and a judgment obtained against the incompetent under such circumstances is not void for want of jurisdiction. Dunn v. Dunn, 114 Cal. 210, 46 P. 5; Nielsen v. Emerson, 121 Cal.App. 415, 418, 9 P.2d 260; 34 A.L.R. 221; 1 Freeman, Judgments, 5th Ed., p. 882; 1 Black, Judgments, 2d Ed., p. 302; Van Fleet, Collateral Attack, p. 654.

[8, 9] Next, it is urged by plaintiff that the conduct of the defendant, Rosaline Grace, in taking a default judgment against her grandmother at a time when she knew, according to the allegations of the complaint, that the latter was incompetent constitutes extrinsic fraud which would justify a court of equity in granting relief against the judgment so obtained. Defendant argues that no fraud was practiced upon Emilie Rust in the former action, because the concealment of information does not constitute fraud in the absence of a confidential relationship between the parties requiring disclosure. It is also urged that since Emilie Rust had not been judicially declared to be incompetent at the time of the former action, defendant could not have had knowledge of her incompetency, but, at most, could have had only an opinion respecting her capacity. Thus, defendant contends, there was no fraud that would justify the relief sought in the present action. This contention cannot be sustained. Incompetency which, as in the present case, is alleged to render a defendant wholly devoid of understanding and incapable of transacting business of any nature is a condition which exists independently of a judicial determination of that fact. Where the defendant is under such a legal disability and the plaintiff has knowledge of his condition, a duty rests upon the plaintiff to disclose such matters to the court and to have a guardian appointed for the purpose of the proceeding. Dunn v. Dunn, supra; Curtis v. Curtis, 250 Mich. 105, 229 N.W. 622; Home Life Ins. Co. v. Cohen, supra; Ammon v. Wiebold, 61 N.J.Eq. 351, 48 A. 950; 1 Black, Judgments, supra. If the plaintiff knows of the defendant's incompetency but conceals such information from the court and, to prevent a true adversary hearing, proceeds to a default judgment by taking advantage of defendant's condition, his conduct constitutes a fraud upon the court as well as upon the incompetent defendant. Since the direct effect of such concealment is to prevent the incompetent from presenting whatever defense he has to the court, it is clear that the fraud is extrinsic in nature. Cf. Flood v. Templeton, 152 Cal. 148, 156, 92 P. 78, 13 L.R.A.,N.S., 579; 15 Cal.Jur. 14, et seq. If the other requirements for equitable relief are present, therefore, allegations such as those found in the present complaint are sufficient to state a cause of action in equity on behalf of the incompetent.

[10-12] It should not be understood, however, from what has been said that fraud on the part of the plaintiff in the former action is essential to equitable relief in cases such as this. Where an adversary hearing has in fact been held, a cause of action for relief in equity can be stated upon the ground that extrinsic fraud

prevented a fair adversary proceeding. In cases such as the one here presented, however, where there has been no adversary proceeding at all, the right of the incompetent defendant to equitable relief may be established if the plaintiff's ignorance of defendant's legal disability prevented a true adversary hearing as well as where the plaintiff's fraud prevented such a hearing. Courts have granted such relief on behalf of incompetent defendants aside from the element of fraud on the part of the plaintiff if, in fact, no adversary hearing was held. Craddock v. Brinkley, 177 N.C. 125, 98 S.E. 280; Godde v. Marvin, 142 Mich. 518, 105 N.W. 1112; Lutter v. Neubauer, 100 N.J.L. 17, 125 A. 113; Snyder v. Woolf, 232 Ala. 87, 166 So. 803; 34 A.L.R. 221. Some courts, it is true, have referred to this situation as "constructive fraud" which entitles the incompetent defendant against whom a default judgment has been taken to relief in equity. Cunningham v. Wood, 224 Ala. 288, 140 So. 351; Snyder v. Woolf, supra. We think it more accurate, however, to characterize such a situation as extrinsic mistake, which is a recognized ground for the intervention of equity where the mistake has prevented a fair adversary hearing. Bacon v. Bacon, supra, 150 Cal. page 486, 89 P. 317, and cases cited above. In Winslow v. McCarthy, 39 Cal.App. 337, 178 P. 720, it was held that a default judgment against an incompetent defendant should be set aside where the court failed to comply with section 372 of the Code of Civil Procedure which provides that an incompetent person must appear either by his general guardian or by a guardian ad litem. Relying upon Crescent Canal Co. v. Montgomery, supra, 124 Cal. page 144, 56 P. 797, the court which rendered the judgment exercised its equitable jurisdiction upon motion to grant relief from a mistake which prevented the incompetent defendant from having a fair adversary trial. Thus, even if no actual fraud on the part of the defendant could be proved in the present action, the facts set forth are sufficient to justify the intervention of a court of equity if the other requirements for equitable relief can be established.

[13-15] Finally, it is suggested by the defendant that the complaint fails to state a cause of action because it does not allege that a different result would have been reached if the interests of the incompetent had been properly protected. It is a general rule that equity will not interfere with a judgment which is unjust unless it appears that the one whose interests were thus infringed can present a meritorious case. 3 Freeman supra, p. 2465, et seq.; 5 Pomeroy, supra, p. 4701; 15 Cal.Jur. 29. The requirement that the complaint allege a meritorious case does not require an absolute guarantee of victory. Cf. McArdle Real Estate Co. v. McGowan, 109 N.J.L. 595, 163 A. 24. It is enough if the complaint presents facts from which it can be ascertained that the plaintiff has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding. It is here alleged that but for the conduct of the defendant the court in the former action would have considered the testimony of additional witnesses concerning Emilie Rust's intention in executing the original deed and would have reached a different conclusion. This is a sufficient allegation under the rule stated. Defendant argues that the testimony referred to would have been inadmissible, but that is a matter for the court to determine upon a trial of the issues. The complaint states a cause of action for relief in equity and the general demurrer should have been overruled.

[16] The order of the court sustaining the general and special demurrer to plaintiff's third amended complaint does not indicate that it was based upon any of the grounds of uncertainty specified in the special demurrer. The parties have stressed only the question whether the complaint stated a cause of action. Under such circumstances and where the complaint is sufficient against a general demurrer, it has been held that the trial court ought not to sustain the special demurrer without leave to amend. Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 114 P.2d 1; Payne v. Baehr, 153 Cal. 441, 447, 95 P. 895; Starr v. Slaney, 11 Cal.App.2d 311, 314, 53 P.2d 395; 24 Cal.L.Rev. 604.

The judgment is reversed.

SHENK, CURTIS, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

PACIFIC EMPLOYERS INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 18068.

Supreme Court of California.

Feb. 27, 1942.

Rehearing Denied March 27, 1942.

1. Workmen's compensation ⇐1420

In proceedings by an employee to recover compensation for a disease allegedly contracted in course of his employment, medical evidence would be given weight to which it was entitled, and proof that the disease was contracted in course of employment was not required to attain absolute certainty or exact demonstration to be sufficient.

2. Workmen's compensation ⇐622, 1364

A disease must be contracted in the course of employment to be compensable, and burden of proof thereof rests upon employee.

3. Workmen's compensation ⇐1939

In reviewing an award of the State Industrial Accident Commission, the question whether a disease was contracted in course of the employment is one of fact for the commission, and all reasonable inferences available are to be drawn in favor of commission's award.

4. Workmen's compensation ⇐609, 610

An injury to be compensable under the Workmen's Compensation Law must "arise out of the employment", that is, occur by reason of a risk or condition incident to the employment, and mere fact alone that the injury occurred while employee was in employer's service is not sufficient.

See Words and Phrases, Permanent Edition, for all other definitions of "Arise Out of the Employment".

5. Workmen's compensation ⇐1492

In proceedings under workmen's compensation act, opinions of qualified medical witnesses with reference to origin and cause of employee's injury are valid evidence which will support an award.

6. Workmen's compensation ⇐613

Injuries suffered by an employee to be compensable need not be of the kind anticipated by employer or peculiar to the employment.

7. Workmen's compensation ⇐1413, 1414, 1422

Circumstantial evidence is sufficient to support an award of State Industrial Accident Commission, and it may be based upon the reasonable inferences that arise and from reasonable probabilities flowing from the evidence, and neither absolute certainty nor demonstration is required.

8. Workmen's compensation ⇐1526

Evidence that traveling salesman was required to travel through a territory in which the disease of coccidioidal granuloma, commonly known as San Joaquin Valley fever, was endemic, and that risk to which salesman was subjected by his employment was not the same as that of the general public in the endemic area inasmuch as the great majority of inhabitants possessed an immunity to the disease which salesman, living outside the area, lacked, supported finding that the disease contracted by salesman "arose out of and in course of his employment", so as to be compensable.

See Words and Phrases, Permanent Edition, for all other definitions of "Arise Out of and in Course of Employment".

9. Workmen's compensation ⇐644

When employees whose duties compel them to use the streets and highways suffer injuries in the course thereof, the injury "arises out of and in the course of employment" and is compensable.

10. Workmen's compensation ⇐1935

Where a rehearing was granted by State Industrial Accident Commission and contrary findings were made, and Supreme Court had nothing more than petitioner's bare assertion that commission did not review the record and consider all the facts on rehearing, it would be presumed that the commission did review the record and consider all the facts before making its findings and award. Code Civ.Proc. § 1963, subd. 15.

In Bank.

Proceeding by the Pacific Employers Insurance Company, insurance carrier for the employer, Alexander-Balart Company, to have annulled an award under the Workmen's Compensation Act by the Industrial Accident Commission in favor of W. Allen Ehrhardt, employee.

Award affirmed.

W. N. Mullen, of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

CARTER, Justice.

Petitioner, the insurance carrier for the employer, Alexander-Balart Company, seeks to have annulled an award of the respondent Industrial Accident Commission to the employee, respondent Ehrhardt, for disability caused by the disease coccidioidal granuloma, commonly known as San Joaquin Valley fever.

The employer's place of business is in San Francisco. It is engaged in the business of selling coffee. Ehrhardt has been employed by it since July 15, 1932, for the most part as a traveling salesman engaged in selling the employer's products in California, Arizona, New Mexico and Texas. Prior to his employment by Alexander-Balart Company, Ehrhardt had never been in Arizona, New Mexico, Texas, or the San Joaquin Valley in California, except that possibly he passed through the latter place when he was about three years of age. His duties as salesman required him to cover the specified territory by train and automobile. During the time here in question, Ehrhardt lived in San Francisco, except the year 1929, during which he resided in Alameda County. He at all times worked out of the San Francisco office of his employer.

According to his testimony, he made the following trips to the places above-mentioned in the course of his employment. His first tour in April of 1933 lasted about two weeks. He traveled from San Francisco to Arizona by train and thence canvassed Arizona in an automobile over dusty roads. He did not return to San Francisco via the San Joaquin Valley. In May, 1933, he drove into that valley in an automobile, and after spending two days there, proceeded to Arizona where he toured that state and New Mexico, encountering a dust storm while there; the trip consumed about two and a half weeks. In August of 1933, he made two visits to the San Joaquin Valley of a duration of about two weeks; he canvassed said valley in an automobile on those occasions. His next visit there was from September 5th to September 23, 1933, during which time he covered Arizona by automobile, having passed through the San Joaquin Valley en route. In the early part of February, 1934, he spent about two weeks soliciting orders in said valley. He suffered from a bad cold and cough sometime in February or March of that year. A few days prior to April 2, 1934, he commenced to find blood in his sputum, and consulted Dr. Hutchins on that date. The doctor believed the cause to be a nose or throat condition and last saw Ehrhardt on April 9, 1934. Thereafter, the coughing and discharge of blood occurred sporadically, but finally while suffering from a more extended attack he consulted Dr. Duggan in July, 1939, who referred him to Dr. Shipman, a specialist in lung diseases. Dr. Shipman's diagnosis was tubercular infection in the apex of his right lung, and in treatment therefor a pneumothorax was induced and the lung kept compressed. Failing to find any tuberculosis bacilli in his sputum upon repeated tests, Dr. Shipman finally had a more extensive analysis of the sputum made, which revealed in January, 1934, the presence of coccidioides infection. A second laboratory test revealed the same, and a third one in March gave Dr. Shipman undeniable proof of the presence of coccidioides infection or San Joaquin Valley fever. That was the first diagnosis or discovery that Ehrhardt had such a disease. Ehrhardt made several trips to San Joaquin Valley and Arizona on his employer's business after the one in February, 1934. He never traveled about in that valley or Arizona except in the course of his employment.

It appears that the cause of coccidioidal granuloma is a mold or fungus which exists in the soil in San Joaquin Valley and Arizona, and that a person may become infected therewith through the respiratory tract by inhaling the mold which is blown about in the dust. The manifestations of the disease are quite similar to tuberculosis. Ordinarily the symptoms at the onset are practically the same as an ordinary cold. The secondary stage of the disease is coccidioidal granuloma. In most instances the disease does not progress beyond the primary stage. The incubation period is one to three weeks. Dr. Shipman testified that the disease is not contracted in San Francisco or the area to the east or north thereof or the upper Sacramento Valley, that the disease is contracted primarily in the San Joaquin Valley and Arizona, and that Ehrhardt probably contracted the disease when he first began to spit blood. He was asked: "Then, Doctor, on the basis of this information it is, as I understand it, your opinion that the disease in this particular instance was contracted by Mr. Ehrhardt in the San Joaquin Valley or Arizona? A. Yes." He was also asked in connection with the cases of the disease reported in

the bulletin of the Department of Public Health of California: "I say—well, let's finish the question—the great majority of these cases, Doctor, show residence in the San Joaquin County area and with that in mind, can it be said that the disease is a disease particularly virulent in that area, in that the likelihood of a person getting it is much greater in that area than elsewhere in the State? A. I think so." Dr. Shipman states in his written report on Ehrhardt's case: "In April of 1934, he (Ehrhardt) showed the first evidence of this disease. It would seem a reasonable conclusion under the facts, regardless of the exact incubation time of the disease, that *it is a practical certainty that he acquired it in the San Joaquin Valley and Arizona between April of 1933 and April of 1934.* The reasons for this are that 77% of the people constantly resident in the valley get the disease. In areas outside the valley cases of the disease are an extreme rarity and in such cases it is usually felt that through some unknown factor of special contact these cases arise by reason of transportation of spores from the endemic area. Where the patient has been in the endemic area to the extent shown for a year prior to breaking down and has not previously been in the area at all, except possibly over twenty years previously, *the probabilities are overwhelming that he contracted the disease in these areas* during the year before it first made its appearance. In fact it would seem to be *a practical certainty.* * * * In summary it would appear that there is only the most remote possibility that the patient here got the disease anywhere but on his business trips during 1933 and 1934 in the endemic area; that the great probability and practical certainty is that he got it on these trips." (Emphasis added.) The evidence also shows that residents of San Joaquin Valley attain a degree of immunity to the disease and are less susceptible to the contraction of it than persons coming into the valley for the first time.

Petitioner's main contention is that the evidence is insufficient to support the award; that there is no showing that Ehrhardt contracted the disease in the course of his employment; and that even if he did contract it in San Joaquin Valley or Arizona while performing services for his employer, it cannot be said to have arisen out of his employment or have been incidental to it, or the proximate result thereof.

[1] We have carefully examined the record and cannot agree with those contentions. The Industrial Accident Commission found that Ehrhardt contracted the disease while in San Joaquin Valley on the business of his employer during the period between April, 1933, to April, 1934. The evidence supports that finding. When we consider the evidence that the disease is endemic in San Joaquin Valley, that the spores causing it are found in the soil there, that it is acquired by an inhalation of those spores which are borne on the wind, that Ehrhardt contracted the disease, that he had not been in San Joaquin Valley except in the course of his employment, that Dr. Shipman testified that in his opinion the disease was contracted there by Ehrhardt and Dr. Pearson stated that the probabilities were one hundred to one that he contracted it there, it cannot be said that the trier of fact, the commission, was not justified in its conclusion. Petitioner points to evidence by its medical witnesses contradictory to the above, and to the effect that the disease possibly could be contracted in Alameda County, and the areas north and east of San Francisco, that cattle in those areas have been found infected, that the infection may be carried in clothes and on other articles, and the like, but that merely created a conflict in the evidence which the commission has resolved against the petitioner. It is not the function of this court to weigh conflicts in the evidence. It appears that the incidence of the disease in places other than San Joaquin Valley were sporadic, and the possibility was remote that Ehrhardt received the infection elsewhere. It should be remembered that in cases of this character medical evidence is to be given the weight to which it is entitled and proof that the disease was contracted in the course of the employment need not attain absolute certainty or exact demonstration to be sufficient. In City and County of San Francisco v. Industrial Acc. Comm., 183 Cal. 273, at page 283, 191 P. 26, at page 29, this court said:

"It, of course, cannot be said that from these facts it is certain that Slattery contracted his sickness because of his employment. But certainty is not required. It is not even required that the award be, in our judgment in accord with the preponderance of the evidence, in order that we be not at liberty to annul it. We cannot disturb the award unless we can say that a reasonable man could not reach the conclu-

sion which the commission did. This we cannot say in the present case." See, also, State Compensation Ins. Fund v. Industrial Acc. Comm., 195 Cal. 174, 231 P. 996; Royal Indemnity Co. v. Industrial Acc. Comm., 70 Cal.App. 435, 233 P. 381; United Dredging Co. v. Industrial Acc. Comm., 92 Cal. App. 110, 267 P. 763; Hartford Accident & Indemnity Co. v. Industrial Acc. Comm., 32 Cal.App. 481, 163 P. 225; Santa v. Industrial Acc. Comm., 175 Cal. 235, 165 P. 689.

Petitioner relies upon such cases as Children's Hospital Soc. v. Industrial Acc. Comm., 22 Cal.App.2d 365, 71 P.2d 83; Pattiani v. Industrial Acc. Comm., 199 Cal. 596, 250 P. 864, 49 A.L.R. 446, but each case is necessarily dependent upon its particular facts. In the Children's Hospital case it does not appear from a reading thereof that there was any medical testimony that the disease, poliomyelitis, was contracted by the nurse while she was on duty at the hospital, her place of employment, nor was there any substantial evidence that she was exposed to the infection there. In the case at bar there is testimony that in the doctor's opinion Ehrhardt contracted the disease while in the endemic area on his employer's business. Also there is evidence that the mold causing the disease is in that area and that 77% of the inhabitants thereof suffer at least a primary infection. In the Pattiani case the finding of the commission was adverse to the applicant, and it was held that the evidence sustained its findings. It does not appear whether there was any medical evidence that the disease, typhoid fever, was contracted by the applicant while in New York City, there being an epidemic in that city at the time.

[2, 3] It is, of course, a fundamental principle that the disease must be contracted in the course of the employment, and the burden of proof thereof rests upon the applicant. Nevertheless, it must be remembered that in reviewing awards of the commission, that question is one of fact for the commission, and all reasonable inferences available are to be drawn in favor of the award.

[4-8] Petitioner argues, however, that even if it be assumed that the evidence established that Ehrhardt contracted the disease in the course of his employment, the application of the doctrine that an injury to be compensable must be in excess of and different from that to which the commonalty is subjected, requires an annullment of the award. It is unquestionably the law that an injury to be compensable under the Workmen's Compensation laws must arise out of the employment, that is, occur by reason of a risk or condition incident to the employment. There must be at least a causal connection between the employment and the injury; the mere fact alone that the injury occurred while the employee was in his master's service is not sufficient. Newton v. Industrial Acc. Comm., 204 Cal. 185, 267 P. 542, 60 A.L.R. 1279; Larson v. Industrial Acc. Comm., 193 Cal. 406, 224 P. 744; San Francisco v. Industrial Acc. Comm., supra. However, there are other principles to be observed in aid of the application of the foregoing rules to the instant case. It is trite, but pertinent, to observe that the issue of whether the injury suffered arose out of a risk incident to the employment is a question of fact in each case and if there is any evidence or reasonable inferences flowing therefrom which support the finding of the commission, the award will not be disturbed on review. Each case must be decided upon its particular facts and no comprehensive formula is available. Larson v. Industrial Acc. Comm., supra. The opinions of qualified medical witnesses with reference to the origin and cause of the injury are valid evidence which will support an award. Newton v. Industrial Acc. Comm., supra; State Compensation Ins. Fund v. Industrial Acc. Comm., supra. The injuries suffered to be compensable need not be of the kind anticipated by the employer or peculiar to the employment. Larson v. Industrial Acc. Comm., supra. In the instant case we have the opinion of medical witnesses that Ehrhardt contracted the disease in the San Joaquin Valley while there in the service of his employer, and that the probability of his having contracted the disease elsewhere is very remote. As stated in City and County of San Francisco v. Industrial Acc. Comm., 183 Cal. 273, 283, 191 P. 26, 30:

"Its [the Commission] conclusion is the more justified by the fact that it coincides with the conclusions of most of the physicians who testified. *Their opinions upon a point of this character are entitled to consideration, since it is a part of their vocation to observe diseases and how they spread, and to draw conclusions from their observations.*" (Emphasis added.) And in addition to that evidence are the circum-

stances that, in the other localities visited by Ehrhardt while not serving his employer during the time here pertinent, the cases of the infection are sporadic and the possibility that he contracted the disease in such places is remote, that approximately 77% of the inhabitants of the San Joaquin Valley area are infected with the disease at some time during the course of their lives although only a few of them develop the secondary phase, coccidioidal granuloma, and that by reason of the prevalence of the infection among those inhabitants they attain an immunity which a person coming into that area for the first time does not possess. Circumstantial evidence is sufficient to support an award of the commission, and it may be based upon the reasonable inferences that arise from the reasonable probabilities flowing from the evidence; neither absolute certainty nor demonstration is required. State Compensation Ins. Fund v. Industrial Acc. Comm., supra; Royal Indemnity Co. v. Industrial Acc. Comm., supra; United Dredging Co. v. Industrial Acc. Comm., supra; Hartford Accident & Indemnity Co. v. Industrial Acc. Comm., supra; City and County of San Francisco v. Industrial Acc. Comm., supra; Santa v. Industrial Acc. Comm., supra. It is reasonable to conclude that if Ehrhardt's duties had not taken him to the endemic area he would not have contracted the disease. It was by reason of and incident to his employment that he came in contact with the infection. The risk to which he was subjected by his employment was not the same as that of the public in the endemic area inasmuch as the great majority of the inhabitants there possessed an immunity to the disease which Ehrhardt, living outside the area, lacked.

[9] There is no substantial distinction with reference to the risk being incident to his employment and the hazards of traffic and travel encountered by an employee whose duties take him onto the streets and highways. The latter hazards are no more closely related to the employment of such an employee as differentiated from the general public, than was the hazard of infection which was met by Ehrhardt in his employment which required his presence in the endemic area. It is the firmly established law that when employees whose duties compel them to travel or to use the streets and highways suffer injuries in the course thereof, the injury arises out of and occurs in the course of employment and is compensable. California Casualty Indemnity Exchange v. Industrial Acc. Comm., 5 Cal.2d 185, 53 P.2d 758; Burton Auto Transfer Co. v. Industrial Acc. Comm., 37 Cal.App. 657, 174 P. 72; Globe Indemnity Co. v. Industrial Acc. Comm., 36 Cal.App. 280, 171 P. 1088; Western Pacific R. R. Co. v. Industrial Acc. Comm., 193 Cal. 413, 224 P. 754; London, etc., Co. v. Industrial Acc. Comm., 35 Cal.App. 681, 170 P. 1074; Maryland Casualty Co. v. Industrial Acc. Comm., 39 Cal.App. 229, 178 P. 542; Real Silk Hosiery Mills v. Industrial Acc. Comm., 86 Cal.App. 189, 260 P. 807. In the case at bar Ehrhardt's employment compelled him to travel over the streets and highways both in cities and in the country in an automobile. The weather being warm he would naturally have and did have the windows of his vehicle open. The spores or mold causing the infection is in the soil in the endemic area, and any breeze would naturally carry the mold to him where it would be inhaled. The case of Roe v. Boise Grocery Co., 53 Idaho 82, 21 P.2d 910, is worthy of note. There the employee, a traveling salesman, in the course of his employment was required to travel over the highways through territory infested with wood ticks infected with the virus which causes Rocky Mountain spotted fever. He was bitten by a wood tick, which resulted in his death from infection with the fever. The Supreme Court of Idaho affirmed an award of compensation of the Industrial Accident Board, and held that the injury arose out of the employment. In answer to the contention that the risk of such infection from wood ticks was no greater than that incurred by the commonalty, the court said at page 912 of 21 P.2d:

"The duties of the deceased required him to make frequent regular trips over the highways, stop at the hotels and visit his customers both to sell and collect; thus the highways he traveled, the hotels he stopped at, and the stores he visited became and were his workshop; they were the places where he constantly spent his time and worked for his employer. That cannot be said of any member of the public not performing similar duties nor similarly employed. Consequently, the deceased was exposed to the danger of being bitten by an infected wood tick in a greater degree than those who lived in the wood tick territory and traveled over the highways traversing it. We think that the rule applied to the servant who, in the course of

the master's business, passes along a public street, and sustains an accident by reason of the risks incidental to the streets, should also be applied to a salesman traveling by automobile over the public highways, who sustains an accident by reason of the risks incidental to the highways." In Fidelity & Casualty Co. v. Industrial Acc. Comm., 84 Cal.App. 506, 258 P. 698, the employee contracted typhoid fever while in a foreign country in the course of his employment. Although the court based its holding that the injury was compensable chiefly upon the ground that the employer knew of the presence of the disease in that country, it remarked at page 510 of 84 Cal.App., at page 699 of 258 P.:

"Furthermore, the evidence sufficiently shows that the inhabitants of these localities, while not immune from the disease, were less subject to infection therefrom than foreigners, and we are unable to say that the conclusion of the commission that the employee was subjected to an exposure in excess of that of the commonalty was not reasonably supported."

Petitioner cites Pattiani v. Industrial Acc. Comm., supra, as controlling. There the employee was sent on his employer's business to New York City where he contracted typhoid fever. An epidemic of the fever then existed in the city. The commission found against the employee, and that the epidemic was not caused by contaminated oysters (the employee had eaten contaminated oysters while in the city), and that there was no risk different than that to which the general public was exposed. This court was there concerned merely with whether the injury was compensable in view of the finding of the commission. It pointed out that there was no evidence of his having contracted the disease by reason of the epidemic and that the evidence supported the finding. In the case at bar the medical testimony shows that Ehrhardt contracted the disease in the course of his employment, and that he, a stranger coming into the endemic area was more susceptible to the disease than the residents thereof. Likewise, in Children's Hospital Soc. v. Industrial Acc. Comm., supra, there was no evidence that the employee, a nurse in a hospital, was in a place where she was exposed to the disease, nor was there any medical evidence that she contracted the disease at the hospital. On the contrary the medical evidence was to the effect that nothing was known about the disease or who were carriers thereof and could transmit it to another. In London Guarantee & Accident Co., Ltd., v. Industrial Acc. Comm., 202 Cal. 239, 259 P. 1096, 54 A.L.R. 1392, the employee was not, by reason of his employment, taken away from his place of residence into an area where he was exposed to a special risk.

[10] The findings of the referee in the first instance were against Ehrhardt. The latter petitioned for and was granted a rehearing and the order granting the same also made findings favorable to Ehrhardt and made the award here attacked; no new evidence was taken on rehearing. The order recited: "Good Cause Appearing Therefor: It Is Ordered that the applicant's petition for rehearing, filed herein January 27, 1941, be and the same is hereby granted.

"It appearing to the satisfaction of this Commission that no sufficient reason exists for taking further evidence,

"It Is Ordered that the instant matter be forthwith submitted for re-consideration and re-determination and that the Findings and Award of January 8, 1941, be rescinded and annulled and the following Findings and Award be substituted as Decision on Rehearing:". Petitioner alleges in its petition for a writ of review:

"That there was no finding in said order granting rehearing and decision on rehearing and it is denied that the members of the Commission at any time read the transcripts and record of this case before reversing the decision of W. Lee DeMara."

Petitioner contends that the order of the commission on rehearing was in excess of its jurisdiction claiming that the commission did not review the evidence in the record, citing Taylor v. Industrial Acc. Comm., 38 Cal.App.2d 75, 100 P.2d 511, and Bethlehem Steel Co. v. Industrial Acc. Comm., 42 Cal.App.2d 192, 108 P.2d 698. Whatever may be the rule with respect to the necessity of a review of the record and a consideration of all the facts by the commission where a rehearing is granted by it and contrary findings are made, we have nothing more than petitioner's bare assertion that the commission did not review the record and consider all the facts. Under those circumstances it is our opinion that the disputable presumption that official duty has been regularly performed is controlling. Code Civ.Proc. § 1963, subd. 15. It will be presumed that the commis-

sion did review the record and consider all the facts before making its findings and award.

The award is affirmed.

GIBSON, C. J., and SHENK, CURTIS, HOUSER, and TRAYNOR, JJ., concurred.



19 Cal.2d 647

NEEL v. MANNINGS, Inc.

L. A. 18116.

Supreme Court of California.

March 2, 1942.

Rehearing Denied March 30, 1942.

1. Judgment ⇐199(3)

A trial court's power to set aside jury's verdict for plaintiff and enter contrary judgment is same as power to grant nonsuit, so that motion for judgment non obstante veredicto may properly be granted only when, disregarding conflicting evidence, giving plaintiff's evidence all value to which it is legally entitled and indulging in every legitimate inference therefrom, there is no evidence of sufficient substantiality to support verdict for plaintiff. Code Civ.Proc. § 629.

2. Negligence ⇐32(1, 2)

One lawfully entering store during business hours to purchase goods does so at implied invitation of owner, on whom law imposes duty to exercise ordinary care and prudence to keep aisles and passageways, in and through which, by their location and arrangement, customer is induced to go in making purchases, in reasonably safe condition, so as not to expose him to danger or accident unnecessarily.

3. Evidence ⇐570

The province of expert opinion testimony is only to aid in coming to conclusion, and it does not exclude consideration of other evidence pertinent to issue involved.

4. Trial ⇐28(1)

In action for injuries to one striking her head against ceiling board while ascending stairway to defendant's restaurant on balcony of public market building, notice, acquired by jury on visit to scene of accident, as to construction of stairway, was independent evidence for jury's consideration in determining issue as to dangerous and defective condition of stairway.

5. Negligence ⇐136(22)

In action for injuries to one striking her head against ceiling board while ascending stairway to defendant's restaurant on balcony of public market building, whether stairway, as maintained by defendant, was unsafe and dangerous for its intended use, to which it was put, because of manner of construction thereof, was question peculiarly proper for submission to jury.

6. Landlord and tenant ⇐169(8)

In action for injuries to one striking her head against ceiling board while ascending stairway to defendant's restaurant on balcony of public market building, undisputed fact that construction of stairs and relation of balcony thereto had remained unchanged during ten-year period of defendant's tenancy was sufficient to sustain jury's finding of constructive notice to defendant of dangerous and unsafe condition of stairway because of manner of construction thereof.

7. Landlord and tenant ⇐169(8)

In action for injuries to one striking her head against ceiling board while ascending stairway to lessee's restaurant on balcony of public market building, architect's testimony that stairway was constructed in conformity with generally approved standards and usual building plans for such type of structure did not absolve lessee from charge of negligence in maintaining stairway in dangerous and defective condition because of manner of construction thereof, as general practice or custom would not exonerate lessee unless it was consistent with due care.

8. Landlord and tenant ⇐169(8)

In action for injuries to one striking her head against ceiling board while ascending stairway to lessee's restaurant on balcony of public market building, evidence that lessee had no knowledge of any like accident having previously occurred on such stairway did not repel suggestion of lessee's negligence in maintaining stairway in dangerous and defective condition because of manner of construction thereof or preclude inquiry as to whether lessee performed legal duty to maintain premises in reasonably safe condition for patrons' use.

9. Negligence ⇐66(2)

Forgetfulness of known danger by one injured as result thereof is not negligence

barring recovery of damages, unless it shows want of ordinary care.

10. Negligence ⇐136(27)

Generally, question whether forgetfulness of known danger by one injured as result thereof constituted negligence, barring recovery of damages, as showing want of ordinary care, is for jury.

11. Landlord and tenant ⇐169(11)

In action for injuries to one striking her head against ceiling board while ascending stairway to lessee's restaurant on balcony of public market building, whether plaintiff's action, in stepping toward left wall rail of stairway to avoid collision with persons descending stairs, without observing or remembering dangerous condition incident to proximity of edge of ceiling bordering stairwell, was reasonable and prudent under circumstances, *held* fact question for jury.

12. Trial ⇐142

Where different conclusions may be reasonably drawn by different minds from same evidence on fact issue, decision thereof must be left to jury.

13. Landlord and tenant ⇐169(11)

In action for injuries to one striking her head against ceiling board while ascending stairway to lessee's restaurant on balcony of public market building, whether natural sway of plaintiff's body, as her weight shifted in moving to left to avoid collision with persons descending stairway, was sufficient to bring her in line to strike her head on edge of ceiling bordering stairwell, was for jury to determine from evidence.

14. Landlord and tenant ⇐169(8)

In action for injuries to one striking her head against ceiling board while ascending stairway to lessee's restaurant on balcony of public market building, evidence *held* sufficient to support jury's verdict for plaintiff on ground of lessee's negligence, proximately causing injuries, in maintaining stairway in dangerous and defective condition because of improper construction thereof.

TRAYNOR, J., GIBSON, C. J., and EDMONDS, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Myrtle Neel against Mannings, Incorporated, for personal injuries. From a judgment for defendant notwithstanding a jury's verdict for plaintiff, plaintiff appeals.

Reversed, with direction.

For prior opinion, see, Cal.App., 115 P.2d 999.

Rehearing denied; GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

G. Revelle Harrison and Albert E. Wheatcroft, both of Los Angeles, for appellant.

Sidney A. Moss, of Los Angeles, for respondent.

CURTIS, Justice.

This is an action for damages for personal injuries sustained by the plaintiff when she struck her head against a ceiling board while ascending a stairway alleged to have been negligently maintained by the defendant Mannings, Inc. The jury returned a verdict in favor of the plaintiff in the sum of $1,500. Thereupon the defendant moved for a judgment notwithstanding the verdict upon the ground that the evidence not only failed to show that defendant was guilty of negligence, but established the fact that the plaintiff's injuries were the result of contributory negligence. The motion was granted and from the judgment entered accordingly for defendant, plaintiff has appealed.

[1] It appears to be the well-established law of this state that the power of the trial court to set aside a verdict and enter a contrary judgment is absolutely the same as its power to grant a nonsuit. Sec. 629, Code Civ.Proc.; Card v. Boms, 210 Cal. 200, 291 P. 190; Hunt v. United Bank & Trust Co. of California, 210 Cal. 108, 291 P. 184; 7 Cal.Jur.Supp. 268, sec. 65c. Therefore, a motion for judgment non obstante veredicto may properly be granted "when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." Card v. Boms, supra, 210 Cal. at page 202, 291 P. at page 191. In the light of this settled legal principle an examination of the record in this case impels the conclusion that the trial court was in error in determining that there was no evidence which gave substantial support to the verdict rendered by the jury.

The essential facts basis of the plaintiff's claim are briefly as follows: For about ten years prior to May 2, 1939, the date of plaintiff's accident, defendant Mannings, Inc., had conducted a restaurant on the balcony of the Grand Central Public Market in Los Angeles. As the only public means of access to this restaurant defendant maintained a stairway of 14 steps, each approximately 7¼ inches high and 10½ inches deep. The stairway was 44 inches wide and extended from the ground floor of the market to the floor level of the balcony. On each side of the lower half of the stairway was a wall rail or banister approximately 30 inches above the steps. As the stairs approached the level of the ceiling, the open space between the ceiling and each wall rail became narrower. The ceiling did not extend over the stairwell except at the bottom of the stairway, but it did extend over the wall rails to each edge of the stairwell. The upper half of the stairway was bordered on each side by solid walls, from which handrails projected into the stairwell. From the lower part of the stairway, because of the open space on either side thereof, there could be seen various stalls located on the floor of the market.

At about noon on the day in question plaintiff and her friend started abreast up the stairway for the purpose of purchasing luncheon at defendant's restaurant. After having so ascended a couple of steps and because of the presence of other persons on the stairway, plaintiff's companion advanced to the left and ahead of plaintiff. The two ladies proceeded in this position to mount the stairs until plaintiff reached the fourth or fifth step, when plaintiff, who was then about five or six inches from the wall rail on the left side, moved further to the left to permit several people who were descending the stairs to pass. At the same time she stepped upward and struck her head on a sharp board on the edge of the ceiling bordering the stairwell, thereby sustaining serious injuries.

Plaintiff testified that she had used the same stairway on other occasions for a period of about fifteen years, during none of which times she had struck her head against the ceiling in question; that her eyesight was good; that immediately prior to the happening of the accident she was looking straight ahead as she moved up the stairs, and that when she struck her head on the ceiling board upon stepping to the left to allow other people coming toward her to pass, she grabbed the skirt of her friend, who was walking just ahead and who thereupon turned to assist plaintiff in her misfortune. Plaintiff's testimony as to the condition of the stairway with respect to the presence of other persons thereon and her action following her injury was corroborated by plaintiff's friend, who further stated that plaintiff complained that she had hit her head and was in considerable pain. A qualified architect, called as a witness by defendant, testified with reference to approved building standards for structures of the type in question as follows: "In my opinion these steps and stairway and that balcony with respect to its position to the stairway were scientifically constructed. This stairway and its surroundings are constructed in the manner approved generally in the County of Los Angeles. In my opinion this construction of the stairway and the railing and the surrounding conditions are built in accordance with sound architectural practice. It is built in accord with the standard of generally approved stairs of this type. * * * In a construction such as involved in this case, where the edge of the ceiling is on the same plane with the well of the stairs or rail, if one wished to operate a restaurant on that balcony to accommodate from three to five hundred people I would not necessarily recommend that a rail projecting from the side of the well be carried the full length of the stairway, but I would so recommend on the basis of good architectural practice. * * * I would recommend that the projecting rail be carried the full length of the stairway merely as a continuous line of the rail and not in order to prevent people from bumping their heads in walking up." During the course of the trial plaintiff moved that the jury visit the scene of the accident and examine the stairway; and accordingly this was done. In connection with this inspection it was stipulated by the parties that complete measurements as to dimensional facts and floorplan arrangement of the stairway were correctly represented by appropriate exhibits introduced in evidence, consisting of several pictures and a diagram. There was also testimony that defendant had no knowledge of any previous accident having occurred on the

stairway, and that about three or four hundred people daily patronized its restaurant on the balcony.

[2] It should be noted at this point that there was no question before the jury as to the legal relationship existing between the parties, for the defendant admitted in its answer that plaintiff entered upon its premises as an invitee. The long-recognized rule governing such status is succinctly stated in Brinkworth v. Sam Seelig Co., 51 Cal.App. 668, 670, 197 P. 427, 428: "One who, during business hours, lawfully enters a store to purchase goods does so at the implied invitation of the owner (Herzog v. Hemphill, 7 Cal.App. 116, 93 P. 899), upon whom the law imposes the duty of exercising ordinary care and prudence to keep the aisles and passageways of the premises, in and through which, by their location and arrangement a customer in making purchases is induced to go, in a reasonably safe condition, so as to not unnecessarily expose him to danger or accident. (Hart v. Grennell, 122 N.Y. 371, 25 N.E. 354; Schmidt v. Bauer, 80 Cal. 565, 22 P. 256, 5 L.R.A. 580; Means v. Southern Cal. Ry. Co., 144 Cal. 473, 77 P. 1001, 1 Ann.Cas. 206.)"

Under this condition of the evidence the questions presented to the jury for determination were: (1) Whether defendant was negligent by reason of the manner in which it maintained the stairway; and if so, (2) whether its negligence was the proximate cause of plaintiff's accident. The jury's findings upon these questions entailed consideration of the following matters: (3) whether plaintiff was negligent; and if so, (4) whether her negligence contributed to her injuries. In deciding these issues, the jury was privileged to consider the defendant's legal obligation to an invitee upon its premises. That there was substantial evidence to support the verdict in this case is apparent from the foregoing recital of the record, when viewed in the light most favorable to plaintiff and without regard for any asserted contradictions in the proof as the rule requires the court to do in determining the propriety of a judgment non obstante veredicto.

[3-5] Clearly tendered by the pleadings in this case and the basis of plaintiff's charge of negligence against defendant was the issue as to the dangerous and defective condition of the stairs leading to the restaurant on the balcony. Bearing upon this question at the trial was the following evidence: The testimony of plaintiff and her companion as to the general physical aspect of the stairway and their use of it at the time of the accident; the pictures and diagram showing the dimensional facts with respect to the steps and the surrounding premises, and revealing that the edge of the ceiling was on the same line or plane as the inside edge of each of the wall rails located on the lower half of the stairway; and the statement of the architect (on cross-examination) that good architectural practice would require a full-length projecting handrail on each side of the stairway. From these evidentiary factors the jury might reasonably have inferred that the plaintiff, in ascending the steps in the manner presumably contemplated by the defendant, was injured by reason of an unsafe condition associated with the stairway, such as the absence of a continuous projecting handrail along the entire length of each side of the staircase to keep a patron's body clear of the wall rails and edge of the ceiling, or the presence of the wall rails on the lower portion of the stairway inviting a customer to assume a position close to the side of the stairs in allowing others to pass thereon and thus be apt to strike the border of the ceiling in progressing on the way to the restaurant. Or the jury might have concluded that the defendant in the exercise of reasonable care to eliminate the danger of injury as described herein, should have walled in each side of the lower half of the stairway as was done on the upper part thereof. It is true that the architect stated (on direct examination) that the stairway was "scientifically constructed" in the generally approved manner and (on re-direct examination) that his recommendation with respect to the desirability of the full-length projecting handrail related to "good architectural practice" in the sense of aesthetic considerations of beauty and continuity of line rather than in deference to safety principles. But the jury was privileged to reject this testimony as inconsistent with the positive statement elicited in the course of cross-examination of this witness and reasonably referable without qualification to the safety features of the premises whereon plaintiff claimed to have suffered injuries, that in the given circumstances he would "recommend that

a rail projecting from the side of the well be carried the full length of the stairway * * * on the basis of good architectural practice." Expert testimony is to be given the weight to which it appears in each case to be justly entitled, and the law makes no distinction between that kind of testimony and evidence of other character. The province of such opinion testimony is only to aid in coming to a conclusion, and it does not exclude consideration of other evidence which is pertinent to the issue involved. 10 Cal.Jur. 971, sec. 228; 974, sec. 232; State Compensation Ins. Fund v. Industrial Accident Commission, 195 Cal. 174, 231 P. 996; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Rolland v. Porterfield, 183 Cal. 466, 191 P. 913. This principle is particularly applicable in the present case when it is remembered that the jury made an inspection of the defendant's premises and observed the pitch or grade of the stairway in relation to the edge of the ceiling bordering the stairwell, the wall rails and handrails in their respective positions, and the probability or likelihood of one striking his head in the fashion above described when ascending the steps in an ordinary manner. The knowledge acquired by this visit to the scene of the accident, supplementing the information embodied in the above-mentioned exhibits relative to the dimensional facts as to the construction of the stairway, was independent evidence in the case, and undoubtedly it had much to do with the jury's determination of this issue in accord with the plaintiff's claim. 24 Cal. Jur. 752, sec. 34; Ethel D. Co. v. Industrial Accident Commission, 219 Cal. 699, 704, 28 P.2d 919; MacPherson v. West Coast Transit Co., 94 Cal.App. 463, 466, 271 P. 509; Vaughan v. County of Tulare, 56 Cal.App. 261, 265, 205 P. 21. Whether the stairway as maintained by the defendant was unsafe and dangerous for the use for which it was intended and to which it was put was a question peculiarly proper for submission to the arbitrament of the jury. Oles v. Kahn Bros., 81 Cal.App. 76, 83, 253 P. 158; Long v. John Breuner Co., 36 Cal.App. 630, 634, 172 P. 1132.

[6] Following its finding that the premises were dangerous and unsafe in the respect alleged by plaintiff, the jury was required to determine whether the defendant was chargeable with knowledge of this condition. Although there was no evidence that defendant had actual notice of the defective character of the stairway, the undisputed fact that the construction of the stairs and the relation of the balcony thereto had remained unchanged during the ten-year period of defendant's tenancy was sufficient to constitute constructive notice to defendant of the condition found to exist by the jury. Papineau v. Distributors Packing Co., 10 Cal.App.2d 558, 52 P.2d 571; Boothby v. Town of Yreka City, 117 Cal.App. 643, 4 P.2d 589; Note, 25 A.L.R. 1295.

[7, 8] The testimony of the architect that the stairway was constructed in conformity with generally approved standards and usual building plans for that type of structure would not serve to absolve defendant from the charge of negligence. The general practice or custom would not exonerate defendant unless such practice or custom was consistent with due care. 19 Cal.Jur. 581, sec. 25; Mehollin v. Ysuchiyama, 11 Cal.2d 53, 57, 77 P.2d 855; Robinet v. Hawks, 200 Cal. 265, 274, 252 P. 1045; Perry v. Angelus Hospital Ass'n, 172 Cal. 311, 315, 156 P. 449. Nor did the showing that defendant had no knowledge of any like accident having previously occurred on the stairway repel the suggestion of negligence and preclude inquiry as to whether it had performed its legal duty to maintain the premises in a reasonably safe condition for the use of its patrons. This circumstance does not negative the possibility that many another person in ascending the stairs to the restaurant may have struck his head against the ceiling as plaintiff claimed she did, but because of slight injury and only temporary pain, no complaint was made. Furthermore, if this absence of report of prior mishaps had the effect urged by defendant, it would furnish a perfect defense, however dangerous and unsafe the stairway might appear to be, as shown by other evidence. Sander v. Los Angeles Ry. Corp., 38 Cal. App. 222, 230, 175 P. 901.

[9-12] The next question to be considered is whether plaintiff was as a matter of law guilty of contributory negligence. In this regard defendant relies on the rule that where one knows a condition to be dangerous and is injured because of failure to take heed thereof, such conduct will bar a recovery. But even though the evidence did establish that the alleged defect in the construction of defendant's premises was patent and observable to any one using the stairway, and that in

addition plaintiff by reason of her past visits to the restaurant was familiar with the existing condition, there would still be the question for the determination of the jury as to whether or not it was a want of ordinary care on the part of plaintiff not to have kept in mind such element of danger when stepping toward the wall rail to allow other persons descending the stairs to pass. Meindersee v. Meyers, 188 Cal. 498, 503, 205 P. 1078; Oles v. Kahn Bros., 81 Cal.App. 76, 82, 253 P. 158; Hayward v. Downer, 65 Cal.App. 450, 451, 224 P. 265. Even forgetfulness of a known danger will not operate to prevent a recovery, for to forget is not negligence unless it shows a want of ordinary care. Generally the question is one for the jury (Gibson v. County of Mendocino, 16 Cal. 2d 80, 89, 105 P.2d 105; Smith v. Southern Pacific Co., 201 Cal. 57, 69, 70, 255 P. 500; Meindersee v. Meyers, 188 Cal. 498, 503, 205 P. 1078; Roseberry v. Edward F. Niehaus & Co., 166 Cal. 481, 483, 137 P. 232; McStay v. Citizens' Nat. T. & S. Bank, 5 Cal.App.2d 595, 600, 43 P.2d 560; Rosella v. Paxinos, 110 Cal.App. 299, 302, 294 P. 39), and the record in the present case demonstrates that it comes well within this settled principle. Plaintiff's act in stepping toward the left wall rail to permit several persons approaching her from the opposite direction to pass diverted her from her normal course of progress up the stairs, which line of travel had been five or six inches distant from this mentioned banister. In so doing her attention was distracted by her effort to avoid collision with these other people, and she momentarily did not observe or remember the dangerous condition incident to the proximity of the edge of the ceiling bordering the stairwell. Whether plaintiff's action was reasonable and prudent under the circumstances was for the jury to decide as an issue of fact. Smith v. Southern Pacific Co., supra, and cases there cited at pages 69, 70 of 201 Cal., 255 P. 500. As was said in McStay v. Citizens Nat. T. & S. Bank, supra, 5 Cal.App.2d at page 600, 43 P.2d at page 562: "Where different conclusions may be reasonably drawn by different minds from the same evidence, the decision must be left to the jury."

[13] Defendant's further contention on this phase of the case, that the accident would not have happened if plaintiff had not protruded her head beyond the space occupied by the stairwell and proceeded up the stairs in that position without looking, is purely argumentative and has no evidentiary foundation in the record. Plaintiff testified that she was positive that she was not leaning over to the left, but was standing erect when she "stepped up and over to her left and then struck her head." Her version of the accident does not appear to be inconsistent with the admitted physical facts relative to the construction of the stairway, and it was for the jury to determine from the evidence before it whether it could reasonably be said that the natural sway of plaintiff's body as her weight shifted in so moving on the stairs was sufficient to bring her in line to strike her head on the edge of the ceiling bordering the stairwell. Neilson v. Houle, 200 Cal. 726, 728, 254 P. 891; Parker v. Manchester Hotel Co., 29 Cal.App.2d 446, 456, 85 P.2d 152.

[14] Tested by the foregoing considerations, it is manifest that the jury, as the basis of its verdict in favor of plaintiff, was warranted in concluding that defendant, by reason of its maintenance of the stairway in the condition above described, breached its legal duty to plaintiff to keep its premises reasonably safe, and that such negligence was the proximate cause of plaintiff's injuries. Accordingly, the judgment is reversed and the trial court is hereby directed to enter judgment in favor of the plaintiff for the sum of $1,500 pursuant to the verdict of the jury rendered in this action.

SHENK, HOUSER, and CARTER, JJ., concurred.

TRAYNOR, Justice (dissenting).

I dissent.

To recover damages for negligence the plaintiff must establish that her injuries were caused by the breach of a duty owed to her by defendant. The occupant of premises open to business visitors is not an insurer of a visitor's safety and need not eliminate every condition that might conceivably cause injury. He is liable only for injuries caused by conditions, of which he knows or should know, that constitute an unreasonable risk to visitors, when he fails to give them adequate warning. Rest.Torts, sec. 343; Prosser, Torts, sec. 79, p. 642; 19 Cal.Jur. 618-622; 8 Cal.Jur. Supp. 349, 350, 353, 354, 1011, 1012.

In the present case there is not sufficient evidence to support a finding that the condition of the stairs subjected visitors

to an unreasonable risk. According to the testimony of the architect, the stairs were scientifically constructed in the generally approved manner. While he recommended that a hand rail projecting from the side of the well be carried the full length of the stairway, he made it clear that this was desirable merely to form a continuous line and not to prevent people from bumping their heads in walking up the stairs. His statement affords no basis for concluding that the stairway subjected visitors to unreasonable risk. The fact that the jury viewed the premises is not sufficient to support a finding of negligence, particularly since the parties stipulated that what was viewed by the jury is presented in the exhibits. These exhibits picture a normal, unobstructed stairway, and contain no evidence of unreasonable risk to visitors.

If there is a defective condition in the premises the occupant may discharge his duty to business visitors by giving them adequate warning. Rest.Torts, sec. 343; see cases cited in Calif. Annotations to Rest.Torts, sec. 343; Prosser, Torts, sec. 19, p. 642; 19 Cal.Jur. 618, 619; 8 Cal.Jur. Supp. 349, 353, 354, 1011-1017. If the danger is so apparent that the visitor can reasonably be expected to notice it and protect himself, the condition itself constitutes adequate warning, and the possessor is under no obligation to take further action. Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793; Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76; Blodgett v. B. H. Dyas Co., 4 Cal. 2d 511, 50 P.2d 801; Dingman v. A. F. Mattock Co., 15 Cal.2d 622, 104 P.2d 26; see cases cited in 8 Cal.Jur.Supp. 351, note 4, p. 1012, note 4; Prosser, Torts, sec. 79, p. 642. "There is no liability for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant." Mautino v. Sutter Hospital Ass'n., supra, 211 Cal. at page 561, 296 P. at page 78. As stated in Shanley v. American Olive Co., supra, 185 Cal. at page 555, 197 P. at page 794: "The responsibility of such owner for the safety of such person in such a case is not absolute; he is only required to use ordinary care for the safety of the persons he invites to come upon the premises. If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger. But such owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. He is not required to give to the invitee notice or warning of an obvious danger."

In the present case the evidence presented to the jury establishes without question that the condition of the stairway was apparent to any person using it and was as well known to the plaintiff as to the defendant. There is no evidence indicating that plaintiff did not have adequate notice of the condition of the stairway, and there is therefore no basis for concluding that defendant violated any duty owed to plaintiff. The judgment of the trial court should be affirmed.

GIBSON, C. J., and EDMONDS, J., concurred.



50 Cal.App.2d 221

McNOWN v. PACIFIC FREIGHT LINES et al.

Civ. 2650.

District Court of Appeal, Fourth District, California.

Feb. 26, 1942.

1. Appeal and error ⇐996, 1001(1)

Contributory negligence is a "question of fact" for the jury to determine and an appellate court will not disturb the finding of a jury upon that issue if there is any substantial evidence or any reasonable inference in support of such finding.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

2. Automobiles ⇐244(36, 45)

In wife's action for injuries resulting from collision of automobile driven by husband with truck, evidence that truck had been driven upon highway and stopped at an unusual place when it was practically dark at an angle at which headlights were not visible, although truck driver had seen approaching automobile, sustained finding

that proximate cause of collision was truck driver's negligence, and that plaintiff's husband was not guilty of contributory negligence.

3. Trial ⇐260(8)

In action for injuries resulting to wife when automobile driven by her husband collided with truck, where court fully instructed jury on rules of contributory negligence and proximate cause and with respect to necessity of keeping a lookout, and charged that any negligence on part of automobile driver was imputable to wife, refusal of defendants' request for instructions on same subjects was not error.

4. Trial ⇐240

A trial judge should instruct the jury fully as to the law in clear and concise language, but it is not necessary or proper for the court to give argumentative instructions.

5. Automobiles ⇐204
Evidence ⇐5(2)

In action for injuries resulting from collision between automobile which was attached by a tow-bar to another automobile, with truck, the automobile being towed was not a "trailer coach" within Vehicle Code requiring trailer coach to be equipped with brakes that can be operated by driver of towing automobile, since it is common knowledge that a "trailer coach" is one thing and that an automobile being towed is another. Vehicle Code, §§ 52, 670.5, St.1937, pp. 1597, 1598.

See Words and Phrases, Permanent Edition, for all other definitions of "Trailer Coach".

6. Appeal and error ⇐1004(1)

Before an appellate court may interpose its judgment as to the sum which will compensate a plaintiff for personal injuries, it must appear that the recovery is so excessive when compared with the sum reasonably warranted by the evidence showing the nature and extent of the injuries received as to shock the sense of justice and raise the presumption that the amount was arrived at as the result of passion and prejudice rather than upon a fair and honest consideration of the facts.

7. Damages ⇐132(3)

$10,000 for injuries received by married woman 43 years of age who was confined in hospital for nearly three weeks, was still extremely nervous, unable to do housework, and because of the dislocation of her coccyx was unable to sit in a normal position without her legs and back seeming numb, was not so excessive as to warrant appellate court in setting it aside, especially in view of the fact that it had been approved by the trial judge who had a right to weigh the evidence upon the question of damages.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Louise McNown against Pacific Freight Lines and another for injuries resulting from motor vehicle collision. From a judgment for plaintiff for $10,000, the defendants appeal.

Judgment affirmed.

Calvin H. Conron, Jr., of Bakersfield, for appellants.

Brittan & Mack, of Bakersfield, and Preston, Braucht & George, of Merced, for respondent.

SCHOTTKY, Justice pro tem.

Appellants appeal from a judgment awarding respondent $10,000 for personal injuries resulting from a collision which occurred on November 18, 1939, at a point approximately 2 miles north of Lebec on Highway 99 in Kern County.

The accident occurred at about 5:50 p. m., at dusk, but late enough in the evening that driving lights were necessary. The defendant Joseph Frank Stephens was operating a truck and trailer 54 feet in length in a southerly direction toward Los Angeles on U. S. Highway 99. He had turned off the U. S. Highway 99 onto the old highway, which intersects the new highway at an angle, and proceeded some 150 to 200 feet south on the old highway, where he turned his truck and trailer back toward U. S. Highway 99. In returning to the main highway he did not use the roadway or cross-road which was some distance to the south, but turned into an open space between two intersections. After maneuvering his equipment around until it faced in a northeasterly direction, an operation requiring several minutes, he parked two feet from the west edge of the paved portion of U. S. Highway 99, and waited some two minutes. While in this position he saw the headlights of the automobile in which plaintiff was riding, and which was operated by her husband, Darl D. McNown, approaching from the south some 300 to 400 yards away. Watching the approaching lights all the while, he

drove upon the highway in low gear at a speed which he estimates from 1 to 4 miles per hour turning toward the north. The paved portion of Highway 99 at that point was 30 feet in width, having three traffic lanes, and as the front of the truck operated by appellant Stephens entered the east lane he saw the McNown car some 150 yards away and noted that it had not slackened its speed. He continued forward until the front of the truck was 3 feet from the east edge of the highway and then stopped. In that position the truck and trailer, facing northeast, blocked the entire paved portion of the highway with the exception of 3 feet on the east side. At the time he stopped in this position the McNown car was only 50 or 60 yards away.

On the right-hand side of the truck, that is the southeasterly side as the truck stood on the highway, there were two small amber clearance lights, one on the front and one on the back, and also clearance lights on the front and back of the trailer. The automobile being driven by the husband of plaintiff was towing a second automobile, a Hudson four-door sedan. The automobiles were coupled with a new late model tow bar. Mr. McNown testified that as he approached the point of the accident he was traveling between 40 and 45 miles per hour and that he knew this because he had glanced at his speedometer. When about 190 feet from the truck he first saw a clearance light on the east side of the road and commenced to apply his brakes. When approximately 175 feet away, he saw the image of the truck before him and applied his brakes firmly, and turned his car slightly to the left. The brakes of the towed automobile were not attached to the car being driven. As the front car was turned, the two automobiles jack-knifed and the front car turned around so that it headed south, the rear car swinging into an arc so that the rear end of the car collided with the right rear end of the truck. Marks of the front car left upon the highway measured 205 feet in length and the skidding or broadside marks left by the towed car as it swung around measured 169 feet.

Appellant's first contention is that the verdict lacks evidentiary support because the undisputed and uncontradicted evidence shows that D. D. McNown, husband of plaintiff, was guilty of contributory negligence as a matter of law proximately causing the accident (a) in failing to see the lighted truck in time to avoid the collision, (b) in driving a car and towing another without adequate brakes, (c) in traveling at an excessive speed, and (d) in failing to use due care and caution under the circumstances.

[1, 2] In view of the familiar rule so often announced by our courts that contributory negligence is a question of fact for the jury to determine and that an appellate tribunal will not disturb the finding of a jury upon that issue if there is any substantial evidence or any reasonable inference in support of that finding, it is difficult for us to understand how appellant can seriously urge such a contention. We have read the entire record carefully and find therein ample evidence to support the implied finding of the jury that the negligence of appellant Stephens was the proximate cause of the collision and that the respondent's husband was not guilty of contributory negligence. In fact, the testimony of appellant Stephens alone is sufficient to support such finding of the jury. The jury could easily have found from appellant Stephens' testimony alone that he was negligent in driving equipment 54 feet long onto Highway 99 from an unusual place, when it was practically dark, at an angle at which his headlights were not visible from the south, when he saw an automobile approaching from the south only 350 yards away, and in continuing to drive such equipment across the highway until it blocked practically the entire thoroughfare, and that said negligence of appellant Stephens was the proximate cause of the collision. And the jury could easily have found from the testimony of appellant Stephens that respondent's husband was not guilty of contributory negligence.

It is unnecessary to prolong this opinion by reciting the many other parts of the record supporting the finding of the jury upon this issue.

Appellants next contend that the trial court "erred in refusing appellants' instructions pertaining to negligence in two respects: (a) in refusing to fully instruct the jury as to the duty of respondent's husband to look, and (b) in refusing to instruct as to the requirement of brakes on the trailer coach."

The court instructed the jury upon the rules of contributory negligence and proximate cause and specifically, with regard to looking, gave the following instructions:

"You are instructed that 'even though the operator of an automobile may be rigidly within the law he still remains bound to anticipate that he may meet persons at any point on the street, and he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his vehicle under such control as will enable him to avoid a collision with another person using proper care and caution, and, if the situation requires, he must slow up and stop'."

"You are instructed that it is the duty of the driver of a motor vehicle to anticipate that he might meet other persons or vehicles at any point on the highway, at all times, and that he must keep a proper lookout for them, and keep his machine under such control as to enable him to avoid a collision with another person using care and caution, and that a failure, if any, upon his part, to use such care, is negligence."

Defendant offered and the court refused the following instructions:

"If you find from the evidence in this case that the said D. D. McNown, husband of said plaintiff and with whom plaintiff was riding at the time of this accident, did not have such control of his car which he was operating as to enable him to stop the same, or so slacken his speed so as to avoid the collision with the vehicle of the defendants, but that by the exercise of ordinary care and caution in operating said car in the manner in which and at the speed at which an ordinary prudent person could have operated said car, he would have had his car under such control as would have enabled him to avoid the collision which occurred, then the said D. D. McNown was guilty of negligence, which negligence is imputable to the plaintiff herein."

"You are instructed that the said D. D. McNown, husband of the plaintiff and with whom plaintiff was riding at the time of said accident, as he drove along the highway at the time and place stated in this action, was under the duty to exercise ordinary care to anticipate vehicles along the highway ahead of him, and to exercise ordinary care to see such vehicles in sufficient time and at a sufficient distance to avoid a collision."

"You are instructed that the said D. D. McNown, the husband of the plaintiff and with whom plaintiff was riding at the time of said accident, was under the duty and care to keep a lookout for objects and vehicles ahead on the highway, and that it was his duty to see that which was in plain sight, and that the said D. D. McNown was under the duty to act as a person of ordinary prudence under the circumstances in respect thereto."

[3, 4] The court elsewhere instructed the jury that any negligence on the part of respondent's husband was imputable to her, and in our opinion the requested instructions add nothing to those given by the court. A trial judge should instruct the jury fully as to the law in clear and concise language but it is not necessary or proper for the court to give argumentative instructions. The requested instructions were properly refused.

Appellants offered and the court refused the following instruction:

"You are instructed that section 670.5 of the Vehicle Code, St.1935, p. 93, as added by St.1937, p. 1598, of the State of California provides as follows: 'Brakes on Trailer Coaches. Every trailer coach having a weight of fifteen hundred pounds or more equipped for the road but exclusive of passengers shall be equipped with brakes which can be operated by the driver of the towing vehicle and which brakes shall be adequate, supplemental to the brakes on the towing vehicle, to enable such combination of vehicles to comply with the requirements of section 670 (a).'"

Appellants argue that the Hudson automobile which was attached to the automobile in which respondent was riding by a tow-bar, was a trailer coach and comes within the following definition in section 52 of the Vehicle Code:

"A 'trailer coach' is a vehicle without motive power designed for human habitation and for carrying persons and property on its own structure and for being drawn by a motor vehicle."

Appellants contend that the automobile attached to the car in which plaintiff was riding by a tow-bar had no motive power, carried a load upon its structure, and was designed for human beings and therefore for human habitation, and that because it weighed more than 1,500 pounds the court below erred in refusing to give to the jury the instruction setting forth the provisions of section 670.5 of the Vehicle Code.

In the Trailer Camp and Coach Law found in Deering's General Laws, Act

5131b, the same identical definition of a trailer coach is given as in section 52 of the California Vehicle Code, and a trailer camp is defined as a place where space is rented to users of trailer coaches.

[5] We think that the court properly refused to give said offered instruction. It is a matter of common knowledge that a trailer coach is one thing and an automobile being towed is another, and there is nothing in the definition above given that can change an automobile into a trailer coach.

[6, 7] Appellants' final contention is that the verdict of $10,000 is excessive and indicates that it must have been the result of passion or prejudice on the part of the jury. The general rule is well stated in Bellman v. San Francisco High School District, 11 Cal.2d 576, 81 P.2d 894, 899, as follows:

"Before an appellate court may interpose its judgment as to the sum which will compensate a plaintiff for personal injuries, it must appear that the recovery is so excessive, when compared with a sum reasonably warranted by the evidence showing the nature and extent of the injuries received, as to shock the sense of justice and raise the presumption that the amount was arrived at as the result of passion and prejudice rather than upon a fair and honest consideration of the facts. * * *" See, also, Sassano v. Roullard, 27 Cal.App. 2d 372, 81 P.2d 213.

The evidence showed that respondent was 43 years of age, and that even though she had suffered an injury in 1937, she was in good physical condition at the time of the accident; that she did her housework, worked in her garden, helped her husband at his place of business, went horseback riding, hunting and fishing, and that she was, at the time of the accident, returning from a 7,000-mile automobile trip; and that as a result of the accident she was confined in the hospital for nearly three weeks; that she suffered great pain; that she had become extremely nervous; that she could no longer do her housework or work in her garden or do any of the other things above enumerated; that she still had severe pains in the back of her head and still had severe pains in her back, due to the dislocation of her "tailbone" or coccyx, which prevented her from sitting in a normal position without making her legs and back seem numb.

Appellants' chief argument on this point is that the dislocation of the coccyx suffered by respondent may be remedied by an operation and therefore cannot be considered permanent, and appellants argue that respondent has failed in her duty to minimize the damages and has failed to use reasonable efforts to restore herself to health. The jury and the trial court had before them medical testimony in this regard. It does not appear from the testimony what would be the extent of the recovery through such an operation. Nor does it appear that such an operation was previously suggested to respondent and refused by her. The trial judge in his minute order denying a motion for new trial stated:

"In the opinion of the Court the verdict in this case is quite liberal. Yet I cannot under the law hold that it is excessive."

The trial judge had the opportunity of hearing all of the witnesses testify and of observing respondent, and in addition to this, the trial judge had a right to weigh the evidence upon the question of damages.

Taking all of the evidence on the question of damages into consideration, we cannot say that the amount of the verdict was so large as to shock the sense of justice and raise the presumption that the amount awarded was the result of passion or prejudice.

In view of the foregoing, the judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

50 Cal.App.2d 184

PEOPLE v. DUNCAN.

Cr. 3527.

District Court of Appeal, Second District, Division 1, California.

Feb. 26, 1942.

Hearing Denied March 27, 1942.

1. Criminal law ⇐1134(8)

An attack upon an indictment or an information cannot be considered by District Court of Appeal on appeal from an order denying a motion for new trial.

2. Criminal law ⇐1134(8)

Where accused moved committing magistrate to dismiss complaint on ground that there was complete failure of proof at preliminary hearing, accused also moved, on arraignment in Superior Court, to set aside information on ground that he was not properly committed, and, after verdict of guilty, accused moved for arrest of judgment on ground that court had no jurisdiction of the offense charged, all such motions were denied, and accused was placed on probation without entry of judgment, and appealed from order denying new trial, District Court of Appeal could not review denial of motion to set aside information, since such denial could only be reviewed on appeal from judgment. Pen.Code, § 995.

WHITE, J., dissenting.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Frank Duncan was convicted of grand theft, and he appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Bertram H. Ross, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

This is an appeal from an order denying motion for a new trial, appellant's appeal from the judgment having been dismissed upon motion made by respondent for the reason that appellant's application for probation was granted by the trial court and, therefore, no judgment was ever entered in the instant cause. People v. Duncan, 48 Cal.App.2d 642, 120 P.2d 708.

Upon his arraignment in the trial court and before he pleaded "not guilty" to the crime of grand theft, as charged in the information, appellant made his motion to set aside said information under section 995 of the Penal Code upon the ground that he was not properly committed before the committing magistrate, which motion was denied.

Appellant states the issues upon appeal as follows:

"No question is raised concerning the sufficiency of the evidence upon the trial of this case. The sole attack on appeal relates to the sufficiency of the proceedings upon preliminary hearing, and to that end by proceedings for diminution of the record the transcript of the preliminary proceedings is before this court.

"It is Appellant's position that jurisdiction to try a felony case attaches to the Superior Court only, as the result of a Grand Jury indictment, or an information filed based upon a preliminary hearing upon which there has been a showing of reasonable cause to believe that a public offense has been committed."

It is further argued by appellant that "The proof of the commission of a public offense before a Magistrate is requisite to the exercise of jurisdiction by the Superior Court and there is no reason why defendant must stand trial where he has been improperly committed. (People v. Bomar, 73 Cal.App. 372, at page 378, 238 P. 758.)"

[1] It appears to be the law that an attack upon either an indictment or an information cannot be considered by this court upon an appeal from an order denying motion for new trial.

In the early case of People v. Turner, 39 Cal. 370, 371, it was stated:

"Objections which go to the form or sufficiency of the indictment, or to the jurisdiction of the tribunal presenting the same, may be presented by demurrer before issue of fact is presented by plea.

"Errors and irregularities in the proceedings, resulting in the presentation of the indictment * * * can only be made available to defendant before plea by motion to set aside the indictment.

"The action of the Court upon the demurrer, and upon the motion to set aside the indictment, can only be reviewed in the ap-

pellate Court on appeal from the final judgment.

"Objections which may be presented by demurrer before plea, may further be made available after verdict by motion in arrest of judgment; and the action of the Court on this motion can only be reviewed on appeal from the judgment.

"Thus, it will be seen, that a motion for a new trial presupposes a sufficient valid indictment, upon which, with sufficient legal evidence in support of its allegations, a legal verdict and a valid, binding judgment may be pronounced. The statute does contemplate or authorize a re-trial upon an insufficient or invalid indictment; hence, a motion for a new trial cannot properly be based upon any objection to the sufficiency or validity of the indictment, or any errors or irregularities occurring in the proceedings before issue of fact joined by plea to a good and sufficient indictment, the object and purpose of a re-trial being simply to enable the trial Court to avoid the errors and irregularities claimed to have occurred on the former trial to the prejudice of the rights secured to the defendant."

In the case of People v. Sanchez, 23 Cal.App. 742, 743, 139 P. 820, 821, it was held: "The suggestion in appellant's brief, of a defect in the information cannot be considered, since there is no appeal from the judgment. People v. Turner, 39 Cal. 370; Pen.Code, §§ 1012, 1239."

Again in the late case of People v. Johnston, 37 Cal.App.2d 606, 608, 100 P.2d 307, 308, it was held: "Appellant filed a demurrer to the information which was overruled by the trial court. The action of the court in overruling a demurrer can be reviewed in this court only upon an appeal from a judgment. People v. Turner, 39 Cal. 370; People v. Sanchez, 23 Cal.App. 742, 139 P. 820. Since we have before us no appeal from a judgment, we cannot consider appellant's attack upon the information."

In the case of In re Basham, 24 Cal. App.2d 285, 286, 74 P.2d 781, where petitioners after conviction of the crime of robbery in the first degree, applied for a writ of habeas corpus, "alleging in substance that they were not legally committed by a magistrate on the particular charge of robbery set forth in the information, and to which they pleaded guilty," it was held: "It is well settled, however, that one convicted upon an information is precluded in a proceeding in habeas corpus from raising the objection that he was not examined or held to answer by a magistrate prior to the filing of such information; that the filing of an information gives the superior court jurisdiction to proceed in the case; and that section 995 of the Penal Code provides the exclusive method of trying the question of whether the information is founded on the necessary preliminary examination, which is by way of motion to set aside the information. Ex parte McConnell, 83 Cal. 558, 23 P. 1119; 13 Cal. Jur. 228."

In the instant case, appellant moved the committing magistrate to dismiss the complaint on the ground that there was a complete failure of proof at the preliminary hearing; upon arraignment in the superior court, appellant made his motion to set aside the information under section 995 of the Penal Code upon the ground that he was not properly committed before the committing magistrate, and finally, after the verdict of the jury and before he made his application for probation, appellant made his motion for arrest of judgment on the ground that the court had no jurisdiction of the offense charged in the information. All of these motions were denied, and appellant was placed on probation.

[2] Since appellant raises no question as to the sufficiency of the evidence to support the verdict of the jury, finding him guilty of the offense charged in the information, and since the action of the trial court in denying appellant's motion to set aside the information under section 995 of the Penal Code can be reviewed only upon an appeal from the judgment, the order denying motion for a new trial is affirmed.

DORAN, J., concurred.

WHITE, Justice.

I dissent. While the cases hold that a defect in the information or the action of the court in overruling a demurrer can be reviewed only on an appeal from the judgment and not when, as here, the appeal is taken from the order denying a motion for a new trial, nevertheless, in the instant case the record shows that when the first witness was called at the trial and before such witness gave any testimony, defendant objected to the introduction of any evidence on the ground that he had been committed

by the magistrate without reasonable or probable cause. Consequently, we are not here confronted with the review of any defect or other impairment appearing upon the face of the information, but with a review of a motion which amounted to a challenge to the jurisdiction of the court. In my opinion, the correctness of the ruling denying such motion is reviewable on appeal from an order denying a motion for a new trial, presenting, as such an appeal does, a question of law involved in a ruling made by the court at and during the trial. Pen.Code, sec. 1259. Prior to making the objection just mentioned to the introduction of any evidence, defendant had made his motion under section 995 of the Penal Code to set aside the information, and in support thereof offered in evidence the transcript of the testimony taken at the preliminary examination, and which transcript is now before us, as it was before the trial court at the time objection was made to the introduction of any evidence.

The case of Greenberg v. Superior Court, 19 Cal.2d 319, 121 P.2d 713, recently decided by our Supreme Court, is authority for the statement that when a grand jury indicts a person without the presentation of evidence to connect him with the commission of the crime charged, it exceeds its authority, and the indictment returned is void and ineffectual to confer jurisdiction upon a court to try a person for the offense charged. By the same token, may it not be said that where a committing magistrate holds a person to answer without reasonable or proper cause therefor, an information predicated upon such a commitment is void and equally ineffectual to confer jurisdiction upon the superior court to try such person for the offense charged in the information?

From a review of the evidence adduced at the preliminary examination, it is at once apparent that no attempt was made to prove the falsity of the representations allegedly made by the defendant, nor to establish that the property admittedly received by the complaining witness was not in fact worth the money she paid therefor. It seems to me these are essential and material elements of the charge made against appellant and form its gravamen or core. I am strongly of the opinion that the evidence presented at the preliminary examination falls far short of establishing that reasonable or probable cause required for commitment of the defendant for trial by the magistrate. Such being the case, the superior court was without jurisdiction to try the defendant (Greenberg v. Superior Court, supra), and the ruling of the court on the motion appropriately made at the trial challenging the court's jurisdiction is in my opinion reviewable on appeal from the order denying the motion for a new trial. Therefore, such order should be reversed.



50 Cal.App.2d 76

JONES et al. v. O'NEAL et al.

Civ. 13344.

District Court of Appeal, Second District, Division 2, California.

Feb. 24, 1942.

1. Appeal and error ⇐931(1), 1010(1)

On appeal, the evidence must be considered in the light most favorable to the prevailing party in the lower court, and if the record discloses substantial evidence to support the findings, they must be upheld.

2. Automobiles ⇐244(10, 42)

In action for personal injuries and property damage sustained in truck collision, evidence was sufficient for trial court to find that plaintiff driver was driving properly on his own side of the road at time of collision and that defendant driver approaching from the opposite direction was driving negligently.

3. Appeal and error ⇐1170(7)

In action for personal injuries and property damage sustained in truck collision, error, if any, in permitting plaintiff driver to testify concerning conversation he had with defendant driver immediately after collision with respect to defendant's alleged failure to make a detour with his loaded truck at a bridge nearly a quarter of a mile from point of collision did not result in a miscarriage of justice and did not call for reversal of judgment. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by D. E. Jones and another against F. D. O'Neal and another to recover for personal injuries and property damage sustained in a truck collision, wherein defendant O'Neal filed a cross complaint for damages to his truck. From a judgment for plaintiffs, defendants appeal.

Affirmed.

George H. Moore and Hugh B. Rotchford, both of Los Angeles, for appellants.

Riccardi, Webster & Donahue, of Pasadena, for respondents.

W. J. WOOD, Justice.

Plaintiffs are the owner and the driver respectively of a truck involved in a collision with a truck owned by defendant O'Neal and driven by defendant Conner. Plaintiff Jones sought a judgment for damages to his truck and plaintiff Timmons sought a judgment for damages for personal injuries. Defendant O'Neal filed a cross-complaint asking for a judgment for damages to his own truck. Each of the various parties denied negligence on his own part and alleged negligence on the part of the opposing parties. The action was tried by the court without a jury and findings and judgment were filed in favor of plaintiffs on both the complaint and the cross-complaint. From this judgment defendants have appealed.

The collision occurred on June 18, 1940, on a desert road in Imperial County. The road had a gravel surface and its width was estimated by the various witnesses at from 16 to 26 feet. Just before the collision the truck driven by Timmons was travelling in a northerly direction and the truck driven by Conner was travelling in a southerly direction. Defendant Conner gave testimony which unquestionably would have supported findings in his favor if the trial court had given sufficient credit to his testimony. It is contended on this appeal that Conner's testimony showed positively that Timmons was on the wrong side of the road and that "there was no evidence that plaintiffs' truck was at any time on the right hand side of the travelled portion of the highway."

[1, 2] Plaintiff Timmons testified that each truck was about 7½ feet in width and that there was sufficient room to pass if each driver had kept his truck on his own side of the road; that he had seen Conner's truck approach when they were 250 to 300 feet apart, at which time he (Timmons) was operating his truck at a speed of from 20 to 25 miles per hour; when he saw the approach of Conner's truck he pulled over to his right "as far as it was safe to do so" and continued to travel "along this ridge of material that was thrown up there"; that he pulled to the east side of the road; that at the time of the impact of the two trucks he was travelling "around 20 miles an hour" and that Conner's truck was travelling "around 40 miles an hour"; that the left front of Conner's truck struck the truck driven by the witness. Under well established rules of law the evidence must, of course, be considered on appeal in the light most favorable to the prevailing party in the lower court and if the record discloses substantial evidence to support the findings they must be upheld. The trial court could draw reasonable inferences from the evidence presented and make findings thereon. We are satisfied that from the testimony of Timmons the court could reasonably draw the inference that Timmons was driving properly on his own side of the road at the time of the impact and that defendant Conner was driving negligently.

[3] Plaintiff Timmons testified concerning a conversation he had with defendant Conner immediately after the collision. This conversation related, in part, to a discussion of several bridges which had been built at different intervals on the road. Signs had been placed by the authorities on some of these bridges requiring loaded trucks to make detours. The accident took place in close proximity to a bridge which did not have such a sign, but at a distance of a little less than one-quarter of a mile north of the scene of the collision there was a bridge which bore a sign calling for a detour by loaded trucks. In relating the conversation Timmons stated that Conner evidently referring to the bridge to the north, said "that he didn't decrease his speed a whole lot when he seen the other truck ahead of me take the detour, and he came right on through the bridge; he said he didn't decrease his speed; he kept right on coming." Conner's truck was loaded. Defendants moved to strike out the testimony of the witness concerning the bridge north of the point of collision. The motion to strike was denied and defendants now assign this

ruling as error. It is difficult to perceive the materiality of evidence concerning the alleged failure of Conner to make a detour with his loaded truck at the bridge nearly a quarter of a mile away from the point of the accident, but it is likewise difficult to perceive how defendants could have been prejudiced by the ruling of the court. The error was of such a nature that it did not result in a miscarriage of justice and therefore does not call for a reversal of the judgment. Constitution of California, art. VI, § 4½.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.



50 Cal.App.2d 854

PEOPLE v. WARREN.

Cr. 3543.

District Court of Appeal, Second District, Division 2, California.

Feb. 26, 1942.

Criminal law ⇐1182

Where transcripts on appeal were filed in the District Court of Appeal on December 23, 1941, thereafter, time for filing briefs having elapsed, an order to show cause why appeal should not be dismissed was issued, returnable February 25, 1942, and on that date there was no appearance on behalf of appellant, either by briefs or otherwise, the judgment appealed from and an order denying a motion for new trial were each affirmed pursuant to statute. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Proceeding by the People against Clarence E. Warren. From the judgment and from an order denying a motion for new trial, defendant appeals.

Affirmed.

John S. Cooper, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., for respondent.

PER CURIAM.

December 23, 1941, the transcripts on appeal were filed in this court. Thereafter, the time for filing briefs having elapsed, an order to show cause why the appeal should not be dismissed was issued, returnable February 25, 1942. On the latter date there was no appearance on behalf of appellant, either by briefs or otherwise.

Therefore, pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order denying motion for new trial are, and each is, affirmed.



50 Cal.App.2d 173

BAUMANN v. HARRISON et al.

Civ. 11712.

District Court of Appeal, First District, Division 1, California.

Feb. 26, 1942.

Appeal and error ⇐709

Where an order for costs was entered against two defendants who had been directed to turn over to plaintiff's attorney accrued rentals and six other defendants, and a provision in judgment for payment of costs out of the accrued rentals was merely an authorization an order denying motion of the six other defendants to satisfy judgment for costs out of the accrued rentals would not be reversed, where findings were not brought up, and record consisted only of the judgment, the notice of motion and two affidavits supporting, and one opposing, the motion.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by Anna Baumann, as bondholder, etc., against H. O. Harrison, Henry G. Bedford and others to foreclose a deed of trust on real property. From an order denying a motion to satisfy a judgment for costs, defendant Henry G. Bedford and others appeal.

Affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellants.

Thomas F. McCue, of Los Angeles, for respondent.

GOODELL, Justice pro tem.

This appeal was taken from an order denying a motion to satisfy a judgment for costs.

The plaintiff sued to foreclose a deed of trust on real property in Los Angeles. The property was sold at a trustee's sale under a power contained in the deed and a decree was entered confirming the sale and awarding a deficiency judgment against the principal defendants. Rentals had been collected by the defendants W. G. Lane and Lane Mortgage Company and in the same decree the plaintiff was awarded a judgment against them in the sum of $12,584.33, of which $8,584.33 was declared to be immediately payable. The plaintiff was also awarded in the same decree a judgment for costs against the four appellants, as well as against W. G. Lane and Lane Mortgage Company and six other defendants. These costs were ultimately taxed at $532.40. At the time the decree was entered W. G. Lane and Lane Mortgage Company had in hand $2,363.39 of the accrued rentals, and the decree ordered this fund to be turned over by them to Thomas F. McCue, attorney for plaintiff. In this connection the decree directed that: "Said attorney is hereby ordered and directed to hold all of such funds subject to the order of this Court and is authorized and directed to first pay therefrom the sum of $819.15 to George M. Sutherland, and the sum of $612.60 to plaintiff as reimbursement for sums expended by her for title search and reports and recording notices, and is authorized to reimburse plaintiff for her costs and disbursements and to defray from such funds any necessary expenses and costs in the further prosecution of this action and in the execution of this Judgment. It is adjudged that no portion of this sum shall be deemed or construed to be a payment in whole or in part of attorneys fees except as may hereafter be authorized by order of this Court. It is further ordered and adjudged that said $2363.39, upon payment thereof shall be credited upon and applied upon the sums due from defendants W. G. Lane and Lane Mortgage Company."

The judgment was entered on June 21, 1938. On June 29, 1938, the $2,363.39 was paid and a partial satisfaction was entered on the margin of the judgment as follows: "An acknowledged partial satisfaction of the within Judgment, amount collected $2363.39 as to judgt. against W. G. Lane and Lane Mortgage Company dated 6/21 1938 filed 6/23/1938." It will be observed that the language of the satisfaction conforms to the language of the judgment which directed that the $2,363.39 should be "credited upon and applied upon the sums due from defendants W. G. Lane and Lane Mortgage Company" which amounted to $8,584.33. It is true that the last-named defendants were also obligated, together with these appellants and six other defendants, for costs in the sum of $532.40, but at the time the $2,363.39 was paid the costs had not been settled. The order taxing costs was not made until October 6, 1938, which was over three months after the payment.

The appellants rely upon the language in the judgment which authorizes plaintiff's attorney "to reimburse plaintiff for her costs and disbursements and to defray from such funds any necessary expenses and costs in the further prosecution of this action" after Sutherland was paid the $819.15 and the plaintiff was reimbursed in the sum of $612.60. They contend that as there remained, after those two payments, more than enough to satisfy the judgment for $532.40 costs, their obligation for costs has been discharged, even though they themselves did not pay the money. The language upon which they rely, however, is merely an authorization; it is not a direction. The language which follows is in the form of a definite order, directing that the $2,363.39 be credited and applied upon the sums due from W. G. Lane and Lane Mortgage Company, and it appears from the marginal satisfaction that this order was literally complied with and such application made. Indeed it would seem that W. G. Lane and Lane Mortgage Company were entitled to have the payment so applied in reduction of that part of the judgment upon which they, alone, were obligated, for they, and not these appellants, made the payment.

The main case was a very complicated piece of litigation, as appears from the reports of at least five appeals besides this one. Goes v. Perry, 18 Cal.2d 373, 115 P.2d 441; Baumann v. Bedford, 18 Cal.2d 366, 115 P.2d 437; Townsend v. Perry, 43 Cal.App.2d 380, 110 P.2d 1019; Baumann v. Harrison, 46 Cal.App.2d 73, 115 P.2d 523; Baumann v. Harrison, 46 Cal.App.2d

84, 115 P.2d 530. Twenty-seven days were devoted to the trial, including an accounting. The many details were within the knowledge of the trial judge and those details are not before us. The findings were not brought up. The record consists only of the judgment, the notice of motion, and two affidavits supporting, and one opposing, the motion. As there is nothing in this record which convinces us that the order appealed from is erroneous, it is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.



50 Cal.App.2d 854

CARPENTER et al. v. GENSLER-LEE JEWELRY CO. et al.

Civ. 13425.

District Court of Appeal, Second District, Division 2, California.

Feb. 26, 1942.

Appeal and error ⇐787

Where transcripts on appeal were filed in District Court of Appeal on November 19, 1941, time for filing briefs had elapsed and no extension of time for filing had been requested, and an order to show cause why the appeal should not be dismissed was issued returnable on February 25, 1942, and there was no appearance for appellant either by brief or otherwise on such date, the appeal would be dismissed. Rules for Supreme Court and District Courts of Appeal, rule 5, § 3.

Appeal from Superior Court, Los Angeles, County; Frank C. Collier, Judge.

Action by Thomas Carpenter and Ollie Carpenter against the Gensler-Lee Jewelry Company and others. From an adverse judgment, Ollie Carpenter appeals. On order to show cause why appeal should not be dismissed.

Appeal dismissed.

Kemper Campbell, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

PER CURIAM.

On November 19, 1941, the transcripts on appeal were filed in this court. Thereafter, the time for filing briefs having elapsed, and no extensions of time for such filing having been requested, an order to show cause why the appeal should not be dismissed was issued, returnable February 25, 1942. On the latter date there was no appearance for appellant, either by brief or otherwise.

Therefore, pursuant to the provisions of section 3, rule V, Rules for the Supreme Court and District Courts of Appeal, the appeal from the judgment herein hereby is dismissed.



50 Cal.App.2d 176

STEELE v. INTERNATIONAL AIR RACE ASS'N OF AMERICA (CARRASCO, State Labor Com'r, Intervener).

Civ. 11777.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1942.

1. Attachment ⇐180
Execution ⇐113
Garnishment ⇐108

The right to priority of claim in case of attachment, garnishment, or execution is purely statutory, and may not be extended to claims other than those specified.

2. Master and servant ⇐82(3)

Under statute providing for priority of labor claims where work has been performed for defendant within 90 days prior to the levy of attachment, garnishment, or execution, the granting of statutory priority as to fund sought to be attached to assignee of labor claims was error, in absence of any showing that the work was performed within 90 days prior to the levy of attachment upon the fund. Code Civ.Proc. §§ 1206–1208.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Proceeding under Code of Civil Procedure, §§ 1206–1208, by J. A. Steele against International Air Race Association of America, wherein H. C. Carrasco, as State Labor Commissioner, etc., intervened to establish as against an attaching creditor the right of priority for labor claims assigned to him. From a judgment for intervener, the plaintiff appeals.

Reversed.

See, also, Cal.App., 117 P.2d 407.

L. L. Steele and John Jewett Earle, both of Oakland, for appellant.

Fred G. Goldsworthy and Olney L. Huff, both of San Francisco, for respondent.

SPENCE, Justice.

This is an appeal by plaintiff from a judgment and an amended judgment entered in favor of the intervener in proceedings had under sections 1206 to 1208 of the Code of Civil Procedure.

The intervener was the assignee of sixty-four labor claims and said intervener sought to establish the right of priority for said assigned claims under the provisions of the sections above mentioned.

[1] Section 1206 of the Code of Civil Procedure provides for such priority where the work has been performed for the defendant "within ninety days prior to the levy" of the "attachment, garnishment, or execution." The right to priority is purely statutory (Legg & Shaw Co. v. Worthington, 157 Cal. 488, 108 P. 284; 11 Cal.Jur. 94) and may not be extended to claims other than those specified.

[2] Plaintiff urges several contentions on this appeal but we may confine this discussion to the contention that the evidence was insufficient to sustain the material findings of the trial court. The trial court found "that attachment was levied by J. A. Steele, plaintiff herein, upon defendant International Air Race Association of America"; that the sum of $1,550.30 was siezed upon said levy; and that the intervener's assignors performed work for said defendant "within ninety days of the date of the levy of the said attachment." The findings do not set forth the date of the alleged levy or the dates when the alleged work was performed.

There is no evidence whatever in the record to show that the work was performed for defendant within ninety days prior to the levy of any attachment, garnishment or execution upon the money in question. We may assume, without deciding, that there was sufficient evidence to sustain the finding that the work was performed for defendant rather than for an independent contractor as claimed by plaintiff. All of the work was performed during the month of May, 1938. This action was commenced on June 2, 1938, but there is nothing to show that any levy was made upon the money in question until February 28, 1939, when the levy was made under a writ of execution. It is apparent that the work was not performed within ninety days prior to said levy.

The record shows that a writ of attachment was issued on June 2, 1938, and that plaintiff attempted to garnish any money of defendant held by the Central Bank of Oakland. It is conceded by the intervener that "nothing was attached under this levy." The intervener apparently claims that another writ of attachment was issued on June 6, 1938, and that a levy was then made under the last mentioned writ upon certain money of defendant which was then held under attachment in another action, which money was subsequently levied upon under execution in this action on February 28, 1939, after the release of the attachment in the other action. There is nothing in the record, however, to support this claim. Plaintiff claims that no such writ of attachment was issued and that no such levy was made thereunder and has offered to stipulate that the alleged writ of attachment and the return thereon, if any exist, may be sent up to this court for consideration. The intervener has not accepted said stipulation. In the absence of any showing in the record that the work was performed within ninety days prior to the levy upon the money in question, the granting of the statutory priority to the intervener cannot be sustained.

The judgment of October 25, 1940, and the amended judgment of December 18, 1940, are reversed.

NOURSE, P. J. and STURTEVANT, J., concurred.

50 Cal.App.2d 204

WEST COAST LIFE INS. CO. v. GLENN-COLUSA IRR. DIST. et al.

Civ. 6698.

District Court of Appeal, Third District, California.

Feb. 26, 1942.

Hearing Denied April 23, 1942.

1. Waters and water courses ⇐228½

Under Irrigation District Act, board of directors of irrigation district had power to enter into a contract for sale of land acquired by district because of delinquency in assessments, and the right to "sell" would be construed to include not only a sale for cash, but also a sale in which payment of the purchase price was made in installments. Gen. Laws 1937, Act 3854, §§ 15, 29, 47.

See Words and Phrases, Permanent Edition, for all other definitions of "Sell".

2. Waters and water courses ⇐231

Under Irrigation District Act, directors of irrigation district hold land acquired by district because of delinquency in assessments in "trust", but the trust is not for exclusive benefit of creditors of district, but rather property owners in district are also beneficiaries of the trust, and the district may freely transfer, lease, or otherwise deal with the land in so far as it does not abuse its discretion. Gen.Laws 1937, Act 3854, §§ 15, 29, 47.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

3. Waters and water courses ⇐231

Evidence supported finding that the consideration for sale by board of directors of irrigation district of approximately 4,000 acres of land acquired by district because of delinquency in assessments was fair, reasonable, and adequate, and hence contract for the sale would not be set aside on suit by creditor of the district. Gen.Laws 1937, Act 3854, §§ 15, 29, 47.

4. Judicial sales ⇐39
Trusts ⇐204

Mere inadequacy of price, however gross, is not itself a sufficient ground for setting aside a sale legally made, and such rule is also applicable to a sale by a trustee.

5. Waters and water courses ⇐231

Under Irrigation District Act, directors of irrigation district were not required to give notice of proposed sale of land acquired by district because of delinquency in assessments. Gen.Laws 1937, Act 3854, §§ 15, 29, 47.

Appeal from Superior Court, Colusa County; Warren Steel, Judge Assigned.

Action by West Coast Life Insurance Company against the Glenn-Colusa Irrigation District and others, to cancel a contract. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Keesling, Wayland & Eliot, of San Francisco, and Huston, Huston & Huston, of Woodland, for appellant.

Hankins & Hankins, of San Francisco, and P. J. Minasian, of Oroville, for respondent Glenn-Colusa Irr. Dist.

George R. Freeman and Elmer Laine, all of Willows, and Rutledge & Rutledge, of Colusa, for respondent Stovall.

TUTTLE, Justice.

This action was brought to cancel a contract executed by defendant district, and defendant H. C. Stovall. Findings were made in favor of defendants upon all issues, and judgment was entered accordingly. The appeal is from the judgment.

The litigation arises out of the affairs of the Williams Improvement District situated within the boundaries of the Glenn-Colusa Irrigation District, and organized under the Statutes of 1927, Statutes of 1927, p. 1415, Deering's Gen.Laws, 1937, Act 3877a, authorizing such organization to meet the situation of any tract or contiguous tracts of land within any irrigation district and susceptible of irrigation by a system of laterals, ditches and pipes or requiring a system of pumps for the irrigation thereof separate and apart from the main irrigation system of said district.

Section 10 of the act reads as follows: "Said board of directors and all other officers of said irrigation district shall have all the rights, powers and privileges concerning said improvement district, and lands thereof and the proceedings herein provided for, as such board may have concerning the irrigation district, of which it is a part, and including the right of said

district, to condemn lands and to acquire, own and hold property within said improvement district."

Under the statute, the Glenn-Colusa Irrigation District, through its directors, had the supervision and control of the Williams Improvement District and exercised the same powers as conferred upon them by the Irrigation District Act.

Plaintiff is the owner and holder of certain obligations of the improvement district, known as warrants, which were issued by the irrigation district, which agreed to pay them. Such warrants matured January 1, 1932. They were unpaid when this action was commenced.

On April 2, 1936, the district was the owner, through tax sales, of practically all the land within the boundaries of Williams Improvement District, legally entitled, "Improvement District Number One of Glenn-Colusa Irrigation District." The price was $28,061.08, the amount of delinquent assessments, penalties and costs. The district was the sole bidder at such sales. On said date the irrigation district, through its board of directors, entered into a contract with defendant Stovall for the sale of said lands. Title to said land was to remain in the district until the full purchase price was paid and all conditions of the contract performed by Stovall. The total acreage sold was about 4000. By the terms of Stovall's contract he was given the right to purchase three thousand nine hundred sixty-five and 11/100 acres of lands in the district for the sum of $22,216.48. There was no cash payment. The first payment of $3,500 was to be evidenced by the promissory note of the buyer due August 1, 1936, with interest at the rate of five per cent per annum. The balance of the purchase price was payable in semi-annual installments of $935.82 with five per cent interest, payable on or before the first day of January and the first day of July in each consecutive year, commencing January 1, 1937. The contract also provided for: Payment by Stovall of all delinquent state taxes, which the evidence shows amounted to $17,000; payment by Stovall annually of "an amount equal to the amount which would be levied by the Irrigation District as assessments on such land for that year if legal title thereof were in buyer"; payment by Stovall annually or semi-annually of "all State and County taxes, levied upon said property during the 10 year term of this agreement"; payment guaranteed by Stovall of all tolls and charges "for water furnished by seller during the term of this agreement to any or all of the land, regardless of the person to whom such water is furnished"; payment by Stovall of an annual stand-by charge of $1,800 in the event a single acre under lift No. 2 uses irrigation water; $1,080 in the event of operating lift No. 1 only.

The complaint, while it does not directly charge fraud, in effect makes such charge. It alleges: "That said contract was entered into by said District without any notice whatever, and without inviting any bids or offers from any person other than the said H. C. Stovall; that said contract was not entered into by said District in such a manner as that a sale of said lands could be effected within a reasonable time at the fair market value thereof, and upon such terms as would serve to protect and benefit the interests of said District, the said landowners and contract-holders, and the plaintiff herein and other owners and holders of warrants issued by said District and unpaid; that said District did not give any information or publicity, or announce its intention to sell said lands prior to the making of said contract; *that the said District and the directors thereof and the said defendant Stovall entered into said contract for the purpose of preventing any person other than the said Stovall from buying or offering to buy any or all of said lands at the market value thereof, or at a price higher than that fixed by the terms of said contract;* that the prices fixed by said contract will not be sufficient to pay the amounts due the plaintiff herein on the principal and interest of the warrants hereinabove alleged and if said sale is consummated, the said plaintiff will suffer great and irreparable injury; that said contract was made for the purpose and with the intent to hinder, delay and defraud the plaintiff herein in collecting or attempting to collect the amounts due and to become due on said warrants." (Italics ours.)

It thus appears that the action is based upon the premise that there was no notice of the intended sale to Stovall, and the contract was therefore entered into for the purpose of preventing any person, other than Stovall, from buying said lands. It is also alleged that the value of said lands, when the contract was executed, was $150,000. A copy of the contract is made a part of the complaint, so that, in addition to the foregoing, it may be said that plain-

tiff relies upon inadequacy of price to support its theory of recovery. The charge that the contract was executed to hinder, delay and defraud plaintiff is not alluded to in the briefs, and it may be fairly stated that the action is not regarded by the parties as what is commonly known as "a creditor's suit," under the provisions of part II, title II, division IV, § 3439 et seq. of the Civil Code.

We have before us the sole question of the sufficiency of the evidence to sustain findings which are adverse to plaintiff upon all the issues made. At the outset we may observe that there is nothing in the record to show *actual fraud* upon the part of the district, its directors or officers. Out of fairness to appellant, we might add that it does not accentuate that issue. Rather, it relies upon (1) a breach of trust upon the part of the district and its officers, and (2), upon a lack of statutory authority to enter into such contract.

[1] It is contended by appellant that the District had no power to enter into a contract of sale. The extent of statutory direction for the sale of district-owned tax deeded lands, is found in section 29 of the California Irrigation District Act, Gen. Laws 1937, Act 3854, reading in part as follows: "The board of directors of said district may determine by resolution duly entered upon their minutes that any property, real or personal, held by said irrigation district is no longer necessary to be retained for the uses and purposes thereof and may thereafter *sell* or lease *such property upon such terms and conditions as may appear to said board to be for the best interest of the said district.*"

Section 47 of the California Irrigation District Act reads in part as follows: "Where property has been sold to the district and a deed for it has been given to the district as the purchaser, *such district shall have the same rights thereto,* and to the rents, issues and profits thereof, *as a private purchaser.*" (Emphasis supplied.)

Section 15 of the California Irrigation District Act reads in part as follows: "The board of directors shall have the power and it shall be their duty to manage and conduct the business and affairs of the district; make and execute all necessary contracts * * *." (Emphasis supplied.)

We think the foregoing sections are sufficient authority for the execution of the contract. The grant of the right to "sell" should be construed to include not only a sale for cash, but a sale in which the payment of the purchase price is made in installments. There is nothing in the cases cited by appellant,—Tulare Irrigation District v. Collins, 154 Cal. 440, 97 P. 1124; Provident Land Corporation v. Zumwalt, 12 Cal.2d 365, 85 P.2d 116, 120—which supports the contention of appellant. On the contrary, in the last mentioned case the court says: "Land coming into other private ownership is again liable for assessments (sec. 33), *and land in possession of the district should, if possible, be sold again, so that it may produce the required revenue.*" (Italics ours.)

[2] It is next contended that the defendant directors held the land in trust for the creditors, and that the sale under the contract, in violation of such trust, was therefore void. We agree with the premise, but not with the conclusions which appellant contends necessarily flow therefrom. In the case of Provident Land Corporation v. Zumwalt, supra, the court said: "Reading the two sections [Cal. Irrigation District Act, Secs. 29 and 47] together, the only reasonable interpretation is that the district may freely transfer, lease or otherwise deal with the lands in so far as its *power* is concerned, but the *lands* remain in trust, and the district exercises its powers, however broad, as a trustee.

The foregoing pronouncement does not, however, authorize the judicial branch of the state to substitute its judgment for that of the directors of the district. It only requires that the latter act fairly in all matters respecting the proper discharge of their duties. The economic conditions of the period, and various other factors which would necessarily enter into the transaction, were elements which would tend to move and actuate the directors in the exercise of their sound judgment and discretion. It is impossible for a record of this character to reflect all of such matters, or place them in their proper perspective. We might further add that the trust mentioned is not for the exclusive benefit of the creditors. As stated in Clough v. Compton-Delevan Irrigation District, 12 Cal.2d 385, 388, 85 P.2d 126, 128: "The property is by this language impressed with a public use, and the trust is for all the purposes of the act. Payment of the bondholders is such a purpose, as we have held in the Provident Land Corporation case, *supra; but there are other purposes as well, and the bondholders cannot be consid-*

ered exclusive beneficiaries, even if the doubtful assumption be made that they, as individuals, are beneficiaries at all. Indeed, it is futile to attempt to discover the 'beneficiaries' of the statutory trust created by section 29."

In our opinion, the property owners in the district are also beneficiaries of such trust. Two matters are relied upon by appellant to overthrow the finding mentioned. The first is the alleged inadequacy of price, and the second, the failure of the directors to give notice of the sale.

[3, 4] The attack made by appellant upon the adequacy of the price may be more properly considered as having to do with the consideration which the district received. The trial court found that such consideration was fair, reasonable and adequate. We think the record sustains such finding. In the first place the property is nothing more than "grain land," which was subdivided and covered with an enormous blanket of debt, in order to bring it under irrigation. According to the testimony of the secretary of the district, it was subject to a bonded debt of the irrigation district which amounted to $6 per acre. In addition, it was liable for a debt of $30 per acre to the improvement district. It had all been sold to the district under tax sales, and no property owner or security owner then appeared to protect their interests. In order to place the property upon the assessment rolls, it became necessary to put the title back into the hands of private owners. The sale to Stovall was then discussed at numerous meetings of the directors, and finally the contract in question was executed. Such a policy is approved in the Provident case, supra, in a quotation we have already made. The price was not the sole consideration of the contract. We have pointed out the other obligations assumed by Stovall. For illustration, the latter agreed to pay all delinquent state taxes against the property, which the evidence shows amounted to $17,000. It is true that one witness testified that the land was worth from $35 to $45 per acre. The trial court may not have been satisfied with such testimony. The purchase price and the other payments assumed by Stovall, would make the actual contract price about $10 per acre.

It is the rule that "mere inadequacy of price, however gross, is not itself a sufficient ground for setting aside a sale legally made." Jones v. Sierra Verdugo Water Co., 63 Cal.App. 254-263, 218 P. 454, 457. This rule is also applicable to a sale by a trustee. (26 R.C.L., sec. 145, page 1294.) We therefore conclude that there is no merit in the foregoing contention.

[5] It is contended by appellant that no notice was given of the sale to Stovall. There is no statutory requirement for such notice. The matter is left to the sound discretion of the directors.

We conclude that the charges made by appellant are unfounded, and that the findings have ample evidentiary support. We are satisfied that the directors had no ulterior motives in dealing with Stovall as they did, but that they were applying to the problem at hand their honest, considered judgment. If they were mistaken, or were wanting in business acumen, they were answerable to their electorate, but not to the courts.

The judgment is affirmed.

THOMPSON, Acting P. J., concurred.



50 Cal.App.2d 143

COSTERISAN v. LOS ANGELES RY. CORPORATION et al.

Civ. 13361.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1942.

1. Negligence ⇐136(9)

Contributory negligence is a matter of law only when from the facts reasonable men can draw but one inference.

2. Appeal and error ⇐999(3)

In an action for injuries where question of contributory negligence was left to determination of jury and was decided adversely to the defendant, reviewing court would not disturb the judgment unless it could say as a matter of law that plaintiff was negligent and that her negligence contributed to her injuries.

3. Street railroads ⇐117(28)

In motorist's action for injuries sustained in collision with street car, whether

motorist was contributorily negligent in attempting to cross intersection in front of street car was for the jury.

4. Street railroads ⇐118(15)

In motorist's action for injuries sustained in collision with street car at an intersection, a "last clear chance" instruction following approved form was properly given where warranted by evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

Appeal from Superior Court, Los Angeles County; Lucius P. Green, Judge pro tem.

Action for injuries by Mary Costerisan against the Los Angeles Railway Corporation and others. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Gibson, Dunn & Crutcher and E. H. Chapman, all of Los Angeles, for appellants.

William B. Gilroy and Paul Taylor, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

This action arose out of the collision between the automobile of plaintiff and the street car of defendant corporation at the intersection of 11th and Hill Streets in the city of Los Angeles. From a judgment, after verdict in the sum of $4,500, defendants appeal upon the grounds of (1) insufficiency of the evidence, and (2) prejudicial error in giving an instruction upon the doctrine of last clear chance.

On July 20, 1939, between 8:30 and 9 p. m., plaintiff while proceeding in her Ford sedan on West 11th Street in a westerly direction approached Hill Street. The traffic signals were not in operation. On arriving at the extended easterly curb line of Hill Street, plaintiff stopped, looked both to the north and to the south, saw no traffic near the intersection and proceeded across Hill Street at ten miles per hour. While she was still 32 feet east of the east curb line of Hill Street, she observed the street car operated by defendant Stall in a position about 30 feet west of the west curb line of Hill Street, moving slowly. She again saw the street car at the time she stopped and observed that it had moved forward. At that intersection some of the street cars traveling on the 11th Street line continue easterly across Hill while others make a left turn and proceed northerly on Hill Street. The route of the street car in question, although not yet indicated, was to turn at Hill Street.

As plaintiff started across the intersection she shifted into second gear on or near the first set of tracks on Hill Street. At that point she again looked to her right for any traffic approaching from the north, which was her only source of immediate danger. But as she looked up and to her left, the street car which had been moving eastward was at this time bearing down upon her. Her automobile was past the center of the street, still headed directly westward when the collision occurred. The rear wheels of her automobile were on the westerly rail of the south-bound tracks. Although she saw the car approaching slowly "she did not take that car into consideration at all," indicating her knowledge that this intersection is a mandatory stop and that of course the car would come to a stand-still before proceeding across the intersection and that therefore she did not consider it a source of peril. Plaintiff and a number of her witnesses testified that the street car did not stop and that no warning was given by the ringing of the bell or otherwise. The conflicts in the testimony as to whether the street car stopped before it began the turn and whether or not the motorman sounded his bell were resolved in favor of plaintiff. Moreover the photograph taken at the scene of the accident shows the rear wheels of the automobile were almost in the center of the path of the street car.

[1-3] Appellant's first assignment is that plaintiff was negligent and that her negligence contributed proximately to cause her injuries. Under the facts recited the primary question for consideration is whether or not there was a question of fact with respect to the negligence of the parties to be determined by the trial court. Contributory negligence is a matter of law only when from the facts reasonable men can draw but one inference. If there was a fact properly to be left to the determination of the jury and if that fact was decided adversely to the defendant, the appellate court should not interfere with the

judgment. Before the judgment before us could be appropriately and fairly upset we must be able to say as a matter of law that the plaintiff was negligent and that her negligence contributed to cause her injuries. Such is the holding of a long line of decisions. Smith v. Southern Pacific Co., 201 Cal. 57, 64, 255 P. 500; Zibbell v. Southern Pac. Co., 160 Cal. 237, 116 P. 513; O'Farrell v. Andrus, 86 Cal.App. 474, 481, 260 P. 957; Barlow v. Crome, 44 Cal.App. 2d 356, 112 P.2d 303, and authorities there cited. That there was a question for the jury as to whether plaintiff was negligent is clear to any one not a partisan. Under the cited authorities it is not difficult to conclude as to the first assignment, that the facts were such that a finding of plaintiff's freedom from negligence was justified by the facts.

The authorities cited by appellant (McHugh v. Market St. Ry. Co., 29 Cal.App.2d 737, 85 P.2d 467; Arnold v. San Francisco-Oakland T. Rys., 175 Cal. 1, 164 P. 798; Flores v. Los Angeles Ry. Corp., 15 Cal. App.2d 576, 59 P.2d 856) do not apply to the facts of the instant case. In each of them the facts definitely establish that the plaintiff was negligent and that his own negligence caused the injury.

[4] It is next contended that the court erred in instructing the jury upon the doctrine of the last clear chance. No claim is made of any error in the instruction given by the court with reference to that doctrine. The instruction given follows precisely the instruction approved in Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915. Appellant's only contention is that the facts do not warrant the giving of such instruction at all. If the verdict was derived solely by reason of the application of the doctrine it was abundantly justified by the evidence. Girdner v. Union Oil Co., supra; 2 Cal.Jur.Supp. 176; Palmer v. Tschudy, 191 Cal. 696, 218 P. 36; Hoy v. Tornich, 199 Cal. 545, 553, 250 P. 565; Basham v. Southern Pac. Co., 176 Cal. 320, 327, 168 P. 359; Boynton v. Richfield Oil Co., 117 Cal.App. 699, 700, 4 P.2d 614; Smith v. Los Angeles Railway, 105 Cal. App. 657, 288 P. 690; Bailey v. Wilson, 16 Cal.App.2d 645, 649, 61 P.2d 68.

Judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concurred.

50 Cal.App.2d 102

VEDDER PETROLEUM CORPORATION, Limited, v. LAMBERT LANDS CO. (RING OIL CO., Limited, Intervener).

Civ. 2693.

District Court of Appeal, Fourth District, California.

Feb. 24, 1942.

Hearing Denied April 23, 1942.

1. Mines and minerals ⇐79(3)

The "value of all oil produced and saved from wells", within oil and gas lease requiring lessee to pay lessor monthly as royalty the equal one-sixth part of value of all oil produced and saved from wells, was the value of the crude oil as it was produced from the mouth of the wells.

See Words and Phrases, Permanent Edition, for all other definitions of "Value of All Oil Produced and Saved from Wells".

2. Mines and minerals ⇐79(3)

Oil and gas lease, requiring lessee to pay lessor monthly as royalty the equal one-sixth part of value of all oil produced and saved from the wells at the posted available market price of district "the day the oil is run into the purchaser's pipeline or storage tank", fixed the time at which the value of the oil was to be determined and did not refer to the condition of the oil.

3. Mines and minerals ⇐79(5)

Where oil and gas lease required lessee to pay lessor monthly as royalty the equal one-sixth part of value of all oil produced and saved from wells at posted available market price of district the day the oil was run into purchaser's pipeline or storage tank, or at "lessor's option delivered into storage tank, or to pipeline within one mile from premises from which oil is being produced", the quoted clause did not support theory that the parties intended to refer to dehydrated oil or intended that lessee should have the share of the lessor dehydrated before delivering it, but supported view that lessor was entitled to his royalty share in kind as the oil came from the well if he so desired.

4. Mines and minerals ⇐79(5)

Where oil and gas lease required lessee to pay lessor monthly as royalty the equal one-sixth part of value of oil produced but did not contain covenants referring to cost of dehydration, and where dehydra-

tion permitted sale of oil at higher price than would have been obtained if oil had not been dehydrated, the lessor was required either to pay its proportionate share of the dehydrating expense or to elect to receive its royalty share of oil in kind in its crude state as produced from the wells, since there was no duty on part of lessee to bear expense of dehydrating the lessor's royalty share.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action for declaratory relief by Vedder Petroleum Corporation, Limited, against Lambert Lands Company, wherein the Ring Oil Company, Limited, intervened. From a judgment for the defendant, the plaintiff and intervener appeal.

Reversed.

Hearing denied; CARTER, J., dissenting.

Monroe B. Kulberg, B. W. Kemper, and Arthur C. Fisher, all of Los Angeles, for appellants.

Sullivan, Roche & Johnson and James Farraher, all of San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment in an action for declaratory relief to determine the rights, duties and obligations of the parties under the provisions of an oil and gas lease and to require payment by respondent lessor of the cost of dehydrating oil produced from the properties subject to the lease, and to recover the proportionate cost paid for dehydrating the royalty oil.

Appellant Vedder Petroleum Corporation, Ltd., was the lessee under an oil and gas lease dated April 22, 1936, wherein defendant and respondent Lambert Lands Company, was lessor. On February 10, 1937, appellant Vedder Petroleum Corporation subleased to appellant and intervener Ring Oil Company, Ltd., a portion of the lands covered by the lease. After the commencement of this action and the intervention by appellant Ring Oil Company, Ltd., the appellant Vedder Petroleum Corporation, Ltd., assigned the lease on the parcel covered by the sublease to the intervener Ring Oil Company, Ltd.

It appears that the intervener drilled on the leased premises and produced oil therefrom, and that during the period covered by the present controversy the oil produced was so-called "wet" oil, that is, oil carrying in cohesion with it more than 3 per cent by volume of water and sediment. When this occurred the intervener was able to obtain 12¢ per barrel more for the oil if same was dehydrated than if sold in the state in which it came from the well. Intervener, in accounting to plaintiff, its sublessor, deducted the proportionate cost of such treatment at 6¢ per barrel, and plaintiff in turn made a like deduction in accounting to defendant and respondent lessor for its royalty in the lease. When the respondent protested that this deduction was unauthorized, the deductions were not made either by intervener or by plaintiff and appellant, but the amount of the cost of such dehydration was paid in each instance to respondent lessor and appellant lessee to prevent a default under the lease and sublease; and this action for declaratory relief was commenced. Intervener being primarily interested in the outcome, sought and obtained permission to intervene in the action.

It was stipulated that the case should be tried on intervener and appellant's amended and supplemental complaint in intervention.

The case involved a determination of two primary issues: first, a determination as to whether the lessor was properly chargeable under the provisions of the lease with its proportionate royalty share of the cost of dehydrating the wet oil; and second, if it was so chargeable the amount of the cost per barrel to intervener of such dehydration. At the trial it was stipulated that the first of these issues should be first submitted and decided; and that if the decision was in favor of the lessee, declaring that the lessor was chargeable with its proportionate cost of the dehydration, the trial should then be continued on the issue as to costs.

The royalty provision of the oil and gas lease involved herein reads as follows:

"Lessee shall pay Lessor monthly as royalty the equal one-sixth (⅙) part of the value of all oil produced and saved from wells producing in excess of an average of fifty barrels per day for the month accounted for, and in the same way, one-seventh (⅐) part of the value of all oil produced and saved from wells producing fifty barrels or less oil per day upon the leased premises (except as hereinafter stated), after making the customary deductions

for temperature, water and b. s., at the posted available market price of the district in which the premises are located for oil of like gravity, the day the oil is run into purchaser's pipe line or storage tanks, and in this event, settlement shall be made by Lessee on or before the 25th day of each month for accrued royalty for the preceding calendar month; or at Lessor's option exercised not oftener than once in any one calendar year, upon sixty (60) days previous written notice, deliver into Lessor's tanks, which said tanks may be located upon the same section or parcel from which the oil production is being obtained, or, at the option of the Lessee, into tanks located upon any other part of the leased premises; or to pipe line within one mile of premises from which the oil is being produced, free of cost, the one-sixth (1/6) or one-seventh (1/7) part of said oil to which Lessor may be entitled as herein provided;..."

No testimony was introduced at the trial but the case was submitted on stipulations as to the facts which were first made orally in open court and later reduced, in part, to writing. Said written stipulation of facts is as follows:

"The following facts, some of which are admitted in the pleadings of the parties, are stipulated to be true for the purpose of the trial of the above entitled action:

"1. The lease from defendant Lambert Lands Co., Inc., to plaintiff Vedder Petroleum Corporation was executed on April 22, 1936, and is still in full force and effect.

"2. On February 15, 1937, plaintiff Vedder Petroleum Corporation, Ltd., sublet the property referred to in the complaint of plaintiff to Ring Oil Company, Ltd., intervener herein, and on October 27, 1939, plaintiff assigned the lease on the property, in so far as affects the premises involved in this litigation, to said intervener.

"3. A controversy has arisen and is in existence between the parties in respect to and relating to the oil and gas lease executed by defendant as lessor, the basis of which controversy is set forth in the pleadings of the respective parties.

"4. Nine wells have been drilled upon the property by intervener, one of which is unproductive, and at least six wells are being operated at this time and producing oil.

"5. The oil as it comes from the wells on the leased premises contains water in excess of three per cent of the total volume of fluid and must be dehydrated, to make it acceptable for delivery into the pipe line of the purchasing company.

"6. If the oil from the leased premises is not dehydrated, it will not be accepted for delivery into the pipe line of the purchasing company. The maximum price at which it can be sold if not dehydrated is twelve cents per barrel less than the price obtained from the purchasing company after dehydration.

"7. There is no posted price for oil in the field of which the property involved in this controversy forms a part. The nearest field for which there is a posted price for oil of like gravity, is the Round Mountain Field, located approximately fifteen miles south of the premises involved herein.

"8. The posted price for oil in this field, and in all fields throughout the state of California, is for oil containing not to exceed three per cent (3%) water, sand and other foreign substances.

"9. Intervener has been dehydrating the oil to make it acceptable for delivery into the pipe line of the purchasing company, and in order to obtain the best available market price. Defendant has ever since the execution of the lease, and production of oil therefrom, taken its royalty in cash and not in kind.

"10. The purchasing company which is taking the oil from the premises involved in this action is paying therefor the price posted at Round Mountain for oil of like gravity, which price is the current market price for like oil of like gravity in this area, and is the highest available price for like oil of like gravity in this field.

"The foregoing stipulation is made for the purpose of supplementing and clarifying the verbal stipulation made in open court on May 1, 1940, and in the event that any discrepancy may exist between this written stipulation and said oral stipulation, the provisions hereof shall supersede and supplant the verbal stipulation."

Judgment was in favor of respondent lessor, decreeing that neither the appellant lessee nor the appellant's sublessee is entitled to charge lessor with any portion of the cost dehydrating oil produced from the leased lands, and this appeal is from said judgment.

Appellant argues that there is no provision in the lease imposing upon the lessee the burden of dehydrating the lessor's royalty share of the oil produced and that the lessee was compelled to treat the oil to reduce its water content so as to make it acceptable for pipe line delivery, and, as a result, obtained a price for the oil, including lessor's royalty share, which was 12¢ higher than would have been obtained if the oil were not so treated. Appellant argues that, therefore, the cost of dehydration was properly chargeable against respondent lessor in proportion to its royalty share of the oil so treated and that the conclusion of the trial court that the lessor was not obliged to pay to the lessee its proportionate part of the cost of dehydrating the wet oil was erroneous as a matter of law.

Respondent argues that because it has been stipulated that the posted price for oil in this field and in all fields throughout the State of California is for oil containing not to exceed 3 per cent water, etc., and that if the oil is not dehydrated it will not be acceptable for delivery into the pipe line of the purchasing company, the parties in providing in the lease for the payment on the value of the oil at the "posted" price were referring to oil containing not more than 3 per cent water and were not referring to so-called "wet" oil; and further that the parties in setting up said royalty provision were considering pipe line oil or they would not have provided for the payment of the value of the oil "on the day the oil is run into the purchaser's pipe line or storage tanks."

Respondent argues further that in view of the stipulation that the oil, as it comes, from wells on the lease, is so-called "wet" oil and must be dehydrated to make it acceptable for delivery into the pipe line of the purchasing company, and that if the oil is not dehydrated it will not be acceptable for delivery into the pipe line of the purchasing company, therefore the oil produced on the leased premises requires dehydration to give it the value upon which respondent lessor's cash royalty is to be determined, and there being no provision in the lease for any deduction of any cost of dehydration, the lessee is obligated to pay that royalty without deducting anything on account of the cost of dehydration.

The only matter involved in this appeal is whether or not appellant oil companies (plaintiff and appellant and intervener and appellant) have a right to deduct the cost of dehydrating wet oil before accounting to respondent lessor for its cash royalty.

The lease is devoid of any covenant referring to the cost of dehydration or the burden of dehydrating the lessor's royalty share of the oil, so we must look to the language of the royalty clause of the lease, viewed in the light of the admitted facts.

The lease provides that "Lessee shall pay Lessor monthly as royalty the equal one-sixth (1/6) part of the value of all oil produced and saved from wells * * * after making the customary deductions for temperature, water and b. s., at the posted available market price of the district in which the premises are located, for oil of like gravity, the day the oil is run into the purchaser's pipe line or storage tanks * * * or at Lessor's option * * * deliver into Lessor's tanks * * * or to pipe line within one mile of premises from which oil is being produced, free of cost, the one-sixth (1/6) or one-seventh (1/7) part of said oil to which Lessor may be entitled as herein provided."

We must first determine the meaning of "oil" in covenant (1) of said lease. In arriving at its meaning we are greatly aided by the case of Alamitos Land Co. v. Shell Oil Co., 3 Cal.2d 396, 44 P.2d 573, 576. The lease in that case was, in its general terms, quite similar to the lease in the case at bar. In that case, our Supreme Court said:

"We are constrained to hold that the words 'petroleum oil' and 'royalty oil' found in the above-quoted paragraphs of the lease mean the crude petroleum well fluid as produced, less the free water therein, that is, the petroleum fluid together with such water and other foreign matter as may be emulsified therein—the fluid in its natural state. We are strengthened in this conclusion by the context of the lease, wherein, in 38 or more places, these words or similar words are found. For example, by said lease the land was demised, together 'with all petroleum, gas and all other hydrocarbon substances contained therein'. The term of the lease was to be 20 years 'and so long thereafter, not exceeding 10 years, as oil or gas is found thereon or therein in paying quantities', subject, however, to certain conditions, 'for the purpose of drilling and boring for petroleum, oil, natural gas, and all other hydrocarbon sub-

stances of whatsoever kind or character'. Again, the following language is found in said instrument: 'upon the discovery of oil in paying quantities in any one of said test wells', etc. Again, 'a well shall be deemed completed when drilling has ceased and said well shall either produce oil in paying quantities, or shall have been drilled to a depth of 3,500 feet or more'; 'for the purpose of this lease, a well shall be deemed to produce oil in paying quantities when it shall produce oil and/or gas in quantities sufficient to pay to pump, or otherwise secure and save'. The lease provides what shall be done within 90 days after oil shall have been discovered on the leased premises in paying quantities. Another paragraph relates to pumping operations and provides that defendant shall pump and operate all the wells to full capacity so long as the same 'produce oil in paying quantities, except when the price of oil in Southern California, similar in quality to that produced hereunder, is depressed to 50 cents or less per barrel of 42 gallons each at the wells of production, as hereinafter set forth.'

"No one can say that the 'cleaned' or 'dry' product is referred to by the above language. Our construction of the lease conforms to the commonly understood meaning of the terms and is in every respect a reasonable deduction. In Hammett Oil Co. v. Gypsy Oil Co., 95 Okl. 235, 218 P. 501, 502, 34 A.L.R. 275, it is said: 'There was no evidence as to what the word "oil" includes, when used in an oil and gas lease, or how the parties to the lease understood it, but a large amount of litigation has arisen over oil and gas leases, and the construction of such contracts, and the word "oil" as used in an oil and gas lease, has always been referred to by the courts and understood to designate the oil produced from a well, or crude petroleum in its natural state. There is nothing either in the contract or in the evidence to disclose that the parties in this lease contract used it in any other sense, but the contract does support the contention that it was used in its ordinary and popular sense, and refers to crude oil as it was produced from the mouth of the well.'"

[1] Upon the authority of the case just cited, we conclude that "the value of all oil produced and saved from wells," etc., was the value of the crude oil as it was produced from the mouth of the wells. If there were a posted available market price of the district where the premises are located for oil of like gravity, the day the oil is run into the purchaser's pipe line or storage tanks, that would be its value for the purpose of determining the amount of cash royalty to be paid but where, as in this case, there is no posted price in the district where the premises are located, then the value must necessarily be its actual market value or, in other words, its selling price in the market.

[2] The provision "the day the oil is run into purchaser's pipe line or storage tanks," in our opinion, is intended to fix the time as of which the value of the oil shall be determined and is not intended to refer to the condition of the oil. It will be noted that the clause just referred to states "on the day the oil is run into purchaser's pipe line or storage tanks." Respondent asserts in its brief that the reference to the storage tanks is of no moment because the oil is delivered to purchaser's pipe line and the posted price in the district is for dehydrated oil only. It is hardly reasonable to assume that the parties would have added the words "storage tanks," if they were considering only pipe line oil. Some purchasers use tanks to store their oil and trucks instead of pipe lines in which to transport it.

[3, 4] Furthermore, there is in the same paragraph of the lease the clause "or at Lessor's option deliver into Lessor's tanks * * * or to pipe line within one mile from premises from which oil is being produced," etc. This clause certainly does not support the theory that the parties intended to refer to dehydrated oil or intended that lessee should have the share of lessor dehydrated before delivering it, but it does support the view that lessor was entitled to his royalty share in kind as the oil came from the well, if he so desired. Under the terms of said lease, lessor could not require lessee to clean the oil before delivery of its royalty share in kind. As we view the matter, respondent should either pay its proportionate share of the dehydrating expense or should elect to receive its royalty share of the oil in kind, in its crude state, as produced from the wells. There is nothing in the stipulated facts nor in the lease itself to justify the conclusion that there was any duty on the part of the lessee to bear the ex-

pense of dehydrating appellant lessor's royalty share of the oil produced from wells on the premises, and, if the duty to clean the oil is absent when the royalty oil is delivered in kind, it is also absent when the proportionate share of the value of such royalty oil is to be paid in cash.

There is nothing in any of the authorities cited by respondent that either compels or justifies a different construction of the lease and we believe that the only reasonable construction is that the respondent lessor should bear its proportionate share of the cost of dehydrating the oil produced, if it elects to receive its royalty share in cash.

It follows, therefore, that the trial court erred in concluding that the appellant lessees were not entitled to charge respondent lessor with any portion of the cost of dehydrating the oil produced from the leased premises, and that the judgment must be reversed.

The judgment is reversed.

BARNARD, P. J., and MARKS, J., concurred.



50 Cal.App.2d 89

DRAKE et al. v. RUSCONI et al.

Civ. 2663.

District Court of Appeal, Fourth District, California.

Feb. 24, 1942.

Rehearing Denied March 25, 1942.

1. Automobiles ⇐244(7, 35)

In action for injuries sustained by minor bicyclist struck by automobile, evidence that automobile was being driven through blind intersection at from 30 to 35 miles an hour sustained finding that driver was negligent in driving too fast and in not keeping proper lookout.

2. Appeal and error ⇐1008(1)

In action for injuries sustained by minor bicyclist when struck by automobile in intersection, whether the bicyclist was guilty of contributory negligence in cutting corner and traveling on wrong side of street was for court sitting without jury.

3. Appeal and error ⇐1011(1)

Where there was conflict in evidence and evidence was sufficient to support the court's findings, the findings could not be disturbed on appeal.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Personal injury action by Carlene Drake, a minor, etc., and others against Alfred Rusconi and others. Judgment for plaintiff and defendants appeal.

Affirmed.

Hoge, Pelton & Gunther and A. Dal Thomson, all of San Francisco, for appellants.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for respondents.

BARNARD, Presiding Justice.

This is an action for damages arising from a collision between a bicycle on which the minor plaintiff was riding and an automobile owned by Alfred Rusconi and driven by his wife.

The accident happened at the intersection of Madera Avenue and D Street, in the town of Kerman. Madera Avenue runs north and south and is 75 feet wide, and D Street runs east and west and is 40 feet wide. On this occasion the minor plaintiff, a girl 12 years old, was riding her bicycle easterly on D Street and across Madera Avenue when a collision occurred between the bicycle and the automobile driven by Mrs. Rusconi at a point within the intersection. The minor plaintiff was thrown to the ground, suffering the injuries complained of. The automobile stopped in anywhere from 15 to 40 feet, depending upon various portions of the testimony. There were skid marks 15 feet back from the automobile after it had stopped, but it cannot be determined from the record at what point the brakes were effectively applied.

This action, which followed, was tried by the court without a jury. The court found in all respects in favor of the plaintiffs and the defendants have appealed from the judgment.

[1] The appellants first contend that there is no evidence to support the court's finding of negligence upon the part of the driver of the automobile. While the evidence is sharply conflicting, there is evidence that Mrs. Rusconi was driving

through this blind intersection at from 30 to 35 miles an hour. This evidence is attacked as unsubstantial and unbelievable in view of the alleged physical fact that the automobile stopped within 15 feet. This in turn depends upon the uncertainness to which we have already referred and the entire matter presents but a question of fact. The evidence, in its entirety, justifies an inference that Mrs. Rusconi was traveling too fast at the point in question. Moreover, the evidence amply justifies the inference and conclusion that Mrs. Rusconi was looking in another direction, that she was not keeping a proper lookout for traffic in the direction from which it was to be expected, and that she could have seen the minor plaintiff in time to avoid the accident had she been properly observing conditions in the line of her travel.

[2] It is next contended that it must be held, as a matter of law, that the minor plaintiff was guilty of contributory negligence. This is based upon the contention that it conclusively appears that the accident occurred near the northerly edge of the northwest quadrant of this intersection, that the minor plaintiff was at the time riding her bicycle across this quadrant in a northeasterly direction, and that she was thus cutting the corner and upon her wrong side of D Street, along which she was proceeding. It appears that the minor plaintiff had just come from the postoffice, which is on the west side of Madera Avenue, a short distance south of D Street. It also appears that she entered D Street a short distance west of Madera Avenue and that she proceeded northerly for some distance on D Street before she turned to her right and proceeded easterly along D Street and across Madera Avenue. While several witnesses testified that she had crossed to within five or six feet of the northerly line of D Street before she turned easterly and proceeded to cross Madera Avenue, she herself testified that she proceeded northerly to about the middle line of D Street and then turned to her right and proceeded east on D Street and across Madera Avenue, and that she was struck by the automobile at about the center of the intersection. This is confirmed by a part of the testimony of several other witnesses and is strongly confirmed by a part of the testimony of Mrs. Rusconi. She testified that she was 15 feet from the center of the intersection when she first saw the girl on the bicycle, and that the minor plaintiff was then 15 or 18 feet away from her. The entire question of contributory negligence, upon the record before us, is one of fact and not of law, and while the evidence would have sustained a contrary finding and conclusion there can be no question that the court's finding thereon is amply sustained by the record.

[3] Nothing more here appears than a conflict in the evidence and there being sufficient evidence to support the court's findings the usual rule applies.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.



50 Cal.App.2d 181

FEINTECH v. WEAVER et al.

Civ. 13264.

District Court of Appeal, Second District, Division 1, California.

Feb. 26, 1942.

Hearing Denied April 23, 1942.

1. Homestead ⇐5

The homestead laws must be liberally construed. Civ.Code § 1266 et seq.

2. Homestead ⇐43

Where claimant attempted to homestead property on which she was living with an adult son by executing declaration of homestead on a printed blank designed for $5,000 homestead provided for head of family and declaration contained all recitals relative to homesteads of person not head of a family, under liberal construction of the homestead declaration, recital that claimant was head of the family was "surplusage" and instrument was sufficient to secure to the claimant valid homestead which defeated attempt of judgment creditor to take title at execution sale. Civ.Code § 1266 et seq.; Const. art. 17, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action to quiet title by Norman Feintech against Alice May Weaver. From a judgment for the defendant, plaintiff appeals.

Affirmed. Appeal from order denying a new trial dismissed.

Edward K. Zuckerman and Arthur Edmund Stein, both of Los Angeles, for appellant.

Don Lake and James R. Jaffray, both of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

The plaintiff seeks to have title to real property quieted in him. This title was acquired at an execution sale, when the property was bid in by the plaintiff as judgment creditor. The defendant sought to have title quieted in her because of a homestead which she asserted defeated the execution sale. The trial court held that the homestead was good and valid, and judgment was in favor of the defendants, from which judgment the plaintiff has appealed. There is but one question to be determined on this appeal, i. e.: Whether the declaration of homestead is sufficient in form.

When the defendant executed the declaration of homestead she used a printed blank designed for the five thousand dollar homestead provided by our law for the head of a family. She was not the "head of a family" because she was not married, but she was living with an adult son upon the property which she attempted to homestead. It is conceded that the declaration of homestead contains all the recitals prescribed by division 2, part 4, title V, chapter III, § 1266 et seq., of the Civil Code relative to homesteads of a person not "head of a family."

The appellant contends that the additional recital contained in the homestead declaration to the effect that the claimant was head of a family, when in fact she was not, destroyed its effectiveness, made it no declaration of homestead at all, and enabled him, therefore, to cause the property to be sold, and to bid it in at an execution sale.

[1] In the recent case of Greenlee v. Greenlee, 7 Cal.2d 579 at page 583, 61 P. 2d 1157 at page 1159, our Supreme Court states, "The homestead laws have always been given a most liberal construction in order to advance their beneficial objects and to carry out the manifest purpose of the Legislature." This has always been the rule of construction laid down by our California courts. McKay v. Gesford, 163 Cal. 243, 124 P. 1016, 41 L.R.A.,N.S., 303, Ann. Cas.1913E, 1253; Estate of Levy, 141 Cal. 646, 75 P. 301, 99 Am.St.Rep. 92; Keyes v. Cyrus, 100 Cal. 322, 34 P. 722, 38 Am.St. Rep. 296; Southwick v. Davis, 78 Cal. 504, 21 P. 121; Roth v. Insley, 86 Cal. 134, 24 P. 853; Simonson v. Burr, 121 Cal. 582, 54 P. 87; 26 Cal. Law Review 241.

There are California cases in which it would seem that the expressed rule of liberality has not always been followed, particularly in decisions involving homestead declarations, and in which a rather strict compliance with the provisions of the code has been required. Most of these cases have held declarations invalid because of the omission of some one of the matters required by the code to be included in them. Jones v. Gunn, 149 Cal. 687, 87 P. 577; Ashley v. Olmstead, 1880, 54 Cal. 616; Hansen v. Union Savings Bank, 148 Cal. 157, 82 P. 768; Reid v. Englehart-Davidson Mercantile Co., 126 Cal. 527, 58 P. 1063, 77 Am. St.Rep. 206.

The authority closest in point to the facts we are now considering is Roth v. Insley, supra. In that case it was contended that the homestead was invalid because a son made a declaration of homestead as head of a family when his only claim to be such was that his mother resided on the property with him. The decision turned upon the main question as to whether the homestead continued after the death of the mother, but in a concurring opinion Mr. Chief Justice Beatty stated: "The declaration of homestead in this case did not show that the claimant was the head of a family. It merely stated that he was, at the date of the declaration, actually residing on the premises with his mother, and altogether fails to state that she was under his care and maintenance, a condition made essential by the statute. * * * But it was a good declaration for any person other than the head of a family, * * * and sufficient to secure a homestead right of exemption to the extent of $1,000 * * *. Such being the case the homestead could not be sold under execution upon a judgment other than one of those enumerated in section 1241 of the Civil Code, without taking the steps prescribed in section 1245 et seq." [86 Cal 134, 24 P. 855.]

In the case at bar disregarding the recital that the claimant was the head of a family, treating it as surplusage, we have a declaration of homestead which contains every element required by the Civil Code,

and which would be upheld without question in any court. To give this effect to the instrument secures to the defendant the right to a home, which the Constitution of our state (article XVII, section 1) enjoins the legislature to protect.

[2] It is therefore concluded that the homestead declaration in this case should be given a liberal construction; that the recital in question is surplusage and unnecessary; and that there was a valid homestead upon the property in question which defeated the attempt of the judgment creditor to take title at an execution sale.

The judgment is affirmed; the appeal from the order denying a new trial is dismissed.

YORK, P. J., and DORAN, J., concurred.



50 Cal.App.2d 66

BAYLESS v. MULL et al.

Civ. 12890.

District Court of Appeal, Second District, Division 2, California.

Feb. 24, 1942.

Rehearing Denied March 16, 1942.

Hearing Denied April 23, 1942

1. Automobiles ⇐193(10)

A salesman of used automobiles who was authorized to demonstrate any used automobile to any prospective purchaser without restrictions as to locality to which he might drive or the length of time he could use automobile, who upon being informed in the afternoon that prospective purchaser would return in the evening, had dinner with a friend and in taking the friend home before proceeding to prospective purchaser's home, passed prospective purchaser's home and injured a pedestrian near the friend's home, as matter of law was not engaged in furthering the business of his employer and hence employer was not liable to pedestrian under doctrine of "respondeat superior".

See Words and Phrases, Permanent Edition, for all other definitions of "Respondeat Superior".

2. Statutes ⇐184, 215

In determining the scope of statute imposing upon automobile owner liability for negligent operation of automobile with owner's permission, the statute must be read in light of the conditions which existed at and prior to its passage and the evils it sought to remedy. Vehicle Code § 402, St.1937, p. 2353.

3. Automobiles ⇐192(1), 193(8), 245

The statute imposing upon automobile owner liability for negligent operation of automobile with owner's permission applies whether driver is owner's agent or servant or not, but if he is not an agent or servant damages recoverable are limited, and if driver is an agent or a servant and is within scope of his employment damages are not limited by statute, and it is immaterial whether he is or is not within scope of his employment or has deviated from his employer's business except so far as either fact bears on question of owner's permission and the amount of recovery. Vehicle Code § 402, St.1937, p. 2353.

4. Automobiles ⇐192(1)

While statute imposing upon automobile owner liability for negligent operation of automobile with owner's permission does not permit the owner to restrict its use to a given territory or to a particular route, the statute has no extraterritorial operation and hence use of vehicle may be restricted to the state. Vehicle Code § 402, St.1937, p. 2353.

5. Automobiles ⇐192(1), 193(10)

Under statute imputing negligence of driver to owner of motor vehicle whenever driver at time of accident is operating it "in the business of such owner or otherwise" with owner's permission, by use of quoted phrase legislature eliminated as a condition of liability of owner that driver should be on owner's business, and the necessity as a basis of liability of master-owner that servant should be on his master's business rather than on his own. Vehicle Code § 402, St. 1937, p. 2353.

See Words and Phrases, Permanent Edition, for all other definitions of "In the Business of Such Owner or Otherwise".

6. Automobiles ⇐192(1)

The statute imposing upon automobile owner liability for negligent operation of vehicle with express or implied permission of owner must be liberally construed notwith-

standing statute imposes a new liability unknown to the common law. Vehicle Code § 402, St.1937, p. 2353; Civ.Code § 4.

7. Automobiles ⇐193(8)

Where salesman of used automobiles was authorized to demonstrate any used automobile to any prospective buyer without restrictions as to locality to which he might drive or length of time he could use automobile, and salesman who took automobile for purpose of demonstrating it to a prospective buyer struck a pedestrian at time when he was not engaged in furtherance of his employer's business, the employer was liable with the salesman for the latter's negligence under statute imposing upon automobile owner liability for negligent operation of automobile with express or implied permission of the owner. Vehicle Code § 402, St.1937, p. 2353.

8. Appeal and error ⇐1004(1)

A judgment would not be reversed for inadequacy of damages awarded for personal injuries where no reason was shown for supposing that jury did not correctly appraise the extent of injuries and compensation allowable therefor.

9. Appeal and error ⇐110

An order denying a new trial is not appealable.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Delia Bayless against Troy Mull and the Central Chevrolet Company to recover for injuries sustained by plaintiff who was struck by an automobile driven by named defendant. From an order of nonsuit in favor of last named defendant and from a judgment against first named defendant on ground of its inadequacy and from an order denying a new trial, plaintiff appeals.

Appeal from order denying new trial dismissed, and order of nonsuit reversed and the judgment affirmed.

Hearing denied; CURTIS and EDMONDS, JJ., dissenting.

Donald Kolts, of Los Angeles, for appellant.

Jennings & Belcher and Louis E. Kearney, all of Los Angeles, for respondent Central Chevrolet Co.

HANSON, Justice pro tem.

This is an action brought by appellant against the Central Chevrolet Company and its employee Mull to recover for injuries she sustained as the result of being run down in a pedestrian lane by a motor vehicle driven by Mull and owned by the Chevrolet Company. The trial court granted a nonsuit in favor of the company but submitted the case of the plaintiff against Mull to the jury, which returned a verdict of $2,000 in plaintiff's favor. Plaintiff's appeal is not only from the action of the trial court in granting a nonsuit but also from the judgment entered upon the verdict, on the ground of its inadequacy.

The main question presented by the appeal from the judgment of nonsuit is whether by reason of the imputed negligence provisions of the Vehicle Code the employer is liable for the negligence of its employee entrusted with driving its motor vehicle, where the accident occurred while the servant was furthering his own business and not that of his master. A subsidiary question is whether the trial court correctly ruled that as a matter of law the servant was not engaged in furthering the business of his master at the time of the accident.

The facts necessary to be stated are these: Mull was employed as a salesman by Central Chevrolet Company to demonstrate and sell its used cars. In that capacity he was privileged to take any car on his employer's used car lot to show and demonstrate it to any prospective purchaser. No restrictions were imposed upon him as to the locality to which he might drive the car nor the manner in which or the length of time he could use it; except that where he expected to be gone for some period of time it was his duty to indicate on the company's bulletin board such fact. On the day of the accident he took the car here involved at 4:30 in the afternoon and made notation of the necessary facts on the bulletin board. As he had a prospective purchaser on 61st Street just off Broadway he drove the car to the prospect's home. There he learned the prospect was not at home but would return later in the evening. He then drove down town and had dinner with a friend who lived on 79th Street just off Broadway. As he planned to return to his prospect's home he offered to take his friend to her home. Accompanied by his passenger he drove down Broadway and passed 61st Street, on which the prospect lived, in order to take his friend to her home on 79th Street before proceeding to the home of his prospect. The accident occurred at 79th Street and Broadway, where, as heretofore stated, the plaintiff was run down in a pe-

destrian lane crossing Broadway. Because of the view we take of plaintiff's appeal from the judgment entered on the verdict it is unnecessary to recite the injuries.

[1] We think that under the holdings of the Supreme Court the trial court did not err in its refusal to submit to the jury the question of the employer's liability under the doctrine of respondeat superior. While the jury could have found that up to the time the driver reached 61st Street he was on business for the employer, it would not have been entitled to so find after he passed 61st Street on his way to the home of his guest, located on 79th Street. Gordoy v. Flaherty, 9 Cal.2d 716, 72 P.2d 538.

[2] Whether plaintiff's case against the employer owner should have been submitted to the jury on the theory that it was equally liable with the driver for his negligence, but with damages restricted to $5,000, depends upon the construction which should be given to section 402 of the Vehicle Code, St. 1935, p. 153, as amended by St. 1937, p. 2353. In determining the sweep of that statute we must read it in the light of the conditions which existed at and prior to its passage and the evils it sought to remedy. The statute was enacted in 1929 and, so far as is here material, reads:

"(a) Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same *with the permission, express or implied, of such owner,* and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

"(b) The liability of an owner for imputed negligence, imposed by this section and not arising through the relationship of principal and agent or master and servant is limited to the amount of five thousand dollars for the death of or injury to one person in any one accident and subject to said limit as to one person is limited to the amount of ten thousand dollars with respect to the death of or injury to more than one person in any one accident and is limited to the sum of one thousand dollars for damage to property of others in any one accident." (Italics ours.)

While the language of the statute seems clear and unambiguous, it will be noted it does not define the phrase "permission * * * of the owner"; nor does it lay down any formula or test for ascertaining what amounts to a "permission" within the meaning of the statute. Moreover, the statute does not indicate whether the owner's potential liability runs with the car, so to speak, wherever it may be operated or used by the person who is entrusted with it, or whether the liability runs with the car only when it is operated or used at such times and places as the owner expressly or impliedly designates. The solution of these and other questions arising out of the statute will be aided, we think, by reference to the legal doctrines of tort liability which prevailed prior to the passage of the statute, and the conditions then existing which gave rise to it.

When the one-cylinder motor car first made its appearance on the highways the liability of its owner who was not operating it at the time of the accident was predicated solely upon the theory of agency, or respondeat superior. In short, if the driver was a servant operating the car in the course of his master's business and in the scope of his employment the master was liable for the servant's tort, otherwise not; if the operator was a bailee not engaged upon the business of the owner, the latter was without liability. Initially there was an attempt to impose an absolute liability on the owner of a motor car for damage caused by it when driven by another, on the theory that the car was a dangerous instrumentality. However, this endeavor quickly fell by the wayside when possession of the "dangerous instrumentality" became so common that it was no longer in the hands of the few but of the many. Accordingly, efforts to curb the growing menace of death and injury in the operation of motor vehicles was sought in numerous other ways. Prominent among these were statutes requiring registration of motor vehicles, licenses to drive, and revocation of licenses to drive in cases where the driver had failed to satisfy an automobile injury judgment. The hope that the latter method would tend either to more careful driving or to the driver's procuring liability insurance was only partially successful, as the financially irresponsible eliminated judgments against them by adjudications in bankruptcy. It was not until 1937 that the legislature of this state hit upon the device of providing that a discharge in bankruptcy should not be effective in requiring the Department of Motor Vehicles to issue an operator's license so long as a judgment against the operator was not satisfied by actual payment.

The validity of that statutory provision, in view of the language of the Bankruptcy Act, was determined only last November by the Supreme Court of the United States in Reitz v. Mealey, 314 U.S. 33, 62 S.Ct. 24, 86 L.Ed. 21. Viewing the conditions then as they were presented to the legislature in 1929, it is apparent that the emphasis had shifted from the earlier view that the motor car was inherently a dangerous instrumentality to the view that it was such only in the hands of an incompetent or irresponsible driver. Indicative of what had transpired in the period 1905–1929 is the fact that when John D. Spreckels on May 5, 1905, appeared before the Secretary of State with $2 to have his White Steamer registered—the first in this state—there were less than 6,000 motor cars owned and operating in the state. As license plates were unknown, Mr. Spreckels was simply assigned number one. By May 11, 1929, when the governor approved the statute above quoted, more than two million cars were registered in this state. In this setting and under the conditions narrated the legislature was urged to pass legislation requiring that all drivers take out compulsory liability insurance so as to do away with the evil of the unsatisfied judgment.

But objections to that solution were both numerous and obvious. The only practical alternative, as it appeared to the legislature, was to impose an absolute or limited liability on an owner in the position of a bailor of his car, or to extend the liability of a master for the acts of his servant in driving the car beyond the strict limits of the scope of his employment as enunciated in the doctrine of respondeat superior, or in imposing both these liabilities. For imposing a liability on a person in a situation analogous to that of a bailor there was legislative precedent in other states; for expanding the liability of the master and at the same time restricting the amount recoverable from him there was guiding legislative precedent not only in other states but in this state as well, in the then existing Workmen's Compensation Acts. The need and motivation for a new statutory liability in automobile injury cases were parallel to the conditions which some years before gave rise to workmen's compensation acts. Under the latter acts a liability for the injury of the employee without the employer's fault was placed on the employer where no such liability existed before; but by way of alleviating the new burden definite and arbitrary financial limits were placed upon the liability. The acts, as is well known, resulted from the changes in industry from that of few low-speed machines to a highly mechanized industry of powerful high-speed machines. In the light of these conditions and factors we think the language of the statute gives clear answer to the intent of the legislature and the alternative it adopted.

[3] The statute, Vehicle Code, § 402, by apt language imputes the negligence of the driver of a motor vehicle to its owner whenever the driver, at the time of the accident, is operating or using it with the permission, express or implied, of the owner; and this regardless of whether he is or is not on business for the owner. Moreover, as has already been stated, the statute applies whether the driver is the owner's agent or servant, or not; but if he is not an agent or servant the damages which may be assessed against the owner may not in any case exceed the limits set forth in the statute. However, if the driver is an agent or servant, and at the time of the accident is within the course of his employer's business and in the scope of his employment, damages are not then limited by the statute. Consequently, if the driver is an employee or agent of the owner it is of no legal significance, under the terms of the statute, whether he is or is not within the scope of his employment or has deviated from his employer's business to that of his own, except so far as either fact may be deemed to bear on the question of the owner's permission and the amount of the recovery.

[4, 5] On its surface and in its context the statute is broad, comprehensive and unequivocal in its terms and meaning. The sweeping language of the statute provides no toe-hold for a construction that would restrict the liability of the owner of a car for the negligence of the driver once he has entrusted him to take it upon the highways. But in saying that we do not imply, nor does the statute say, that the owner may not limit the time it shall continue on the highway. After all, an owner by granting to another permission to drive the car does not make him a gift of it. Moreover, while the statute does not in terms permit the owner who entrusts his car to another to restrict its use to a given territory, much less to a particular route, the statute has no extra-territorial operation and so the use may clearly be restricted to this state. Whether the statute may be read as per-

mitting a restriction of use to some lesser general territory is not involved in this case. We assume, without deciding, that a rule of reason may here be applied. But what we do say is that the legislature did not intend by the language it used to permit an owner to show any and all restrictions he may have placed on the use of his car and thus escape liability. By the use of the phrase in the statute reading "in the business of such owner or otherwise" the legislature eliminated as a condition of liability of the owner that the driver should be on the owner's business; and by the same token, the statute being applicable to the master and servant relation, it eliminated the necessity as a basis of liability of the master-owner that the servant should be on his master's business rather than on his own.

The two decisions of our Supreme Court so heavily relied upon by respondent company do not rule contrary to what we have said herein. In Henrietta v. Evans, 10 Cal. 2d 526, 75 P.2d 1051, the owner loaned his motor vehicle to a prospective purchaser for the sole purpose of driving from Desert Center, California, to Beaumont, California, to pick up some papers needed to complete the sale. The prospective purchaser instead of stopping at Beaumont and returning to Desert Center drove on to Colton, California, where he had an accident. In ruling the owner was not liable the court placed its ruling on the ground that an owner was entitled to restrict the use of his car to a particular place or locality for a special purpose. The opinion makes it clear that nothing short of a substantial violation of restrictions is ground for avoiding liability. In the instant case there were no express restrictions or limitations. In the case of Engstrom v. Auburn Automobile Sales Corporation, 11 Cal.2d 64, 77 P.2d 1059, the defendant automobile agency lent one of its automobiles to a prospective purchaser with instructions to return it not later than 5 o'clock p. m. on the same day. The purchaser kept it over night and was involved in an accident the next day. It was held that the permissive use had ceased prior to the accident and hence the owner was not liable under the statute. The case is not in point as we have here no question involving a limitation of time. The only other case in the Supreme Court which is cited and relied upon by respondent is Gordoy v. Flaherty, supra. That was a case where the employee at the time of the accident was driving his personally owned automobile, and a fortiori the case is not within the statute and possesses no legal significance in the problem before us.

In the District Courts of Appeal only three cases have had occasion to construe and apply the phrase "permission * * * of such owner." One, the case of Di Rebaylio v. Herndon, 6 Cal.App.2d 567, 44 P. 2d 581, is merely another case of express limitation of time. Another is Gousse v. Lowe, 41 Cal.App. 715, 183 P. 295, which involved the taking of the employer's automobile by a chauffeur contrary to instructions and for the personal use only of the chauffeur, and so it is not of any controlling importance here. In the third case, Montanya v. Brown, 31 Cal.App.2d 642, 88 P.2d 745, hearing denied by the Supreme Court, the defendant owners of the motor car involved in the accident conceded they had given the driven permission to drive their car, but asked that the jury be instructed that their liability could not exceed $5,000. The trial court refused to so instruct, and upon the return of a verdict for $35,000 refused to restrict the judgment to $5,000 or to grant a new trial. The only issue in the case was whether there was sufficient evidence of the agency of the driver to sustain a verdict not limited to $5,000. On its facts the case is not in point on any question raised in the instant case.

[6] In construing statutes of other states which contain the exact language or the substance of that which is found in the first paragraph of our statute above set forth, several of the courts of such states have held that the language has no application to a master-servant case; others have held the contrary. The argument for excluding the master and servant, principal and agent cases is that the statute is essentially penal and so should be strictly construed. These holdings are not persuasive here, as we think it plain from the language used in the second paragraph of our statute that it is applicable to a master and servant, principal and agent, and any other case where an owner of a motor vehicle has granted permission, express or implied, to another to drive his motor vehicle. By the language found in the second paragraph reading, "The liability of an owner for imputed negligence imposed by this section and not arising through the relationship of principal and agent or master and servant is limited to * * *", it is made plain

that the relationships mentioned are within the sweep of the statute. If it were intended to exclude such relationships either they would not have been mentioned at all, as is the case where the courts have held them excluded, or express language would have been used to exclude them, and not language of the character used in the second paragraph of our statute. Moreover, we are not entitled strictly to construe the statute because it imposes a new liability unknown to the common law, but rather are required by reason of the provisions of Civil Code, section 4, to give it a liberal construction.

Aside from the questions we have already passed upon, the only real difficulty, apparently, which the courts of last resort have encountered, in these imputed negligence statutes, is in interpreting what is meant by the phrase "with the permission, express or implied, of such owner," as found in the first paragraph of our statute. In some states where the statutory phrase is substantially identical or similar to ours it is held that when an owner consents to the use of his motor vehicle by another he is equally liable with such other for the latter's negligence, even though he expressly or impliedly restricted his consent to its use for a particular or limited purpose, as, for example, to a specific place and return, or by a certain route, or for a limited time. Other courts have construed the phrase somewhat more narrowly. This divergence of opinion has come about in various ways. Courts which hold that the imputed negligence statutes do not apply to cases where the doctrine of respondeat superior is applicable argue that the legislature could not have intended to impose on a bailor a greater liability than is imposed upon a master under the respondeat superior doctrine, and so permit the owner to introduce evidence bearing on a restricted use as permitted and limited in the master-servant cases. Other courts take the position that the purpose of the legislature was to increase the liability of a non-culpable owner of a motor vehicle for its operation on a public highway. In the view of these courts the foundation of the statutory liability is the *permission* given to another to use an instrumentality which if improperly used is a danger and a menace to the public. They reason that as the owner can avoid the liability by refusing to permit the use of his motor car by another or procure insurance to protect him, he should not be permitted to avoid the consequences of the operator's negligence and escape liability therefor by secret restrictions limiting the right to use the motor vehicle. The view of these courts is well expressed by the Massachusetts court in Guzenfield v. Liberty Mut. Ins. Co., 286 Mass. 133, 190 N.E. 23, 24, where it said "the liability * * * so to speak, run[s] with the car unaffected by the owner's action unless its presence on the public ways was without his sanction." The question before us, as to the liability of a master for the negligence of his servant who at the moment of the accident is not furthering his master's business, is an open one in the Supreme Court of this state. The question has not been passed on in any of the District Courts of Appeal except in Gammon v. Wales, 115 Cal.App. 133, 300 P. 988, petition for hearing denied by the Supreme Court, where the court expressly held that an owner of a motor vehicle is liable under the statute for the negligence of its employee-driver even though at the time of the accident he was not acting in the course of his employment.

[7] From what we have said it is plain that the master was equally liable with the servant for the latter's negligence, and so the case should have been submitted to the jury on the basis of the statutory liability.

So far as the case of the employer is concerned, it only remains to say a word in response to its oblique suggestion that there is a question as to whether it was the owner of the car. If it was not, it is to be noted that its argument stops with the suggestion. We see no reason to doubt the employer was the owner, and every reason to say it was. The suggestion merits no further discussion. See Swing v. Lingo, 129 Cal.App. 518, 19 P.2d 56, and McCalla v. Grosse, 42 Cal.App.2d 546, 109 P.2d 358.

[8] The remaining question is whether the verdict against the employee was inadequate and should be set aside. Aside from a recital of the injuries of the plaintiff as testified to by her and her witnesses, she fails to point out a single valid reason for supposing that the jury did not correctly appraise the extent of her injuries and the compensation that should be allowed therefor. Accordingly, we see no basis for a reversal of the judgment against the employee Mull.

[9] For the reasons indicated the order granting the nonsuit in favor of respond-

ent Central Chevrolet Company is reversed and the judgment against respondent Mull is affirmed. As no appeal lies from an order denying a new trial, it is dismissed.

So ordered.

MOORE, P. J., and McCOMB, J., concurred.



50 Cal.App.2d 155

KELLER et al. v. MARKLEY.

Civ. 6527.

District Court of Appeal, Third District, California.

Feb. 25, 1942.

Hearing Denied April 23, 1942.

1. Trial ⇐139(1)

The trial court has power to direct a verdict in favor of defendant where there is no substantial evidence tending to prove all the controverted facts necessary to establish plaintiff's case, and it is not necessary that there should be an absence of conflict in the evidence, since to deprive the court of the right to exercise such power, the conflict must be a substantial one.

2. Automobiles ⇐245(8)

Where motorist making right turn into street struck minor bicyclist who was on wrong side of street, in action for injuries to the bicyclist evidence that bicycle had made tracks across highway right in front of where automobile was standing after accident, and that motorist had driven entirely off highway onto shoulder, indicated that motorist was operating his automobile with extreme due care and justified directed verdict for motorist.

3. Automobiles ⇐244(7)

Where motorist making right turn into street struck minor bicyclist who was on wrong side of street, in action for injuries to bicyclist evidence did not disclose that motorist was under duty to use his horn. Vehicle Code, § 671, St.1935, p. 223.

4. Negligence ⇐4

Negligence in a particular case is to be determined by the application of the standard of the ordinarily prudent or reasonable person.

5. Negligence ⇐134(1)

It is necessary, in order to conclude that an individual has been guilty of negligence, that there be present in the record some substantial evidence indicating that the individual has failed under the circumstances to conform to the duty of care required of the ordinarily prudent or reasonable person.

Appeal from Superior Court, Sutter County; James O. Moncur, Judge Assigned.

Personal injury action by Walter Keller, Jr., a minor, by and through his father, Walter Keller, Sr., guardian ad litem, for personal injuries, and by Walter Keller, Sr., for expenses incurred, against H. C. Markley. From an adverse judgment, plaintiffs appeal.

Affirmed.

Hearing denied; CARTER, J., dissenting.

J. O. Goldstein and Burton J. Goldstein, both of Chico, and Ray Manwell, of Marysville, for appellants.

Yale S. Kroloff, of Oakland, and Rich & Weis, of Marysville, for respondent.

PER CURIAM.

This is an appeal from a judgment entered pursuant to a verdict rendered in favor of defendant, under directions of the court.

The action is prosecuted by plaintiff, Walter Keller, Jr., a minor of the age of eleven years, by and through his father, Walter Keller, Sr., guardian ad litem, and Walter Keller, Sr., individually, against H. C. Markley, the defendant and respondent above named. The plaintiff, Walter Keller, Jr., seeks to recover damages in the sum of $25,030, alleged to have been caused by the negligence of defendant, arising out of an automobile accident. The father, Walter Keller, Sr., asks for damages in the sum of $3,345.83, the amount of expenses incurred in caring for the injuries received by his minor son.

[1] The question presented is the sufficiency of the evidence to establish the negligence of defendant, and thus sustain a verdict against defendant. In Newson v. Hawley, 205 Cal. 188-190, 270 P. 364, 365, it is said: "It is a settled rule of law regarding trials by jury that in a proper case the court has full power to direct the jury

to render a verdict. This power exists in favor of the defendant where there is no substantial evidence tending to prove all the controverted facts necessary to establish the plaintiff's case. It is not necessary that there should be an absence of conflict in the evidence. To deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one."

In order to determine this question, it becomes necessary to set forth the evidence rather fully.

The injuries to plaintiff (the Keller boy), which were serious in effect, were received as a result of a collision between his bicycle, which he was operating, and the car being driven by defendant, which was a 1929 Ford Pickup model. The accident took place at the intersection of U. S. Highway 99E, and what is known as "Kent Avenue." This is situated at a place called "Lomo" in Sutter County. Highway 99E runs due north and south, up to a point referred to in the evidence as "Lomo Curve." Proceeding north on this highway, and approximately three hundred to four hundred feet beyond this curve, an intersection is formed by the junction of Kent Avenue and Highway 99E. Kent Avenue cuts off from the highway in a northeasterly direction, forming a triangle between these two thoroughfares. A stop-sign is located on Kent Avenue, approximately fifty feet from the intersection, and about one hundred fifty feet further north, and on the same side of the avenue as the stop-sign, there is a grocery store.

Shortly before the accident, which took place at about 3:00 o'clock p. m. on February 25, 1939, the Keller boy and a friend, Sterli Epperson, who was fifteen years of age, were proceeding, on bicycles, south on Kent Avenue toward the intersection with Highway 99E. The Epperson boy was to the right hand side of the Keller boy, and the Keller boy, in position, was closer to the center of Kent Avenue. The testimony of Epperson, on the question as to whether the Keller boy was in front or behind him at the time of the collision, is contradictory, as well as his testimony bearing upon the question as to whether he saw the Keller boy from the time they left the grocery store up until the moment of impact between the bicycle and the car. Epperson testified, at one stage of the direct examination, and in answer to the question as to what direction the Keller boy was going, that: "It looked to me like he was trying to go across the highway." The evidence is not conclusive as to the position of the Keller boy's bicycle, at the time of impact, with relation to the stop-sign, although Epperson testified that he was just even with this stop-sign, or had gotten a short distance beyond it when he heard the noise of the collision. This witness testified that as he reached the stop-sign, he glanced up and saw the car (defendant's) making the turn into Kent Avenue. He stated that the car was on the paved portion, and on the right hand side of the road. At the point of impact, there is no question, and it is not disputed, that plaintiff was over on defendant's side of the highway. Subsequent to the collision, and before defendant's car had been moved in any manner, the evidence establishes the fact that at least the right front and rear wheels of defendant's car were off the pavement on his right side, resting upon the gravel or dirt shoulders of the highway.

The injuries to the Keller boy were of such serious consequence that as a result his memory was affected, and at the time of the trial, some fourteen months after the date of injury, he was unable to testify as to any of the facts concerning the accident. The loss of memory was apparently a result of having received a blow about the head which caused a severe concussion. He also received a severe injury to one of his legs, and injury to his eyesight.

Defendant was the only eyewitness who saw the collision between defendant's car and the bicycle operated by plaintiff. There were, however, a number of witnesses who arrived at the scene of the accident shortly after the collision. These witnesses, called by plaintiff, included H. C. Williams, a traffic officer, S. B. Castleman, the owner and operator of the grocery store located at the intersection in question, A. L. Chandler, a laborer, and Joseph Reheremann and Norbert Reheremann, brothers, who are engaged in farming. These two brothers were performing carpentry work, at the time of the accident, on a small building located near the grocery store.

The defendant, Markley, was called under section 2055 of the Code of Civil Procedure, and testified in answer to plaintiff's questions concerning the circumstances connected with the accident. The defendant stated that he was a farmer; had resided in Sutter County for thirty years; and that he was thoroughly familiar with the intersection which was the scene of the

accident, as he ordinarily turned onto Kent Avenue from Highway 99E in going to his ranch. Markley testified that just prior to the collision with plaintiff's bicycle, and before making a right hand turn into Kent Avenue, that he was traveling at approximately twenty-five miles per hour. He stated that before he reached the intersection, he saw the two boys on their bicycles on Kent Avenue, proceeding toward the intersection. He judged that they were one hundred or one hundred fifty feet away from him at that time, and that he was about twenty feet from the intersection. The boys, at this time, the defendant states, were riding alongside one another, four or five feet apart. The defendant stated that after he made the turn into Kent Avenue, he drove off of the concrete portion of the highway onto the dirt shoulder on his right hand side, as the plaintiff, who was about seventy feet away at this time, was riding his bicycle some five or six feet out from the opposite side of the road, toward the center of the highway, and that the road was quite narrow. The testimony of defendant, relating the circumstances just prior to the collision, is as follows:

"Q. When you saw him toward the center of the highway, did you blow your horn? A. No.

"Q. Did you ever, at any time, from the first minute you saw those boys on their bicycles, coming down the Avenue, ever blow your horn? A. No, sir.

"Q. Why not? A. It happened so quick. The boy run in front of the car, and I put on my brakes and tried to stop and wheel my car to the right.

"Q. The whole thing happened very quickly? A. Yes.

"Q. How fast were you going when you made the turn around the intersection? A. Between twenty and twenty-five.

"Q. How do you know you were going twenty or twenty-five miles an hour? A. I turned across 'Death Curve,' and had to slack up there to cross that, and I was going to turn into Kent Avenue, and had my car down so I could turn at Kent Avenue.

"Q. At the time you were making the curve there and saw that boy, as I asked you before, when he was close to the center of the highway there, did you then believe that you should pull to the left (right) or off onto the shoulder, or something was going to happen? A. I didn't know anything was going to happen, but I pulled off on the shoulder.

"Q. How far was the boy away from you when you first saw him before you hit him? A. I couldn't say that. One hundred or a hundred and fifty feet.

"Q. Did you ever see the boy after that? A. Yes.

"Q. When? A. Just before I hit him.

"Q. How far away from him were you before you hit him? A. Maybe fifteen feet; I couldn't say.

"Q. What did you do when you saw him fifteen feet away? A. I put on my brakes and wheeled my car to the right. That is all I could do."

The traffic officer, H. C. Williams, who testified for plaintiff, stated that at the time of the accident he was patrolling the highway in the vicinity, and that he arrived, by coincidence, at the scene of the collision within a very few minutes after its occurrence. The Keller boy had not yet been removed to the hospital. Mr. Williams testified that Kent Avenue was a paved highway, ten or fifteen feet in width, with shoulders composed of a mixture of dirt and gravel; that defendant's car was located with all four wheels off of the paved portion of Kent Avenue; and that the only skid marks from the car of defendant were two small skid marks approximately two feet long located back of the two wheels. This witness stated, in answer to the question as to whether there were any tracks going from the right hand side of Kent Avenue across to the position of defendant's car, that there were bicycle tracks, and he testified in the following language: "There were tracks from the bicycle that started on the edge of the pavement and circled right over on to the car. About in that position. These tracks were made by dust and dirt that is usually made when a rubber tire pulls off of the dirt onto a pavement. These bicycle tracks hit across the highway right in front of where the car was sitting. Q. How many tracks did you find? A. Just two. The front and rear wheels, and after the bicycle straightened up, there was just one."

Mr. Williams stated that at the time he saw the Keller boy, some few minutes after the accident, he was lying on a blanket, approximately four feet in front of defendant's car. He believed the boy had been moved prior to that time.

S. B. Castleman, the owner and operator of the grocery store located near the intersection and scene of the accident, testified that at the time of the collision he

was engaged in carpentry work on a building situated near the intersection; that he did not see the collision, but heard the crash and ran toward the scene of the accident; that plaintiff was lying ten or twelve feet in front of defendant's car, and that plaintiff's bicycle was under the axle and between the two front wheels of the car; that the right front wheel and right rear wheel of the car were off of the pavement on the grass shoulder of the highway; and that the left wheels of the car were a foot or so on the pavement.

A. L. Chandler, who arrived at the scene of the accident some seven minutes after the collision, gave substantially the same testimony in regard to the position of the defendant's car, the plaintiff's bicycle, and the position of plaintiff as he lay on the highway. He testified that defendant's car was approximately thirty feet from the intersection of Highway 99E.

Joseph Reheremann and Norbert Reheremann, who were working on the building with S. B. Castleman, both arrived at the scene of the accident at approximately the same time as Mr. Castleman. Their testimony as to the location of defendant's car, the bicycle, and the Keller boy, conforms substantially to the testimony given by the other witnesses. They all testified that the Keller boy lay some eight to ten or twelve feet in front of the car.

Walter Keller, Sr., the father of plaintiff, arrived at the place of the accident a few minutes after its occurrence, and he testified, as did the others, that the plaintiff was lying ten or twelve feet in front of defendant's car. He also testified that the ground was torn up between the place where the plaintiff lay upon the highway and the location of the car, and that there were marks which were similar in form and size to the pedals of the bicycle.

The questions presented in considering the motion for a directed verdict, were those of negligence on the part of defendant, and contributory negligence on the part of plaintiff. If, under the evidence, as a matter of law, the defendant was not guilty of negligence, or if as a matter of law, the plaintiff was guilty of contributory negligence, the action of the trial court in directing the verdict for defendant was perfectly proper. The question of contributory negligence on the part of plaintiff becomes immaterial if it be concluded that defendant, as a matter of law, is free from negligence.

[2] We are of the opinion, after a careful consideration of the evidence presented in the record before us, that not only is there a lack of evidence of sufficient substantiality in support of a verdict which might have been returned in favor of plaintiff, but that on the contrary, all the evidence indicates that defendant, at the time of the collision with plaintiff, was operating his automobile with extreme due care. Granting to plaintiff's evidence all the weight to which it is legally entitled, it is not reasonably possible to draw from that evidence any legitimate inference of negligence on the part of defendant in the operation of his automobile. The evidence indicates clearly that defendant was not driving his car at an unlawful rate of speed. There are two important physical facts disclosed by the evidence which conclusively indicate that the defendant was not traveling more than fifteen or twenty miles per hour, as he so testified, at the time of the collision. Those physical facts are: First, the defendant's car was brought to a stop a very short distance from the intersection, and completely over on the defendant's right hand side of the highway. In fact, the right front and rear wheels of the car were off on the shoulders. If defendant had been traveling, at an excessive rate of speed, there would have been the tendency, in the maneuvering of this right hand turn, to throw his car toward the center of Kent Avenue. At least his car would not have been brought to a stop far over on his right hand side, as was the case, so short a distance from the actual turn in the highway. Secondly, the skid marks from the tires of defendant's car were only two or two and one-half feet in length. This fact indicates that defendant's car was traveling at a very low rate of speed, and was quite completely under the control of its operator. There is no evidence in the record, nor was there any attempt to prove, that the brakes of defendant's car were faulty.

The testimony given by defendant, in explanation of the cause of the accident, and which we believe is fully supported by other evidence, including the testimony of the traffic officer, relating to the course of plaintiff's bicycle tracks, indicates that he was operating his car with necessary care in regard to the safety of plaintiff, and that he did all that could reasonably be required of a prudent man in attempting to avoid the collision.

The defendant stated that prior to making the turn onto Kent Avenue, he observed the two boys on their bicycles, one hundred to one hundred and fifty feet away, proceeding toward the intersection, and riding side by side on their own right side of the highway. There was no obstruction of Kent Avenue at this point on Highway 99E, and there is no reason to discredit defendant's testimony in this regard. The defendant then testified that when he was about seventy feet from the boys, he pulled off on the shoulder of the highway on his right hand side, because one of the boys (the Keller boy), was out five or six feet toward the center of the highway. The position of defendant's car and plaintiff's bicycle, immediately after the accident, together with the evidence of the bicycle tracks leading from the opposite side of Kent Avenue across the highway to the point of impact, is in support of defendant's testimony just related, that is, that he observed plaintiff some seventy feet away, riding his bicycle toward the center of the highway, and pulled his car off onto the right shoulder. The defendant's statement that the Keller boy, when approximately fifteen feet distant, suddenly turned directly in front of the car, is also consistent with the foregoing evidence pertaining to the physical facts.

It is true that during the examination of defendant, he gave testimony that might be construed to indicate that he did not constantly watch the boys on their bicycles after having observed them from the point on Highway 99E, some one hundred to one hundred fifty feet distant, and appellant would have us believe that defendant failed to observe them at all after having seen them from the distance of one hundred to one hundred fifty feet. This conclusion is based upon the following testimony:

"Q. How far was the boy away from you when you first saw him before you hit him? A. I couldn't say that. One hundred or a hundred and fifty feet.

"Q. Did you ever see the boy after that? A. Yes.

"Q. When? A. Just before I hit him.

"Q. How far away from him were you before you hit him? A. Maybe fifteen feet—I couldn't say."

It is to be remembered, however, that defendant had already testified that he saw the boys about seventy feet away after having observed them from a distance of one hundred to one hundred and fifty feet, and that it was at this time, that is, when they were seventy feet away, that he started to pull off onto the shoulder of the highway. In view of this testimony, and again referring to the position of defendant's car, as located after the accident, it is our opinion that it would not be fair or rational to deduce from the quoted testimony that defendant had failed to observe the plaintiff, after having first seen him, until just before the impact. If defendant had not observed plaintiff and his position on the highway, it is highly improbable that defendant's car would have been entirely off the highway onto the shoulder.

[3] It is our opinion that there is absolutely no evidence of any substantiality from which it might be concluded that defendant was guilty of negligence in the operation of his car at the time of the accident. The evidence fails to disclose that defendant was under a duty to use his horn, as required by section 671 of the Vehicle Code, St.1935, p. 223.

[4, 5] Negligence in a particular case is determined by application of the standard of the "ordinarily prudent or reasonable person." Fouch v. Werner, 99 Cal. App. 557, 279 P. 183. It is necessary, in order to conclude that an individual has been guilty of negligence, that there be present in the record some substantial evidence indicating that the individual has failed under the circumstances to conform to the duty of care required of the "ordinarily prudent or reasonable person." There is no evidence in the present case from which it might be concluded that defendant failed to act as an "ordinarily prudent or reasonable person."

Concluding, as we do, that as a matter of law, there is insufficient evidence in support of a determination of negligence on the part of defendant, it becomes unnecessary to discuss the question of contributory negligence on the part of plaintiff (the Keller boy). Contributory negligence and the consideration of the presumption that the Keller boy exercised reasonable and ordinary care for his own safety, are issues which were material to the disposition of this appeal, only in the event that there was sufficient evidence from which a jury might have found, as a question of fact, that defendant was guilty of negligence.

We believe we have sufficiently answered all material issues raised by this appeal.

The motion for a directed verdict in favor of defendant was properly granted, and the judgment entered pursuant thereto is hereby affirmed.



50 Cal.App.2d 92

BIAGGI v. PHILLIPS et al.

Civ. 2688.

District Court of Appeal, Fourth District, California.

Feb. 24, 1942.

1. Taxation ⇐658(1)

The purpose of notice before a sale of property for taxes is to give taxpayer an opportunity to pay taxes before title, by operation of law, passes from him.

2. Taxation ⇐679(5)

Under 1937 amendment to tax law providing that no sale of property "except property sold to the State for delinquent taxes in the year 1930, or at any time prior to 1930" shall be made in accordance with provisions of certain sections of Political Code after effective date of amendment and prior to the first day of February, 1939, the quoted language refers to the sale by operation of law mentioned in section 3771, and Legislature intended that any property sold to the state under that section in 1930, or prior thereto, even though deeded to the state under section 3785 after 1930, is subject to sale under section 3897. Pol.Code, §§ 3771, 3785, 3817d, 3897.

3. Evidence ⇐48

It is common knowledge that in the publication of every delinquent tax list there is a statement, as required by statute, that on a date fixed the property will, by operation of law, be sold to the state. Pol.Code, § 3767.

4. Taxation ⇐421(1), 630, 658(4)

The test to be applied in determining whether descriptions of land in assessment rolls, delinquent tax lists, addenda sale notice, and notice of sale were sufficient was whether descriptions were sufficient to identify the property, the question of sufficiency being a "question of fact" to be determined by the court from evidence. Pol.Code, §§ 3650, 3897.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

5. Taxation ⇐421(1), 630, 658(4)

Where there was a recorded map of territory in which land sold for taxes was located, and land could be easily identified in various steps of tax proceedings, and lots, blocks and sections were correctly stated in descriptions of land, and at least 20 notices containing description of land, as stated on assessment roll, were sent to owner prior to tax sale, the description of land in tax proceedings was sufficient to satisfy statute requiring the description to be sufficient to identify land. Pol.Code, § 3897.

6. Taxation ⇐658(3)

Where notice of sale of land for taxes stated that land was assessed to "Wm. A. Bradford, Jr.," and owner's correct name was "Wm. A. Radford, Jr.," the discrepancy in names was fatal, notwithstanding that owner received notice mailed to him. Pol. Code, § 3897.

7. Taxation ⇐614

It is a fixed "rule of property" in California that in proceedings to sell property for unpaid taxes, no requirement of statute can be disregarded and that parties who purchase property at tax sales acquire title to property purchased only if all proceedings for levy of taxes and sales are in strict conformity to requirements of statutes governing tax proceedings.

See Words and Phrases, Permanent Edition, for all other definitions of "Rule of Property".

8. Taxation ⇐614

Tax proceedings in California are "in invitum" and are strictly construed.

See Words and Phrases, Permanent Edition, for all other definitions of "In Invitum".

9. Taxation ⇐734(9)

Failure of the tax collector to correctly state in the notice of sale the name of person to whom land was assessed was an irregularity which rendered a tax sale of the land invalid and was fatal to title based upon a deed issued at tax sale. Pol.Code, § 3897.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Suit by William R. Biaggi against Ethel M. Phillips and others to quiet title to land, wherein defendant David F. Appling filed a cross-complaint. From a decree adjudging that defendant David F. Appling was the owner of the land, plaintiff appeals opposed by David F. Appling.

Reversed.

Wm. R. Biaggi, in pro. per, of San Jose, for appellant.

Iener W. Nielsen, Harold V. Thompson, and W. O. Watters, all of Fresno, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from a decree adjudging that defendant and respondent David F. Appling is the owner of three parcels of real property in Fresno County, described in the appellant's complaint and in respondent's cross-complaint, as follows:

"Lots 48, 56 and 66 in Block 8; Lots 95 to 98 inclusive, in Block 9, as said Lots and blocks are laid down and delineated upon the Map of the East Coalinga Oil Fields, Fresno County, California, being a subdivision of the Southwest quarter of Section 30, Township 19 South, Range 16 East, M. D. B. & M. Surveyed June 1919 by T. F. Harrold, C. E. Said map having been filed for record July 15, 1919 in Volume 8, pages 50 to 54 of Plats, in the office of the County Recorder of Fresno County, California."

It was stipulated at the trial that the appellant, by virtue of a deed from Wm. A. Radford, Jr., introduced in evidence by appellant, was the owner and holder of the record title subject to the validity of respondent's tax deed and of the tax proceedings leading up to the issuance of the same.

Respondent Appling claims title to the said three parcels of land by virtue of a tax deed executed and delivered to him on June 14, 1938, by L. V. Hatch, Tax Collector of Fresno County, pursuant to a tax sale held under the provisions of section 3897 of the Political Code.

The tax collector testified that on June 11, 1932, and in consideration of $1.63, a deed was executed conveying said three parcels to the State of California.

The property in question appears on the 1926 assessment roll as assessed to Wm. A. Radford, Jr., 1827 Prairie Avenue, Chicago, Ill., and described as "East Coalinga Oilfields; Lots 48, 56, 66 Blk 8, Sec. 30, Twp. 19 S., Range 16 E."

The property was originally marked on the assessment roll "Sold to the State" under section 3771 of the Political Code on June 26, 1927, because of nonpayment of taxes levied and assessed for the year 1926, amounting to $1.64. The delinquent tax list, as published in 1927, states the total amount of taxes, penalties and costs due and payable amounted to $1.64. In the Addenda Notice attached to the delinquent tax list published in 1932, the least acceptable bid or amount necessary to redeem the property prior to its being sold or deeded to the state is set forth as $1.63. In the Addenda Notice, as so published in 1932, the property is described as "East Coalinga Oil Fields, Lots 48, 56, 66 Block 8, Sec. 30, Twp. 19, Rg. 16." In the Notice of Sale published on May 9, 1938, the property is described as "East Coalinga Oilfields, Sec. 30, Twp. 19 S., Rg. 16 E., Lots 48, 56, 66 Block 8, assessed to *William A. Bradford, Jr.,* for the fiscal years 1926 to 1932, inclusive. Said property was sold to the State June 21, 1927, for delinquent taxes of 1926, Certificate of Sale No. 788. Deed No. 788 was issued to State of California June 30, 1932, and recorded in Vol. 1225, Page 360 of Official Records of Fresno County. All of the above lots and blocks being in East Coalinga Oilfields Subdivision in Section 30, Twp. 19, Rg. 16, M. D. B. & M., according to the map filed July 15, 1919 in Vol. 8, Pages 50 to 54 of Plats in the office of the Recorder of Fresno County."

A copy of said Notice of Sale was sent by registered mail to Wm. A. Radford, Jr., and was received by him, as were approximately twenty other notices mailed to him between the first sale of delinquency and the final sale.

The records in the various steps in the tax proceedings were introduced in evidence and will be referred to hereafter, so far as it is necessary to do so.

The court below found in favor of respondent and judgment was entered decreeing that respondent was the owner of said real property, and this appeal is from said judgment.

Appellant's first contention is that the sale of said property on June 2, 1938, was in violation of section 3817d of the Political Code, as amended in 1937, which section, so far as pertinent here, reads as follows: "Notwithstanding the provisions of section 3764 and 3771a of this code no sale

at auction to the public shall be made of unredeemed property in the years of 1937 or 1938 or in the month of January, 1939, but at the day and hour fixed in accordance with subdivision (2) of section 3764 of this code all property otherwise subject to sale to the public shall be deeded to the State as provided in section 3785 of this code. No sale of any property, except property sold to the State for delinquent taxes in the year 1930, or at any time prior to 1930 shall be made in accordance with the provisions of section 3897, 3897a and 3897b of this code after the effective date of this act and prior to the first day of February, 1939. Property sold to the State for delinquent taxes in the year 1930 or prior to 1930, and deeded to the State pursuant to section 3785 of this code, shall be subject to sale under the provisions of section 3897 of this code."

The section just quoted was a continuation of a series of so-called tax moratorium laws which began with the enactment of the original section 3817d at the 1933 session of the legislature, which laws were the result of the economic depression and which were enacted as urgency measures. In 1933, the legislature provided in said section that no sale at public auction should be made of unredeemed property in the years 1933 and 1934. At the special session of 1934 said section 3817d was amended to provide that no such sale should be made prior to July, 1936. In 1935, said section was amended to read practically the same as at present except as to dates, and it was provided therein that "No sale of any property, except property *sold to the State* for delinquent taxes in the year 1925, or at any time prior to 1925, shall be made in accordance with the provisions of section 3897 of this code after the effective date of this act and prior to the first day of January, 1938." (Italics ours.) At the 1937 session section 3817d was again amended, the principal change being to make the above-quoted clause read "No sale of any property, except property *sold to the State* for delinquent taxes in the year 1930, or at any time prior to 1930 shall be made in accordance with the provisions of section 3897, 3897a and 3897b of this code after the effective date of this act and prior to the first day of February, 1939." (Italics ours.)

Appellant contends that in the 1937 amendment to section 3817d the legislature intended that the tax moratorium should apply to all property sold and deeded to the state subsequent to 1930, and that no valid sale of said property could be held until after February 1, 1939.

Appellant argues that the language in section 3771 reading "shall by operation of law and the declaration of the tax collector, be *sold to the State,* and said tax collector shall make in appropriate columns on the delinquent list, opposite each parcel of land to be sold an entry, *'Sold to the State,'*" was not the real sale to the state and was not the sale referred to by the legislature in the language in section 3817d, *"sold to the State* for delinquent taxes." (Italics ours.) Citing Sawyer v. Berkeley Securities Co., 99 Cal.App. 545, 279 P. 217, and Ducey v. Dambacher, 27 Cal.App.2d 658, 81 P.2d 597.

[1] These cases, cited by appellant, do not aid us in arriving at what the legislature intended in enacting section 3817d. A case more in point is Kipp v. Billingham, 217 Cal. 527, at page 528, 20 P.2d 318, at page 319, where the court said: "The purpose of the notice is to give the taxpayer an opportunity to pay his taxes before the title, by operation of law, passes from him. Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 P. 936. While we use an expression denoting that he is divested of title, it is not literally true where the deed is not to be issued until after five years have elapsed. It is said in Santa Barbara County v. Savings & Loan Soc., 137 Cal. 463, 70 P. 457, 458: 'Such sale vests an equitable title in the state, and at the expiration of five years, if the property is not redeemed in the meantime, the deed of the tax collector to the state vests in it the legal title, and the controller may then direct the tax collector to sell at public auction to the highest bidder, at a sum not less than all the delinquent taxes, penalties, and interest.'"

[2,3] As we view the matter, it is quite clear to us that when the legislature used the language "except property sold to the State for delinquent taxes in the year 1930, or at any time prior to 1930," it referred to the sale by operation of law mentioned in section 3771. It is a matter of common knowledge that in the publication of every delinquent tax list there is a statement, as required by section 3767, that on a date fixed the property "will, by operation of law, be *sold to the state.*" (Italics ours.) To uphold appellant's contention we would

have to believe that the legislature, in 1937, intended to pass a law preventing the sale at public auction of land upon which taxes had not been paid since 1925, a period of twelve years. Had the legislature so intended, it could very easily have said so. The great majority of taxpayers understand that if they permit their taxes to become delinquent, the property assessed is *"sold to the State"* and we believe that the only reasonable construction of the statute here involved is that the legislature intended that any property sold to the state under section 3771 in 1930, or prior thereto, even though deeded to the state under section 3785 after 1930, was subject to sale under section 3897.

Appellant's second contention is that respondent's tax title is void "because the descriptions contained in the 1926 assessment roll, in the 1927 delinquent tax list, in the Addenda Sale Notice attached to the 1932 delinquent tax list, and in the Notice of Sale of May 9, 1938, given by the tax collector of Fresno County pursuant to section 3897 of the Political Code, are insufficient, invalid and void."

The property herein involved is described in the 1926 assessment roll as follows: "East Coalinga Oilfields, Lots 48, 56, 66, Blk. 8, sec. 30 Twp. 19 S. Range 16 East." In the 1927 delinquent tax list the property in question is described as: "East Coalinga Oil Fields, Lots 48, 56, and 66, Block 8."

In the Addenda Notice of Sale at public auction of property for delinquent taxes of 1926, attached to the 1932 delinquent tax list, the property is described as: "East Coalinga Oilfields, Lots 48, 56, 66 Block 8, Sec. 30, Twp. 19 S., Rg. 16 E."

In the Notice of Sale of property of the state given by the tax collector pursuant to section 3897, the property is described as "East Coalinga Oilfields, sec. 30, Twp. 19 S., Rg. 16 E., Lots 48, 56, 66, Block 8."

Appellant contends that all of the foregoing descriptions are uncertain and void, and cites numerous cases in support of his contention.

Section 3650 of the Political Code provides for the contents of the assessor's assessment book and states that it must show, among other things,: "Land, by township, range, section, or fractional section; and when such land is not a congressional division, or subdivision, by metes and bounds, *or other description sufficient to identify it.*" (Italics ours.)

Section 3897 of the Political Code requires that the Notice of Sale of real property thereunder shall contain "a description of the property to be sold, sufficient for identification."

[4] The true test to be applied in this case is to determine whether or not the various descriptions of the property are sufficient to identify the property. The question of sufficiency is a question of fact to be determined by the court from the evidence.

In Lummer v. Unruh, 25 Cal.App. 97, at page 104, 142 P. 914, at page 916, the court said: "Says Mr. Cooley in his work on Taxation: 'The designation of the land will be sufficient if it affords the owner a means of identification and does not positively mislead him, or is not calculated to mislead him.' To the same effect are the decisions of the Supreme Court of this state. See Best v. Wohlford, 144 Cal. [733] 736, 78 P. 293; San Francisco v. Pennie, 93 Cal. 465, 29 P. 66; [City and County of] of San Francisco v. Flood, 64 Cal. 504, 2 P. 264." See also, Numitor Gold Mining Co. v. Katzer, 83 Cal.App. 161, 256 P. 464; Best v. Wohlford, 144 Cal. 733, 736, 78 P. 293.

In the case at bar, plaintiff's complaint described the property as: "Lots 48, 56 and 66, in Block 8, Lots 95 to 98, inclusive, in Block 9, as said lots and blocks are laid down and delineated upon the Map of the East Coalinga Oil Fields, Fresno County, California, being a subdivision of the Southwest quarter of Section 30, Township 19, South, Range 16 east, M. D. B. & M. Surveyed June 1919 by T. F. Harrold, C. E. Said map having been filed for record July 15, 1919 in Volume 8, pages 50 to 54 of Plats, in the office of the County Recorder of Fresno County, California."

In the deed from Wm. A. Radford, Jr., to appellant, introduced in evidence by appellant, the property is described the same as in the complaint. The evidence thus shows that there was a recorded map of East Coalinga Oilfields and that the land could easily be identified in the various steps of the tax proceedings, as the lots and block and section were correctly stated. Furthermore, the evidence shows that at least twenty notices containing the description of the property, as stated on the assessment roll, were sent to Wm. A. Radford, Jr., prior to the tax sale in 1938.

[5] We believe that the record in this case is ample to satisfy the requirement of section 3897, and of the other sections, that the description of the property should be "sufficient to identify it."

The fourth contention urged by appellant is that the Notice of Sale of June 2, 1938, did not set forth the correct name of the taxpayer and that the tax sale and respondent's deed are, therefore, void.

Section 3897 provides that the Notice of Sale published and mailed shall "contain the name of the person to whom the property was assessed, on the county assessment roll for each year on which there may be delinquent taxes against said property."

The Notice of Sale pursuant to section 3897, here attacked, as published in the newspaper and as mailed to Wm. A. Radford, Jr., and received by him, stated that the property was assessed to *Wm. A. Bradford, Jr.*, for the fiscal years 1926 to 1932, inclusive.

In construing a similar requirement contained in section 3785, our supreme court, in the case of Henderson v. De Turk, 164 Cal. 296, at page 297, 128 P. 747, said:

"Defendant claims solely under a deed from the state based on a sale and alleged deed to the state on account of delinquent taxes. The deed to the state recited the name of the person assessed as 'E. W. Davies,' while the assessment was to 'E. W. Davis.'

"The law in force both at the time of the sale and the time of the execution of the deed provided that the deed to the state must recite, among other things, 'the name of the person assessed.' Section 3785, Pol.Code. This means, of course, the name of the person assessed *as it appears upon the assessment roll.* It has uniformly been held in this state that a tax deed which misrecites or omits to recite any one of the facts required by the statute to be recited has no effect at all as a conveyance, the theory being that it is competent for the Legislature to prescribe the form of instrument which, as the result of a proceeding in invitum can alone divest the citizen of his title, and that, where the statute prescribes the particular form of the tax deed, the form becomes substance, and must be strictly pursued, and it is not for the courts to inquire whether the required recitals are of material facts or otherwise. See Baird v. Monroe, 150 Cal. 560, 564, 89 P. 352, and cases there cited. The particular point here involved was decided in Grimm v. O'Connell, 54 Cal. 522, where the assessment was to 'Charles Grimm,' and the tax deed recited that the property was assessed to 'Charles Grimm and all owners or claimants known or unknown.' It was held, upon the theory above stated, that the deed was void because it failed to correctly recite the name of the person assessed. There are other decisions holding that any such deed is void when it misrecites or omits to recite any one of the facts required by statute to be recited therein, and there is no decision laying down a different rule. As is substantially said in respondent's petition for a rehearing, these decisions constitute a rule of property from which the court should not depart.

"The deed cannot be held valid by applying the rule of idem sonans, if we are to adhere to the ruling in Emeric v. Alvarado, 90 Cal. 444, 465, 27 P. 356. There the assessment was to 'Castero,' while the owner's name was 'Castro.' The court said: 'It is not a case to which the rule of idem sonans applies. Tax proceedings are in invitum, and, to be valid, must closely follow the statute, and idem sonans applies to cases of pleas of misnomer and issues of identity, where the question is whether the change of letters alters the sound—not to assessments and other cases of description, where the written name is material. "Different letters will make different names, though the sound be the same." The deed to Pollard described the land sold as having been assessed to "Castro," and does not purport to be made in pursuance of an assessment to "Castero."' While there is a diversity of opinion in other jurisdictions on this point, we think this ruling should be followed in this state." See, also, Bruschi v. Cooper, 30 Cal.App. 682, 159 P. 728, 734; Cooley on Taxation, vol. 3, p. 2801; Clayton v. Schultz, 22 Cal.App.2d 72, 70 P.2d 512.

[6] Respondent, in answer to appellant's argument, contents himself with the very brief statement that appellant has cited cases "which would purport to hold that a slight misspelling of the taxpayer's name in the notice of sale is fatally defective" and respondent cites the case of Bell v. Fee Title Co., 69 Cal.App. 437, 231 P. 598, where it is held that the fact that

the notice of sale contained the owner's name spelled Leonide Ducommun, while the deed showed the name to be spelled Leonide Ducommen did not render the tax sale void. Respondent asserts that this case "is to the effect that delinquent taxpayers cannot rely on such a trivial mistake to defeat the purpose of tax legislation," and respondent calls attention to the fact that the record shows that the tax owner received the notice of sale mailed to him. We do not believe that appellant's contention and authorities on this point can be brushed aside thus lightly. Respondent has cited no authority, and we have been unable to find any, holding that the fact that the tax owner received the notice mailed to him served to cure errors or omissions occurring in the published notice. It cannot reasonably be argued that Wm. A. Radford, Jr., and Wm. A. Bradford, Jr., are not entirely different names.

[7,8] It is clear from the authorities that it has become a fixed rule of property in California that in proceedings to sell property for unpaid taxes, no requirement of the statute can be disregarded, and that parties who purchase properties at tax sales acquire the title to the property purchased only if all the proceedings for the levy of taxes and the sale are in strict conformity to the requirements of the various statutes governing the same. Tax proceedings in California are in invitum and are strictly construed. Galbreath v. Dingley, 43 Cal.App.2d 330, 110 P.2d 697; Jordan v. Beale, 172 Cal. 226, 155 P. 990; Warden v. Ratterree, 215 Cal. 215, 9 P.2d 215, 86 A.L.R. 1204; Knoke v. Swan, 2 Cal.2d 630, 42 P.2d 1019, 97 A.L.R. 841.

[9] In view of the authorities hereinbefore referred to, we must conclude that the failure of the tax collector to correctly state in the notice of sale the name of the person to whom the property was assessed, was an omission and irregularity which rendered the tax sale invalid and is fatal to the title of respondent, which is based upon a deed issued at said sale.

Appellant raises several additional points, but because the point just discussed is fatal to the judgment it is not necessary to prolong this opinion unduly by discussing them.

The judgment is reversed.

MARKS and GRIFFIN, JJ., concurred.

50 Cal.App.2d 152

SMITH et al. v. YOUNG.

Civ. 13272.

District Court of Appeal, Second District, Division 3, California.

Feb. 25, 1942.

1. Judgment ⇐443(3)

Finding that defendants in an action in municipal court were prevented from making their defense because they "believed" that nothing further would be done by plaintiff, together with fact that two automobiles attached by plaintiff were released from the writ of attachment, even though coupled with production of receipt for amount sued for, was insufficient to establish "extrinsic fraud" of plaintiff precluding defendants from their day in court, so as to justify vacating the judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

2. Judgment ⇐435

A judgment vacating a municipal court judgment could not be sustained on ground of "mistake of fact", notwithstanding introduction in evidence of a receipt for amount recovered in the judgment, where the findings did not determine ultimate fact whether account had or had not been paid, since the receipt, although evidence tending to show payment, was not conclusive.

See Words and Phrases, Permanent Edition, for all other definitions of "Mistake of Fact".

3. Appeal and error ⇐1122(3)

Where several of the most important issues which were presented to trial court had not been made the subject of findings, and it appeared that a determination thereof would entail an extended hearing, District Court of Appeal would not indulge the powers granted it by constitution to make additional findings on appeal. Code Civ.Proc. § 956a, Const. art. 6, § 4¾.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Suit by George W. Smith and another against E. M. Young to vacate a municipal court judgment on ground of extrinsic fraud. From a judgment for plaintiffs, the defendant appeals.

Reversed.

Roy A. Linn, of Los Angeles, for appellant.

Hugh G. Maddox, of Long Beach, for respondents.

SCHAUER, Presiding Justice.

This is a suit in equity to vacate a judgment of the municipal court on the ground of extrinsic fraud. Issue was joined on the complaint and the answer. This appeal upon the judgment roll alone is well taken in that the findings do not support the judgment.

Paragraphs VI, VII, VIII, IX, and X of the complaint comprise allegations that the account sued upon in the municipal court action had been paid before the action was filed, that a receipt evidencing such payment had been given to plaintiff herein Geo. W. Smith (defendant therein), that when summons was served in such municipal court action the defendant Smith exhibited such receipt to the attorney for the plaintiff in that action, told him that his (Smith's) attorney was out of the city and was told by such attorney for the plaintiff that "a mistake had been made * * * that it would not be necessary for him to consult his attorney, as he intended doing nothing further in the said action; and that at said time and place [such attorney for the municipal court plaintiff] executed and delivered to the plaintiff * * * a release of the property theretofore attached in said action; and * * * then and there represented * * * that if the said Geo. W. Smith was willing to drop the matter that he would also. * * * That the aforesaid representations [made by the attorney] were untrue, and were made in order to influence the plaintiff to prevent him from interposing his defense to said action. * * * That the plaintiffs [defendants therein] relied upon said representations * * * in that they failed to file their answers in said action."

The answer in this action denies each and all of the recited allegations of the complaint, but the trial court made no finding of fact on any of such issues except that it found that plaintiff Geo. W. Smith did go to the office of the attorney for the plaintiff in the municipal court action, did exhibit a receipt in the form of a statement for the account endorsed "paid in full," and that a release of attachment of two automobiles was given to Mr. Smith by the attorney. The trial court also found that plaintiffs here "were prevented from filing an answer and offering a defense to said Municipal Court action by reason of the fact that the defendants George W. Smith and Mary E. B. Smith believed that when the cars were released from the writ of attachment * * * that nothing further would be done in said Municipal Court action."

[1, 2] The issues upon which no findings were made were material and the mere finding that plaintiffs "were prevented" from making their defense because they *"believed"* that nothing further would be done is insufficient to support the judgment on the theory of fraud in that it does not establish fraud, extrinsic or otherwise, in the inducement of such belief. The fact that a release of attachment was given, even though coupled with production of the receipt, certainly does not, in the absence of further facts, even tend to establish an effort to preclude plaintiffs from their day in court, to mislead them, or otherwise to show fraud. (For a definition of extrinsic fraud see Godfrey v. Godfrey, 1939, 30 Cal.App.2d 370, 379, 86 P.2d 357, and cases there cited.) Likewise the judgment cannot be sustained on the ground of mistake of fact because, aside from the fact that the complaint pleads fraud, not mistake, the findings do not determine the ultimate fact whether the account had or had not been paid; the receipt was evidence tending to show payment but was not conclusive. In the absence of a finding that the account had been paid the conclusion that it would be unconscionable to enforce the municipal court judgment is untenable. See Wattson v. Dillon, 1936, 6 Cal.2d 33, 40, 56 P.2d 220.

[3] As several of the most important issues which were presented to the trial court have not been the subject of findings and as the determination thereof would apparently entail an extended hearing, this is not a proper case for us to indulge the powers granted by section 4¾ of article VI of the Constitution. Code Civ.Proc., § 956a. See Tupman v. Haberkern, 1929, 208 Cal. 256, 269, 280 P. 970.

The judgment is reversed.

SHINN, J., and PARKER, WOOD, J., concurred.

50 Cal.App.2d 111

IDEN et al. v. ZEEMAN CLOTHING CO., Inc., et al.

Civ. 2914.

District Court of Appeal, Fourth District, California.

Feb. 24, 1942.

Hearing Denied April 23, 1942.

1. Negligence ⇐136(27)

Whether forgetfulness of a known danger shows want of ordinary care so as to constitute negligence is a "question of fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

2. Negligence ⇐135

In action against proprietor of store and owner of building in which it was operated for injuries sustained by customer while leaving ladies' rest room, which opened from a hallway through center of the building, finding that customer, who had without difficulty entered rest room, the floor of which was 8¼ inches above the hallway floor, was guilty of negligence in leaving which was the proximate cause of fall to hallway floor and resulting injuries, was supported by substantial evidence.

3. Appeal and error ⇐1010(1)

An appellate court will not disturb trial court's finding of fact, if supported by substantial evidence in the record.

4. Negligence ⇐134(5)

In action against proprietor of store and owner of building in which it was operated for injuries sustained by customer while leaving ladies' rest room, which opened from a hallway through the center of building, finding that premises were not negligently maintained was supported by substantial evidence.

Appeal from Superior Court, San Bernardino County; Frank A. Leonard, Judge.

Action by Josephine Lewis Iden and W. A. Iden against Zeeman Clothing Company, Incorporated, and others for personal injuries sustained by first named plaintiff as the result of a fall in a store. From a judgment in favor of defendants, plaintiffs appeal. Upon the death of W. A. Iden pending the appeal, Josephine Lewis Iden was appointed special administratrix of his estate and was substituted in the action in such capacity.

Judgment affirmed.

N. C. Peters and R. Bruce Findlay, both of San Bernardino, for appellants.

Victor Hyatt, Donald E. Ruppe, and C. W. Bowers, all of Los Angeles, for respondent Zeeman Clothing Co., Inc.

Joe Crider, Jr., Clarence B. Runkle, and Stephen J. Grogan, all of Los Angeles, for respondent M. J. Connell, Inc.

WEST, Justice pro tem.

The appeal herein was taken by plaintiffs from a judgment rendered in favor of the defendants. Following the institution of the appeal, the plaintiff and appellant, W. A. Iden, died, and Josephine Lewis Iden was appointed special administratrix of his estate, and was substituted in the action in such capacity. Plaintiffs instituted the action to recover damages for personal injuries sustained by plaintiff Josephine Lewis Iden, which were alleged to have been caused by negligence on the part of the defendants. Defendants by their answer denied that they were guilty of any negligence which had caused injury or damage to plaintiffs, and as an affirmative defense alleged that any injuries sustained by plaintiffs had been contributed to, directly and proximately by negligence upon the part of the plaintiff Josephine Lewis Iden.

Respondent M. J. Connell, Inc., was at the time of the accident the owner of a business building in the city of Los Angeles. Respondent Zeeman Clothing Company, Inc., was a tenant of the building and operated a retail clothing store on the fourth floor thereof. On February 6, 1939, plaintiffs, who were husband and wife, visited the Zeeman store for the purpose of purchasing merchandise. While in the Zeeman premises, Mrs. Iden had occasion to go to the ladies' rest room, which opened from a hallway proceeding through the center of the building. She procured a key, proceeded to the door of the rest room and unlocked the door. The floor of the rest room was 8¼ inches above the floor of the adjacent hallway, and the step was negotiated by a single rise, there being no intermediate step or landing between the two floor levels. The door from the hall into the rest room opened inward, the edge of the step being almost flush with the north wall of the hallway. Directly across the hall from the rest room door was located the salesroom of a business concern which had frosted glass windows in the partition facing the hall and through

which some light entered the hall. Other illumination was afforded from a skylight located several feet along the hallway from the rest room door. The door also had a panel of frosted glass. Several light fixtures hung from the ceiling along the hallway, each fixture containing a 60 watt lamp. The cement floor and baseboard of the hall were gray in color. The plastered walls of the hall were cream or tan and the floor of the rest room itself was of neutral color. At the time of the accident the light in the rest room was not lighted, and whether or not the ceiling lamps in the hallway were turned on was disputed. The sufficiency of illumination in the hall generally was also a point of contention.

Mrs. Iden proceeded safely into the rest room after unlocking the door, and stepping up to the elevated floor of the rest room from the hallway. Shortly thereafter, when she was ready to leave the rest room, she opened the door and fell into the hallway, sustaining serious injuries.

The case was tried before the court without a jury. Upon the conclusion of the trial, the court made findings that defendants were not guilty of negligence in the maintenance of the premises; that plaintiffs were guilty of negligence in that Mrs. Iden negligently failed to look where she was walking or stepping at the time that she fell, and judgment was duly entered in favor of the defendants.

Appellants contend that the findings of the trial court were not supported by the evidence. They contend that the premises where the accident took place were being maintained at the time of the accident in violation of the provisions of the municipal safety ordinance of the city of Los Angeles, and therefore defendants were guilty of negligence as a matter of law. They further urged that the evidence disclosed a failure on the part of respondents to provide sufficient illumination in the hallway adjacent to the door of the rest room, and finally, while conceding that appellant Josephine Lewis Iden momentarily forgot that it was necessary to step down from the rest room into the hall, that such momentary forgetfulness upon her part did not constitute negligence under the facts of the case.

Referring first to the last contention, appellants call attention to the case of Giraudi v. Electric Improvement Company, 107 Cal. 120, 40 P. 108, 110, 28 L.R.A. 596, 48 Am. St.Rep. 114, where the rule is stated as follows: "It is said that, if one was aware of a fact which should have put him upon his guard, he cannot rebut the presumption of contributory negligence by showing that he momentarily forgot it. This is true as a general proposition, but, like all other rules upon this subject, it must have a reasonable construction. To forget is not negligence, unless it shows the want of ordinary care, and it is a question for the jury."

[1] The purport of the foregoing excerpt is that forgetfulness of a known danger may or may not show want of ordinary care, and whether it does or not is a question of fact. The following cases enunciate the same rule: Roseberry v. Edward F. Niehaus & Co., 166 Cal. 481, 137 P. 232; Oles v. Kahn Bros., 81 Cal.App. 76, 253 P. 158; Smith v. Southern Pacific Co., 201 Cal. 57, 255 P. 500.

[2, 3] The trial court found that appellants' conduct amounted to negligence which was the proximate cause of her fall and resulting injuries. In our opinion there was substantial evidence to support such finding. It is elementary that where there is evidence in the record giving substantial support to the finding under attack, an appellate court will not disturb such finding.

[4] In view of what has just been said, there is no occasion to dwell on the contention of appellants that there was inadequate illumination in the hallway at the point where the fall took place. It is sufficient to observe that appellant admitted that she had no difficulty in finding her way to the door of the rest room, finding the keyhole and inserting the key therein, nor was there any evidence that she had any difficulty in determining that it was necessary for her to step up from the hallway to the rest room level. From all the facts the court found that the premises were not negligently maintained, and we are of the opinion that there was substantial evidence to support the finding.

In view of the foregoing, it is unnecessary to consider the application of the city ordinance of the city of Los Angeles respecting the maintenance of office buildings.

The judgment is affirmed.

BARNARD, P. J., and MARKS, J., concurred.

MOORE et al. v. CALIFORNIA OREGON POWER CO.

Civ. 6648.

District Court of Appeal, Third District, California.

Feb. 25, 1942.

Hearing Granted April 23, 1942.

1. Appeal and error ⇐934(1)

On appeal from judgment for defendant notwithstanding verdict for plaintiffs, if there was evidence of sufficient substantiality to support the verdict in favor of plaintiffs it must be upheld, otherwise the judgment appealed from must stand.

2. Waters and water courses ⇐137, 138

The right asserted by upper riparian proprietor to detain, regulate, and artificially control the entire flow of a river in operation of power facilities was an "appropriative right", constituted an actionable invasion of the riparian rights of the lower owner, and notwithstanding the waters would be ultimately returned to stream bed below the appropriator's plant and above lower proprietor's diversion ditch, and continued exercise of such right for five years established it by prescription.

See Words and Phrases, Permanent Edition, for all other definitions of "Appropriative Right".

3. Waters and water courses, 151, 152(3)

A riparian owner may not enjoin the use by an appropriator of excess waters, but he may still lose his rights unless he acts to have them declared before an adverse use ripens into a right. Const. art. 14, § 3.

Appeal from Superior Court, Siskiyou County; Arthur Coats, Judge Assigned.

Action by C. F. Moore and another against the California Oregon Power Company for damages for an alleged violation of riparian rights. From a judgment for defendant notwithstanding verdict for $7,500 for plaintiffs, the plaintiffs appeal.

Judgment affirmed.

Hearing granted; CARTER, J., not participating.

Carter, Barrett & Carlton, of Redding, for appellants.

Brobeck, Phleger & Harrison and Jas. S. Moore, all of San Francisco, for respondent.

COMSTOCK, Justice pro tem.

Plaintiffs by this action originally sought both an injunction and damages for an alleged violation of riparian rights. The prayer for an injunction was abandoned in view of the public use to which the defendant puts the water of the river in question and the issues as to damages were submitted to a jury which returned a verdict in plaintiffs' favor for $7,500. Defendant, having moved for a nonsuit and for a directed verdict and these motions having been denied, moved for a judgment notwithstanding the verdict. This motion was granted and judgment was entered in favor of the defendant. Plaintiffs have appealed from the judgment.

The controversy arises from the acts of the defendant public utility corporation in the operation of a power plant on the Klamath River in which said defendant claims the right to impound, regulate and control the flow of the river for the generation of electric energy for sale to the public.

The Klamath River has its principal source in Klamath Lake in Oregon, which is fed by the Sprague and Williamson Rivers. In their natural state the rivers of this region are heavily influenced by winter rains and melting snows and the natural summer flow is much lower than in the winter and spring. Defendant maintains a storage dam at the outlet of Upper Klamath Lake, known as the Link River Dam, which was completed in 1921. This dam makes of Upper Klamath Lake a seasonal storage reservoir, accumulating the heavy run-off of the fall, winter and spring for release during the dry months of the summer. The United States Government exercises certain superior rights of control over the amount of water permitted to be drawn from the lake by the defendant, to protect irrigation requirements of government projects dependent on the lake for their water. Heavy irrigation requirements occur from about May to September of each year, although the demand for water may arise earlier and be subject to change in exceptionally dry seasons.

Among other of its works, defendant operates a dam and generating plant at a place known as Copco in Siskiyou County, California, some miles above plaintiffs' lands. This project was initiated about 1909 or 1911 by defendant's predecessors. Notices of appropriation were posted and recorded in each of those years. A dam

was built across the river to a height of 113 feet and the first unit of the power plant known as Copco No. 1 was installed in 1917 and placed in operation in 1918. In 1922 the dam was raised to a height of 126 feet and an additional unit was installed, making two units at Copco No. 1 with a total capacity of 25,000 kilowatts. The plant here has existed and been in operation without change since 1922. In 1925 a plant known as Copco No. 2 was installed downstream from Copco No. 1 for the purpose of utilizing the water after it passes through the No. 1 plant. Copco No. 2 does not detain or impound water or otherwise affect the flow of the river.

The reservoir at the Copco plant has a total storage capacity of about 80,000 acre feet. The plant is of the high-head type. To obtain the necessary head for efficient operation of the generators, the upper five feet of water only is normally used, the outlets being located near the top of the dam and the upper 5,000 feet being drawn upon.

A large part of northern California is supplied with electric energy through defendant's facilities. When the works at Copco were constructed it was a widely-publicised project and a matter of common notoriety throughout the locality.

Upon the completion of the dam in 1917 the entire flow of the river was cut off for a period of about three weeks while the reservoir was being filled. Subsequently on numerous occasions in further construction, and in repair and maintenance the river has been completely shut off. In the production of energy, defendant's method of operation has continuously been to impound and release water according to the extent of the demands of its customers upon its facilities.

Plaintiffs originally took possession of the property described in the complaint in 1927 under a contract of sale. A deed was delivered to them after the commencement of this action in 1934, and in 1938, before the trial, they disposed of the property. The entire property is a ranch of about 400 acres, of which about 240 acres are riparian to the Klamath River. Prior to 1931 plaintiffs, during the period of their occupancy, had been using the water for beneficial purposes, irrigating about 70 acres of land and growing alfalfa and a garden thereon. They took water from the river at a point about 1½ miles upstream from their land, by means of a ditch, which is about 4 feet wide and 2½ feet deep and of uniform size from its head to plaintiffs' land. Copco No. 1 dam is located about 8½ miles upstream from the head of plaintiffs' ditch.

The complaint points exclusively to defendant's Copco plant as the objectionable operation. Certain pertinent parts of the complaint are to the following effect: That said defendant, among other of its works, owns, operates and maintains at Copco, California, a hydro-electric power and generating plant on the Klamath River some miles northerly from plaintiffs' land and at that place operates and maintains its power-generating plant and has there constructed and erected and maintains a concrete dam across the natural channel and course of said Klamath River for the purpose of impounding and confining the waters of said river to be used and employed in the generation and manufacture of electrical power and current; that by means of said dam the defendant can and does, for the purposes aforesaid, regulate and control the natural flow of the waters of said river and more particularly during the irrigating season thereof which extends from the month of May to the following September or later, depending upon seasonal conditions; that during said irrigating season the waters and the natural flow of said river is lower than at other seasons of the year; that by reason of the impounding and confining of the waters of said stream and the regulation and control thereof, the said defendant by its acts frequently reduces the flow of said stream to a minimum during said irrigating season and thereby and by reason thereof deprives the plaintiffs from diverting any of the waters of said river through their ditches for the purpose of irrigating said land; that the impounding and confinement and such harnessing, regulation and control of the natural flow of the waters of said stream is and ever has been unreasonable and in violation of plaintiffs' natural rights to the natural flow of the waters of said stream; that as riparian owners of said tract of land the plaintiffs have and of right ought to have the free, natural and unobstructed flow of the waters of said river upon and adjoining their premises; that the climate at the location of said lands is very dry and the annual rainfall is very slight and said lands unless irrigated otherwise than by natural rainfall are unfit for cultivation and pasturage; that the

soil of said land is fertile and by irrigation can be rendered very productive; that during the fall, winter and spring months of each year there is a large increase in the volume of water flowing down the Klamath River other than that which ordinarily flows therein during other portions of the year; that the increased flow of water which comes down said river at such times has, from time immemorial, except as the waters of said river have been wrongfully diverted by defendant, caused said river to overflow its banks and to cover with such overflow an extended area of said land; that the waters causing and constituting such overflow have each year brought down from the mountains and valleys, through which said river flows, quantities of material which it has by said overflow deposited on said land; that the material so brought down by the floods to said land has fertilized and enriched said lands and has caused the said lands annually to yield increased crops of grass and cereals and has largely increased the value of said lands; that such annual overflow and flooding of said lands has also wet and irrigated said lands so that they would without further irrigation produce and have produced large and valuable crops of grass and cereals and do maintain and have maintained abundant pasturage and feed for stock; that without such flood and overflow said lands unless otherwise artificially irrigated would have produced little or no grass, feed or other crops; that the increase in the volume of water so flowing down said river causes a greatly increased percolation of said waters to the bank of said river into and through all of said lands belonging to plaintiffs and below the surface or soil thereof and has thereby so irrigated said lands that they would without further irrigation produce and have produced large and valuable crops of grass, cereals and pasturage which would not otherwise have been produced on said lands; that the plaintiffs, their grantors and predecessors in interest under their rights as riparian proprietors in said Klamath River and by virtue of their ownership of said lands bordering on the channel of said river have for more than twenty years last past used and are now using the waters of said river, except as such use has been wrongfully interfered with by said defendants as hereinabove alleged for watering of stock, domestic and agricultural purposes for which an owner of land bordering on a stream has a right to use the waters thereof; that any rights of the defendant to the waters of said stream are subsequent to the rights of plaintiffs and their predecessors in interest as riparian owners to the waters of said river, and that the said power plant and dam were built and constructed by defendant long after plaintiffs' said premises were brought under cultivation and irrigated by the waters of said river by plaintiffs and their predecessors in interest; that the only source of water which plaintiffs have for the irrigation of their lands is from the aforesaid Klamath River to which plaintiffs' said tract of land is appurtenant and riparian; that for many years last past the plaintiffs have been unable to profitably cultivate and irrigate their said lands by reason of the confinement and control of the waters of the said Klamath River by said defendant which resulted in a deprivation to plaintiffs of said waters for irrigation purposes and in denial of plaintiffs' said rights as riparian owners; that the same has greatly damaged plaintiffs and has rendered their said lands worthless for agricultural purposes for which the same are principally valuable and to which purpose they have been devoted since on or prior to the year 1877; that by reason of the premises and the acts of the defendant the said lands have been rendered dry and sterile and that the value thereof has been greatly and irreparably reduced in this, that with water available for the irrigation thereof for the raising of crops of hay and grain and the furnishing of pasturage the value of the same is at least six times greater than the value of the lands deprived of their riparian water rights and of the water for irrigation thereof; that by reason of the manipulation of the waters of said Klamath River by said defendant the plaintiffs are being deprived and will be deprived of the natural fertilization of their said lands by the flood waters of said Klamath River and the natural irrigation of said lands accomplished by the natural flow of the waters of said Klamath River and of the natural irrigation of said lands resulting from the seepage and percolation of said waters through the bank of said river into and through said lands below the surface of the soil thereof which would be the natural course without interference by defendant; that in case the defendant continues to impound, confine, harness, regulate, control and manipulate the waters of said Klamath River plaintiffs will be deprived of their rights to have the natural flow of the

waters of said Klamath River through, over, across, by, upon and past their said riparian lands and will be deprived of the natural irrigation of their said lands by said water and by reason thereof plaintiffs will suffer great and irreparable damage and injury.

[1] It appears from the briefs and from the record that the principal and probably the sole ground upon which the lower court granted the motion and rendered its judgment, notwithstanding the verdict, is that the evidence shows without substantial conflict that the defendant obtained and owns a prescriptive right to impound, detain, regulate and control the entire flow of the river, if necessary, in operating its plant for the purpose of generating electric energy for sale to the public in accordance with such demands as its customers may make upon its facilities, which right is paramount to plaintiffs' rights as lower riparian owners. This defense was properly pleaded by the defendant. On settled principles, if there was evidence of sufficient substantiality to support the verdict in favor of the plaintiffs, it must be upheld; otherwise the judgment appealed from must stand.

There is no controversy between the parties in respect to the period of limitation of actions which applies, the plaintiffs asserting and the defendant admitting that the superior right claimed by it depends upon its having taken the water for a continuous period of five years under conditions sufficient to fulfill all of the requirements of title by prescription. Defendant's claim is that the use ripened into an adverse right in 1927, its control of the river having been exercised continuously, adversely and under a claim of right since 1922.

Appellants admit that they have lost the right to the nighttime, Sunday and holiday use of the water, but contend that until 1931 there was no invasion of their right to the daytime use of the water in sufficient quantity to meet their needs and that their cause of action did not arise until that year; that having brought their action in 1933 they are in time. Their position in this respect is summed up in the following statement quoted from their brief:

"In the first place, the evidence establishes beyond quibble that, although defendant constructed all of its dams but one prior to five years before the commencement of this action, there was an ample supply of water flowing in the river to meet plaintiffs' needs before 1931, but after 1931 there has been no water available to plaintiffs. The injury to plaintiffs or the taking of the property occurred in 1931, and plaintiffs, not having any cause of action until the taking or the injury, their cause of action did not accrue until 1931; and they commenced their action in 1933."

This is a wide departure from the allegations in the complaint, heretofore referred to, wherein the substance and effect of plaintiffs' charge was that the invasion of their rights consisted in the facts that defendant had constructed and was maintaining at Copco a dam and hydro-electric generating plant whereby it could and did, for the purpose of generation and manufacture of electrical power and current, impound, confine, regulate and control the waters of the river, both winter and summer, in violation of plaintiffs' natural rights to the free, natural and unobstructed flow thereof, as they and their predecessors in interest had enjoyed and used them for more than twenty years last past, except as wrongfully interfered with by defendants, for watering of stock and domestic and agricultural purposes. But passing any consideration of the admissions of the pleading as to the nature and character of the defendant's claim and use of the water, we shall examine appellants' contentions as to the effect of the evidence apart from the admissions and the application of the law thereto.

[2] The gist of appellants' claim is that since they personally were accustomed to and desired only to do their irrigating during certain times of the day when between 1927 and 1931 they had found sufficient water flowing in the river to satisfy this need, they were not injured until there was in 1931 an actual, physical interruption of this limited time and method of use. The argument proceeds upon the general principle that in order to establish a right by prescription, the acts by which it is sought to establish it must operate as an invasion of the right of the party against whom it is set up. The principle is well enough established, but the facts in the case at bar are such that the rule aids the respondent rather than appellants. Here the controversy is between a lower owner of riparian lands who did not possess the lands until long after the acts of the defendant in

impounding and controlling the flow of the entire stream commenced, and an upper appropriator adversely claiming the right to harness and regulate the entire flow at will for the production and sale of power and to engage extensively in a large and permanent public enterprise. It is not a dispute between riparian owners as such. Whether there has been an invasion of rights giving rise to a cause of action must depend upon the nature, character and extent of the use and adverse rights asserted. The evidence shows, without contradiction, that since 1922 when the Copco plant was put in operation the right claimed and the use made by the defendant was to detain, regulate and artificially control the entire flow of the river as was expedient in the operation of its existing facilities for the production of power for sale to the public as a public utility serving a large territory to the extent of the demands upon it, including the myriad of acts inherent in the nature of such an operation. The assertion of such a right and the carrying on of such an enterprise is an invasion of the rights of private lower riparian owners from its inception. Taking into consideration the nature of the country, the stream and the climate, notwithstanding the waters would be ultimately all returned to the stream bed below defendant's plant and above plaintiffs' diversion ditch, the very nature of the undertaking is such that the river would not flow as it was wont to do in a state of nature. As was said in Herminghaus v. Southern California Edison Co., 200 Cal. 81, at page 110, 252 P. 607 at page 619: "* * * as to said waters as a whole and to the extent of their retention in said reservoirs, their ultimate return to the river would depend, not at all upon the claims and asserted rights of lower riparian owners to the usual, natural, and ordinary flow of said waters, but altogether upon the will and convenience of the defendants in their proposed utilization of said waters for power production."

Passing upon one of the claims of the defendants in that case that their right was solely a riparian one and distinguishing those cases which hold that riparian owners as such have a right to use waters for the production of power under certain circumstances and those which deal with a mere temporary detention of water by dams during periods of scant flow, the court said, 200 Cal. at page 111, 252 P. at page 619: "Such cases have no bearing upon such an extensive, prolonged, and indefinite storage, withdrawal, and sequestration of the waters which form the usual and ordinary flow of such a stream as the San Joaquin river to the inevitable detriment of not one but all of the lower riparian owners and users of such waters."

We are convinced that the nature of the right asserted and the use made of the waters of the Klamath River by the defendant here is of the same kind as was involved in the Herminghaus case and that it is well established that such a use is an appropriative one and constitutes an actionable invasion of the riparian rights of the lower owner in a case of the sort here presented. Seneca Consol. Gold Mines Co. v. Great Western Power Co., 209 Cal. 206, 287 P. 93, 70 A.L.R. 210; Colorado Power Co. v. Pacific Gas & Electric Co., 218 Cal. 559, 24 P.2d 495.

Appellants argue very earnestly that the case of City of San Diego v. Cuyamaca Water Co., 209 Cal. 105, 287 P. 475, supports their position. Also cited are Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 P. 623; Faulkner v. Rondoni, 104 Cal. 140, 37 P. 883; Pabst v. Finmand, 190 Cal. 124, 211 P. 11; Scott v. Fruit Growers' Supply Co., 202 Cal. 47, 258 P. 1095, and certain cases from other jurisdictions. We do not find these cases in point. City of San Diego v. Cuyamaca Water Co., involved certain rights which were governmental in character. Among other things which distinguish it from the case at bar is the principle there involved that no prescriptive right may be gained by adverse use against a governmental body. The other California cases involved the relative rights of riparian owners. Pabst v. Finmand, supra [190 Cal. 124, 211 P. 14], expressly recognizes the doctrine applicable here in the following language: "As to a nonriparian owner the riparian owner is under no duty to share the waters * * * and the slightest use by such nonriparian owner diminishes to some extent the flow of the stream. Obviously, there is no question of reasonable use in the sense in which that term is applied to the rights of respective riparian owners, since a riparian owner, as against a nonriparian owner, is entitled to the full flow of the stream without the slightest diminution. The initial step in the diversion of the water by the nonriparian owner is therefore an invasion of the right of the lower riparian owner,

and every subsequent diversion is a further invasion of that right."

It is unnecessary to specifically analyze the other cases mentioned.

[3] It is asserted by appellants that since under the 1928 amendment to section 3, article XIV of the Constitution, and cases construing the effect thereof, they had not right to divert any more water than could be put to present beneficial uses on their property, they had no cause of action until they were deprived of water for which they had and were making an actual present beneficial use, which they say did not occur until 1931. The contention is not sound. While the riparian owner may not enjoin the use by an appropriator of excess waters, he may still lose his rights unless he acts to have them declared before an adverse use ripens into a right. In Peabody v. City of Vallejo, 2 Cal.2d 351, at page 374, 40 P.2d 486, at page 494 the court said: "When there is no substantial infringement of the right, that is, when there is no material diminution of the supply by reason of the exercise of the subsequent right, the owner is entitled to a judgment declaring his preferential and paramount right and enjoining the assertion of an adverse use which might otherwise ripen into a prescriptive right. * * * If the exercise of the appropriative right cause a substantial diminution of the supply the owner is entitled to compensation for the resulting damage to his lands. But the technical infringement of the right is not actionable * * * except to establish priority." See, also, Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 45 P.2d 972.

Great reliance is placed by appellants upon the principle that a seasonal or periodical use cannot afford a basis for a prescriptive right to take water continuously, as applied in Northern California Power Co. v. Flood, 186 Cal. 301, 199 P. 315, and Bazet v. Nugget Bar Placers, Inc., 211 Cal. 607, 296 P. 616. The rule referred to has no application here. The distinction is that in the case of the diversion of measured quantities of water for irrigation or mining uses at fixed and determinable intervals, there is no invasion or threatened invasion of the rights of lower riparian owners to quantities beyond those used nor of a use at other periods of time than those appropriated, whereas in such an extensive, prolonged and indefinite withdrawal of waters at all seasons from their accustomed course and flow as is here involved, for nonriparian use, there is inherently present from the time of the initiation of such a claim and use not only the actual harnessing, regulation and control of the entire stream at all times, but a continuing threat to do so, dependent only upon the will of the appropriator and the demands of the public upon the facilities of the utility for the production of so much power as they may require for all of their uses. Naturally and inevitably in such an operation, if the demand for power increase, larger amounts of water must be released from storage if required, followed by periods of accumulation sufficient to build up the supply again and if there be seasons of scant flow it must occur that there are corresponding periods when no water may spill over the dam and all that may flow on down in the natural channel is that which is passed through the generating machinery at the will of the operator. That water reached appellants' ditch during the period of their possession and ownership prior to the shortage of 1931 was but an incident which in no way limited the broad nature and character of use and control claimed and exercised by defendant from the time of completion of its Copco dam to its present height or imposed upon it any duty or obligation to supply appellants' needs.

We have not overlooked appellants' contention that this appeal involves merely a case of conflicting evidence. This contention might have been sound had the case depended upon whether the quantity of water reaching appellants' ditch was regular or irregular in its fluctuations. However, we think it does not turn upon that point but upon the extensive nature and character of the defendant's claim and exercise of the right to control and regulate at will the entire flow of the stream at all times for the purposes of power production and sale, which, as we have stated, constituted an invasion of the riparian rights of the lower owners from the beginning.

The contention that there is substantial evidence that the dam at Keno, above the Copco plant and dam, was responsible for plaintiffs' alleged damages is not borne out by the record: No issue as to this dam is tendered by the pleadings. The evidence on behalf of plaintiffs is to the effect that the fluctuations of flow complained of commenced in May, 1931, and the testimony as

to the diminution in value of plaintiffs' property by reason of defendant's acts related to May, 1931. The undisputed evidence is that the Keno dam was not completed until November, 1931. Furthermore, the evidence does not show that the operation of the Keno dam had any effect upon the general control and regulation of the river exercised by defendant through the Copco plant since 1922.

We need not pass upon defendant's contention that plaintiffs' predecessors, and not plaintiffs, owned the cause of action, if any. This is predicated upon the claim that the invasion of the right of the lower riparian owner took place in 1922, and inasmuch as we have already held that it did, and that consequently defendant has established its prescriptive right, that is determinative of the case.

We have carefully considered the other points urged by appellants but find no merit in them and deem it unnecessary to discuss them in detail.

The judgment is affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.



WALKER v. CITY OF SAN GABRIEL et al.

Civ. 13392.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1942.

As Modified March 20, 1942.

Rehearing Denied March 20, 1942.

Hearing Granted April 23, 1942.

1. Licenses ⇐38

Where issuance of license to conduct an automobile wrecking yard was governed by a city ordinance, the power to revoke such license must be found within such ordinance.

2. Mandamus ⇐187(9)

On appeal from judgment of nonsuit in mandamus proceeding to compel reinstatement of a license which was revoked for specified violations contained in letter to city council from chief of police, where not all of ordinance pertaining to such license was contained in record and no proof was made of other city ordinances which regulated the conduct of licensee, in absence of such enactments from the record the appellate court would assume that all the violations specified referred to city ordinances or to provisions of general statutes.

3. Licenses ⇐38

The trial of a licensee by administrative board for revocation of his license is not governed by strict, technical, legal rules, but to afford "due process of law" accused licensee must receive notice of hearing for revocation and must be permitted to testify and to produce his witnesses to defeat the charges brought against him.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

4. Licenses ⇐38

Hearsay testimony alone may support the order of an administrative body revoking a business license, the weight to be given to such testimony being for determination of the board or commission, and it is not necessary that an administrative board should enforce the strict requirement of the hearsay rule which is not indispensable to the administration of justice.

5. Licenses ⇐38

A licensee whose license to operate automobile wrecking yard was revoked by city council was not entitled to invoke the hearsay rule in objection to letter of chief of police which was read in licensee's presence, which letter itemized the numerous violations of law which the chief found had been committed by licensee. Code Civ.Proc. § 1963, subd. 15.

6. Evidence ⇐83(2)

Every presumption is in favor of the lawful exercise of his duties by chief of police. Code Civ.Proc. § 1963, subd. 15.

7. Licenses ⇐38

The city council in proceeding to revoke business license was entitled to assume that findings of chief of police with reference to business involved were correct.

8. Constitutional law ⇐318

In proceedings before administrative boards "due process of law" is complied with when the report of an officer or expert appointed especially to investigate, survey and recommend has been filed with the board as

a part of the proceedings and upon its presentation and filing the burden shifts to party affected by such report to show that findings of such expert or official are unfounded.

9. Constitutional law ⇐80(3)

Quasi judicial functions may be intrusted to boards, commissions, and agents to the end that ever-increasing complexity of administrative affairs may be simplified and business of complex civilization expedited, and delegation of such powers to a city council or other duly constituted board is authorized.

10. Mandamus ⇐172

A court hearing the application for mandate to secure the restoration of a license, revoked by order of an administrative board of state-wide jurisdiction, is required to exercise an independent judgment and, if requested, grant a trial de novo, but such rule has no application to the review of decisions of an administrative tribunal of local jurisdiction.

11. Municipal corporations ⇐63(1)

Where the act of a local administrative board, such as city council, involves discretion and exercise of judgment concerning a matter of which it has jurisdiction, the courts cannot interfere unless it be shown that the tribunal has exceeded its powers or unless its discretion has been fraudulently or corruptly exercised.

12. Officers ⇐103

The findings of a board, whether of local or state-wide jurisdiction, come before the courts with a strong presumption in their favor based primarily on the disputable presumption contained in statute that official duty has been regularly performed. Code Civ.Proc. § 1963, subd. 15.

13. Licenses ⇐38

An ordinance authorizing city council to revoke a business license if "satisfied that any condition of the license or terms of this ordinance have been violated" means that the council must honestly determine upon evidence presented to it in an open hearing in presence of licensee that his conduct of licensed premises has violated conditions of his license.

14. Mandamus ⇐174

Where it appeared that satisfactory evidence was presented to city council at an open hearing and in presence of accused licensee that ordinance authorizing the license for operating an automobile wrecking yard and other ordinances had been violated and that licensee was given an opportunity to present his defense, trial court could not interfere with order of the council revoking the license.

15. Municipal corporations ⇐103

An action of the city council is presumed to have been correctly performed.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge pro tem.

Mandamus proceeding by O. P. Walker against the City of San Gabriel and others to compel the reinstatement of a revoked business license to operate an automobile wrecking yard. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Keller & Smith, of Alhambra, for appellant.

Herbert S. Farrell, of Alhambra, for respondents.

MOORE, Presiding Justice.

The question for determination in this case is whether a city council may revoke a business license upon finding (1) that the licensee has violated the statutes and ordinances which regulate his business, and (2) that the continuance of such license would be contrary to the public welfare.

The license of appellant to operate an automobile wrecking yard in the city of San Gabriel having been revoked by the city council, he procured the issuance of an alternative writ of mandate to review the proceedings. The matter came on duly to be heard and resulted in a judgment of nonsuit which comes here on plaintiff's appeal.

Appellant had conducted his business in the same location for the preceding thirteen years. On January 22, 1941, he received from the city clerk a letter which advised him that the city proposed to revoke his license to operate the wrecking yard and that he should appear before the city council six days later. At the time designated he appeared before the council in company with his attorney, Richard J. Keller. When the matter was called up for consideration the attorney stated that appellant was ready, able and willing to produce evidence as to why his license should not

be revoked, but that he should first hear the evidence as to why it should be revoked. Thereupon Officer Jorgenson read a communication from the chief of police of San Gabriel setting forth that appellant had been arrested for dismantling a motor vehicle without informing the state; that he had been convicted of dismantling a motor vehicle without notifying the chief of police; that upon an inspection of appellant's yard, it had been discovered that the conditions of his license had been violated by parking in front of his yard two automobiles incapable of being operated under their own power, by having three fire extinguishers not in working condition, and by possessing seven wrecked automobiles concerning which neither the city nor the state had been notified of their dismantling; that Harold L. Walker, a son of appellant, had been cited for parking his tow car in the public alley in the rear of the wrecking yard, thereby creating a traffic hazard in violation of a city ordinance; that upon an inspection of the premises at a later date appellant was warned of three violations of the law; that seven months thereafter, following an inspection, twelve violations had been committed by appellant's parking eight cars in front of his premises on Valley boulevard, a main traffic artery, which cars were not in running condition; that one car was undergoing repair on the highway; that parts of dismantled vehicles extended above the fence surrounding the premises; and that the road west of appellant's premises was used to wreck, repair and store used automobiles, contrary to a city ordinance to one of which violations appellant had pleaded guilty and been fined. In addition to the foregoing, complaints had been made against appellant's methods of operating his wrecking yard, in that the public area in the rear of the yard was constantly being used to repair and test automobiles, creating a public nuisance and a hazard to children. Finally, complaints had been made to the chief of police of the use by appellant's employees and visitors, on the premises, of intoxicants, whose empty bottles lay about the place.

The mayor having requested appellant to produce his proof and having offered to continue the hearing to a later day, Mr. Keller again stated that "until the witnesses making the complaints were presented" and subjected to cross-examination there was no evidence to refute. A vote was thereupon taken by the council, resulting in the unanimous revocation of appellant's license. Three days later he was notified by the city clerk that his business license had been revoked.

When the matter came on for hearing before the superior court Attorney Keller testified that the only evidence presented at the hearing before the city council was the letter from the chief of police, and that following the reading of such letter he had requested that the persons making the charges contained in the letter should be present to testify. Appellant was sworn but was precluded from testifying as to whether any complaints had been made to him with reference to the manner in which he conducted his business. He admitted that at the hearing before the city council that body was ready to hear any evidence that appellant might desire to offer. Also it was established at the trial that appellant had received proper notice of the proceeding to be had before the council and that he had in no way been prevented from introducing his evidence. Thereupon, following argument, respondent's motion for judgment of non-suit was granted.

[1, 2] The issuance of licenses for the operation of such places of business as that conducted by appellant is governed by section 42 of Ordinance 408 of defendant city, which is as follows:

"All licenses issued under this ordinance, or any section thereof, are granted and accepted by all parties receiving licenses with the express understanding that the City Council of said City may revoke the same at any time * * * if satisfied that any condition of the license or terms of this ordinance have been violated * * * or that the holder of any such license is an unfit person to be trusted with the privileges granted by such license; provided, however, that no license shall be revoked * * * without first giving the holder thereof an opportunity to appear before the City Council in his own behalf by notification in writing to the holder of such license, giving and fixing the time and place of such hearing * * *." It follows that the power to revoke the license of appellant must be found within the cited ordinance. Barron v. Board of Dental Examiners, 109 Cal.App. 382, 293 P. 144; Schomig v. Keiser, 189 Cal. 596, 209 P. 550; Cavassa v. Off, 206 Cal. 307, 274 P. 523. Not all of the ordinance is contained in the record. Neither was proof made of other

city ordinances which regulate the conduct of a licensee to operate a wrecking yard. In the absence of such enactments from the record we may assume that all of the "violations" specified in the chief's letter referred to city ordinances or to provisions of general statutes.

It is contended by appellant that a business license cannot be revoked without first giving the licensee notice and without granting him a hearing thereon, citing Carter v. Stevens, 211 Cal. 281, 295 P. 28; Irvine v. State Board of Equalization, 40 Cal.App.2d 280, 104 P.2d 847; Martin v. Board of Supervisors, 135 Cal.App. 96, 26 P.2d 843; Abrams v. Daugherty, 60 Cal.App. 297, 212 P. 942; Angelopulos v. Bottorff, 76 Cal.App. 621, 245 P. 447. In the instant case the record shows beyond a peradventure that appellant did receive notice of a hearing; that in response thereto he appeared before the city council at the time appointed; that he was there afforded the opportunity to present his evidence and even a willingness was expressed by the presiding officer to accommodate appellant's convenience by a postponement of the hearing.

[3] The trial of a licensee by an administrative board for the revocation of his license is not governed by strict, technical, legal rules. It is indispensable to a proceeding before an administrative board that the accused licensee receive notice of the hearing which is called for the purpose of considering the revocation of his license, provided that upon his appearance before the board in response thereto he be permitted to testify and to produce his witnesses for the purpose of defeating the charges brought against him and the evidence introduced in support thereof. When these things are done, due process has been complied with and the proceedings of the board are in all respects legal.

[4] It is contended that a license cannot be revoked by the city council upon hearsay evidence, citing Thrasher v. Board of Medical Examiners, 44 Cal.App. 26, 185 P. 1006; Dyment v. Board of Medical Examiners, 93 Cal.App. 65, 268 P. 1073; Martin v. Board of Supervisors, supra. These authorities are not in point. In the cases against the board of medical examiners hearsay evidence was held insufficient as a basis for revoking the medical license for the reason that the statute which created the medical board makes it a quasi judicial tribunal and requires legal proof for the conviction of an accused. In the Martin case the appellant was denied a license without a formal hearing, without the testimony of the appellant and without any legal proof. The hearing was held to be unofficial, arbitrary and irregular. Hearsay testimony alone may support the order of an administrative body. Independent Indemnity Co. v. Industrial Acc. Comm., 2 Cal. 2d 397, 410, 41 P.2d 320; Sada v. Industrial Acc. Comm., 11 Cal.2d 263, 78 P.2d 1127. The weight to be given to it is for the determination of the board or commission. Sada v. Industrial Acc. Comm., supra. It is not necessary that an administrative board should enforce the strict requirement of the hearsay rule. That rule is not indispensable to the administration of justice.

[5, 6] But appellant misconceives the nature of such a proceeding as that under review by the trial court. He is not entitled to invoke the hearsay rule in such a proceeding. Upon his request for evidence, the letter from the chief of police was read in his presence. It itemized with meticulous care the numerous violations of the law which that officer found had been committed by appellant. The letter was prepared by the proper officer in the course of his official duties and every presumption is in favor of the lawful exercise of his duties by the chief of police. Code Civ. Proc. 1963, subd. 15; People v. Chambers, 22 Cal.App.2d 687, 719, 72 P.2d 746.

[7, 8] The council was entitled to assume that the findings of the city's principal law enforcing officer with reference to a matter that concerned his official duties were correct. Such findings had the same weight as that accorded to a city electrician who is authorized to determine whether an electrical installation is dangerous and upon whose opinion the city council might act requiring the dangerous condition to be eliminated. Gaylord v. Pasadena, 175 Cal. 433, 166 P. 348. In such proceedings before administrative boards, due process is complied with when the report of an officer or expert, appointed especially to investigate, survey and recommend, has been filed with the board as a part of the proceedings in the matter. There it reposes for the consideration of the board, for the inspection, answer and proof of those under rule to show cause, and for public information. Upon its presentation and filing, the burden shifts to the party affected by such report to show that the findings of such expert

or official so reporting are unfounded. In re Willow Creek, 74 Or. 592, 144 P. 505, 146 P. 475; Pacific Live Stock Company v. Lewis, 241 U.S. 440, 454, 36 S.Ct. 637, 60 L.Ed. 1084. In the event the board attempts to act upon the mere ipse dixit of the officer who has made the investigation and survey and without a knowledge of his report and without hearing argument, due process is not complied with and the action taken would be based upon vicious hearsay and not upon facts found to exist. Evidence for a hearing may be taken and analyzed by a competent person duly authorized for the task. Assuming that this has been done and all other constitutional requirements have been complied with and the respondent has been allowed to present his proof, he then has no just ground for complaint. Ohio Bell Tel. Co. v. Public Utilities Comm., 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093; Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288.

[9] It has become a universal rule throughout America that quasi judicial functions may be entrusted to boards, commissions and agents to the end that the ever-increasing complexity of administrative affairs may be simplified and the business of our complex civilization expedited. The delegation of such powers to a city council or other duly constituted board must be done or the wheels of government would be so clogged and the public mind would become so confused that progress would be rendered extremely difficult, if not impossible. Gaylord v. Pasadena, supra.

[10-12] When we consider the extent to which courts may go in reviewing decisions of administrative tribunals, the line of demarcation between review of decisions of boards having statewide jurisdiction and those having only limited, local jurisdiction is clear. A court hearing the application for mandate to secure the restoration of a license, revoked by order of an administrative board of state-wide jurisdiction, is required to exercise an independent judgment and, if requested, grant a trial de novo. Laisne v. California State Board of Optometry, Supreme Court, 19 Cal.2d 831, 123 P.2d 457, decided March 16, 1942. However, as pointed out in the Laisne case, that rule has no application to the review of decisions of administrative tribunals of local jurisdiction. Where the act of a local administrative board, such as the city council, involves discretion in the exercise of judgment concerning a matter of which it has jurisdiction, the courts cannot interfere unless it be shown that the tribunal has exceeded its powers or unless its discretion has been fraudulently or corruptly exercised. Berkeley High School District v. Coit, 7 Cal.2d 132, 137, 59 P.2d 982; Nickerson v. San Bernardino County, 179 Cal. 518, 177 P. 465. The findings of a board, whether of local or state-wide jurisdiction "come before the courts with a strong presumption in their favor based primarily on the disputable presumption contained in section 1963, subsection 15 of the Code of Civil Procedure 'that official duty has been regularly performed.'" Drummey v. State Board, 13 Cal.2d 75, 86, 87 P.2d 848, 854.

[13-15] The city council of San Gabriel was authorized to revoke the license of appellant if "satisfied that any condition of the license or terms of this ordinance have been violated." This means nothing more than that the city council must honestly determine, upon evidence presented to it in an open hearing, in the presence of the licensee, that his conduct of the licensed business has violated the conditions of his license. So long as it is made to appear that satisfactory evidence was presented to the city council, at an opening hearing and in the presence of the accused, showing that the ordinance authorizing the license and other ordinances have been violated, and that the licensee was given an opportunity to present his defense, the trial court was without power to interfere with the order entered by the council revoking the license. Shorr v. City of Azusa, 38 Cal.App. 709, 177 P. 513; City of Stockton v. Frisbie & Latta, 93 Cal.App. 277, 270 P. 270. An action of the city council is presumed to have been correctly performed. City of South Pasadena v. San Gabriel, 134 Cal. App. 403, 417, 25 P.2d 516.

There appearing to have been neither a denial of due process nor an abuse of discretion on the part of the city council in revoking the license of appellant, the order of the trial court in granting the nonsuit is affirmed.

W. J. WOOD, and McCOMB, JJ., concurred.

50 Cal.App.2d 136

McDORMAN v. MOODY.

Civ. 13333.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1942.

1. Appeal and error ⇐854(2)

Judgment which was just was required to be affirmed, notwithstanding the trial court adopted an untenable theory.

2. Corporations ⇐121(5)

In assignee's action to recover balance due under contract for sale of corporate stock, evidence that the assets of the company were not sufficient to justify issuance of permit for any stock and that the company had been adjudged bankrupt sustained finding that stock had not been delivered to buyer and that assignee was not able or ready to deliver stock and precluded recovery.

3. Corporations ⇐121(5)

In assignee's action to recover balance due under contract for sale of corporate stock, where answer denied assignee's allegation that assignee had exercised option to declare remaining unpaid balance due and payable and had demanded payment which had been refused, evidence showing acceleration and demand for payment prior to filing of action was necessary to prove assignee's case.

4. Corporations ⇐121(2)

In assignee's action to recover balance due under contract for sale of corporate stock, tender of stock was a necessary "condition precedent" before assignee could enforce payment of unpaid balance.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

5. Corporations ⇐118

Before assignee of contract for sale of corporate stock could require buyer to pay unpaid balance, the assignee was obliged to fulfill the conditions imposed upon the seller. Civ.Code, § 1439.

6. Corporations ⇐121(2)

In action by seller's assignee for balance due under contract for sale of corporate stock which contained provision that, in event corporation should be adjudicated a bankrupt, buyer should not be liable for further payment and that, if corporation executed assignment for benefit of creditors, payment should be held in abeyance until it was conclusively determined that the corporation was again able to operate free from assignment, it was incumbent on the assignee not only to tender stock in a solvent corporation but also to make good that offer by making an appropriate deposit of the shares. Civ.Code, § 1439.

7. Contracts ⇐278(1)

Generally, one who cannot perform his part of a contract is not entitled to performance on the part of his contractee.

8. Sales ⇐345

If buyer notifies seller before seller is in default that buyer will not perform his obligation and does not retract such notice before time fixed for his performance, the seller is entitled to enforce the obligation without previously performing or offering to perform his part of the contract, but, on the trial, there must be proof of the ability of the seller to perform his obligations. Civ. Code, §§ 1440, 1495.

9. Sales ⇐347(3)

A contract for the purchase of property cannot be enforced by the seller when the consideration for the purchase price wholly fails in a material respect. Civ.Code, § 1689.

10. Corporations ⇐121(1)

Where promise of seller to deliver corporate stock has failed without fault on part of buyer, the consideration of the buyer's promise fails in a material respect and seller or his assignee cannot enforce the contract.

11. Sales ⇐151

An agreement to sell implies the ability to deliver the thing sold, and, where the seller becomes unable to execute his part of the contract, his right to enforce payment of the purchase price fails.

12. Sales ⇐14

A covenant for title applies to the time of conveying rather than to the date of the contract for sale.

13. Sales ⇐195

Although the payment of purchase price of an article may be due under contract, if the article sold will not be substantially forthcoming, the payment of the purchase price is excused.

14. Corporations ⇐118

Buyer was released from making further payments to assignee of contract for

sale of corporate stock after discovery of inability of seller to deliver the stock he had agreed to sell.

15. Corporations ⇐121(1)

Where contract for sale of corporate stock contained an acceleration clause but provided that buyer should not be liable for further payment, if corporation was adjudicated a bankrupt, seller's assignee could not recover balance due on theory that buyer's default in making January payment caused total balance to be immediately due and payable and that assignee put buyer in default and filed suit before corporation was adjudged bankrupt in February, in view of fact that stock had not been delivered and seller and assignee were unable to deliver stock.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by Genevieve McDorman against Joseph M. Moody for breach of contract. From an adverse judgment, plaintiff appeals.

Affirmed.

Elbert E. Hensley, of Los Angeles, for appellant.

R. Bruce Murchison, John Bricker Myers, Jr., and Richard C. Hart, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

This action arose out of an alleged breach of contract whereby plaintiff's assignor, one Messimer, agreed to sell to respondent Moody 1,500 shares of stock in the United Trading Stores, Inc., an Arizona corporation.

The contract was made May 20, 1939. By its terms Messimer agreed to sell and transfer to Moody all of his right, title and interest in and to the 1,500 shares of stock of the corporation for the sum of $12,000, payable as follows: $150 June 20, 1939, and $150 on the 20th day of every month thereafter until the full sum of $12,000 is paid. The instrument then proceeds:

"* * * in the event the United Trading Stores, Incorporated, should file a voluntary petition in bankruptcy and be adjudicated a bankrupt, or should be declared an involuntary bankrupt, then in either of said cases the party of the second part, from and after the date of adjudication of the United Trading Stores, Incorporated, as a bankrupt, shall no longer be liable by reason of this agreement for any further payments for the purchase of said stock; and

"* * * should the United Trading Stores, Incorporated, execute a deed of assignment for the benefit of creditors * * * all payments to be made under this agreement by the party of the second part to the party of the first part shall cease from the date of the execution and delivery of the deed of assignment for the benefit of creditors, and such payments shall be held in abeyance until such time as it shall be conclusively determined that the United Trading Stores, Incorporated, is again able to operate free from such assignment, at which time the party of the second part shall resume payments provided for herein and shall continue to make such payments until the full sum of $12,000 provided for herein is paid, and nothing contained herein shall be understood to require the party of the second part, upon the resumption of business of United Trading Stores, Incorporated, free from the said assignment, to pay to the party of the first part in a lump sum the payments falling due during the assignment period, but the assignment period shall lengthen the period of time necessary to complete the payment of the $12,000 provided for herein, and the party of the second part shall, upon the resumption of business as aforesaid, be obliged to pay only the monthly installments provided for herein during the length of time remaining and necessary to pay the balance of the consideration provided for herein; but if the said corporation should not be able to operate again free from the assignment and should it be liquidated, then * * * the party of the second part shall not be liable any longer under the terms and conditions of this agreement.

"* * * in case of default by the party of the second part for any other reason than those mentioned in this agreement in making any of the payments above described, that * * * the full amount of the balance then due upon this agreement shall become immediately due and payable."

There is no indication that an application had ever been made for a permit to issue the stock of the corporation or that it ever had sufficient assets to justify the granting of such permit.

Respondent made seven monthly payments during 1939, aggregating $1,050. On January 20, he forwarded his check for the installment then due to the assignor, but

six days later, on discovering that a petition to have the corporation adjudicated a bankrupt was about to be filed, he stopped payment on his check and advised the assignor that "proceedings were in progress for a petition in bankruptcy" against the corporation and that he would make no further payment on the contract. Neither did Messimer make demand upon respondent for the payment of the balance of the purchase price after the latter's refusal to make further payments nor did he make tender of the stock prior to or during the trial.

After hearing respondent's declaration not to make further payments Messimer assigned his interest in the contract to appellant who alleged in her complaint that she had "exercised the option to declare the remaining unpaid balance under the terms of said contract due and payable." Also, she alleged that she and her assignor "have duly performed all conditions of said contract on their part to be performed and are ready, willing and able to deliver the articles described in said contract." She demanded the balance of $10,930 and $2.50 protest fees. Her complaint was filed February 8, 1940. At the trial the only evidence received was the contract, the assignment, the check, the notice of protest, the adjudication of bankruptcy dated February 26, 1940, and the testimony of the parties.

The findings of the court which are pertinent to our discussion include the following: That the corporation was adjudicated a bankrupt on February 26, 1940; that prior to that date the 1,500 shares had never been issued and could not then be issued to respondent; that the corporation did not have assets sufficient to warrant the issuance of the shares; that plaintiff's option did not exist to declare the unpaid balance due; that the assignor and plaintiff have not duly performed all conditions of the contract; that they are not ready, able and willing to deliver the stock.

[1] With the foregoing the court made other findings which are not justified by the documentary proof and which led it to adopt an untenable theory; at the same time the judgment is just and must be affirmed.

[2] Appellant pleaded that she and her assignor had "duly performed all conditions of said contract on their part to be performed and are ready, willing and able to deliver the articles described in said contract." The denial of these allegations created a material issue of fact upon which the court found that no part of the 1,500 shares had been delivered and that plaintiff and her assignor "are now unable or *ready* to deliver all or any part thereof to the defendant." Under the contract, the assignor was obliged to deliver the 1,500 shares. The findings and the evidence are emphatic and clear that they were not delivered within the seven months during which respondent regularly made his monthly payments. When the denouement occurred and the insolvency of the corporation was revealed, the assignor was utterly unable to make delivery. He could not, and the plaintiff did not, establish her right to have the shares issued. The assets of the company were not even sufficient to justify the issuance of a permit for any stock. Upon the entry of the order of adjudication in bankruptcy it was thereafter vain to expect the issuance of any shares. Competent proof establishes that appellant was not able or ready to deliver or will ever be able to deliver any part of the shares sold under the contract. The findings against appellant upon this material issue foreclosed her right to prevail.

[3] The complaint alleges: "that said plaintiff has exercised the option to declare the remaining unpaid balance * * * due and payable; that demand has been made upon defendant * * * of the unpaid balance and that defendant has refused to pay such balance." These allegations also declare certain facts which are denied by the answer. Not a word of evidence was introduced to establish either an acceleration of the unpaid balance or that demand for payment thereof was made prior to the filing of the action. These are facts the evidence of which was necessary to prove appellant's case.

[4] Neither did appellant tender the stock. Such offer was a necessary condition precedent before she could enforce payment of the unpaid balance. 17 C.J.S., Contracts, § 480, p. 985.

[5, 6] Before appellant could require respondent to pay she was obliged to fulfill the conditions imposed upon the vendor. Civ.Code, sec. 1439; 6 Cal.Jur. 399. If she had been authorized to accelerate the payment of the unpaid balance, her declaration to that effect would have made performance on her part concurrent with per-

formance on the part of respondent. It was incumbent on her not only to tender the stock in a solvent corporation but also to make good that offer by making an appropriate deposit of the shares.

[7, 8] It is a general rule that one who cannot perform his part of a contract is not entitled to performance on the part of his contractee. 17 C.J.S., Contracts, § 452, p. 934. Notwithstanding that if a vendee under a sales agreement notifies the vendor before the latter is in default that the vendee will not perform his obligation and does not retract such notice before the time fixed for his performance, the vendor is entitled to enforce the obligation without previously performing or offering to perform his part of the contract (Civ.Code, sec. 1440), yet upon the trial there must be proof of the vendor's ability to perform all of his covenants. Dickey v. Kuhn, 106 Cal. App. 300, 303, 289 P. 242. Even if the vendor had offered to deliver the stock sold under the agreement such offer would have been of no effect in view of the inability of the vendor to perform according to his offer. Civ.Code, sec. 1495.

[9-12] The principle is universally recognized that a contract for the purchase of property cannot be enforced by the vendor when the consideration for the purchase price wholly fails in a material respect. Civ.Code, sec. 1689; Walker v. Harbor Business Blocks Co., 181 Cal. 773, 782, 186 P. 356. Where the promise of the vendor to deliver corporate stock has failed without fault on the part of his vendee, the consideration for the promise of the vendee thereupon fails in a material respect. 3 Williston on Contracts, sec. 814. An agreement to sell implies the ability to deliver the thing sold. When the vendor becomes unable to execute his part of the contract, his right to enforce the payment of the purchase price thereupon fails. Williams v. Miller, 68 Cal. 290, 9 P. 166; Ogren v. Inner Harbor Land Co., 83 Cal. App. 197, 256 P. 607. It was held in the Ogren case, supra, that where buildings upon property, sold under contract and remaining in the possession of the vendor, were destroyed by fire the petitioner could not compel the vendee to complete the purchase but that the latter might rescind and secure the return of what he had paid on the contract. Under an agreement to agist and pasture the cattle of B for a year, A cannot compel payment of the amount charged for the pasturage where it is shown that there was no grass on A's land upon which B's herds might feed. Williams v. Miller, supra. A covenant for title applies to the time of conveying rather than to the date of the contract for sale. Kares v. Covell, 180 Mass. 206, 62 N.E. 244, 91 Am. St.Rep. 271.

[13] No promise in a bilateral contract is wholly independent of the counter-promise. Although performances under the contract are not necessarily to be rendered at the same time, yet the price of a chattel, which is the subject of the contract, is the agreed exchange for the chattel whether the price be payable before or after delivery. (Restatement of Contracts, sec. 266.) Although the payment of the purchase price of an article may be due as under the contract, at the same time if the article sold will not be "substantially forthcoming" the payment of the purchase price is excused. 3 Williston on Contracts, sec. 828. See Gentry v. Recreation, Inc., 192 S.C. 429, 7 S.E.2d 63, 128 A.L.R. 743; Hoefer v. Fortmann, 219 Iowa 746, 259 N.W. 494; Street v. Commercial Credit Co., 35 Ariz. 479, 281 P. 46, 67 A.L.R. 1549.

[14] The foregoing authorities indicate clearly the legal concept and ethical standard which should determine the rights of parties where a vendor cannot make delivery of the thing which he has sold on contract. Because of the inability of plaintiff's assignor to deliver what he sold, the vendee was released from making further payments after discovery of such failure.

[15] Appellant contends that under the agreement the default of respondent in making the January payment caused the total balance to be immediately due and payable and that she put respondent in default and filed suit before the bankruptcy of the corporation was adjudicated. She cites authority (Harris v. Kessler, 124 Cal. App. 299, 301, 12 P.2d 467) justifying her election to treat the sale as absolute and to sue for the balance due, ignoring the fact that she owed a concurrent obligation which she was unable to perform.

The contention that respondent could have caused the issuance of the stock and thereby have been possessed of the consideration for his money is a meaningless gratuity. To hold the evidence of a right to corporate stock adds no value to it. There could have been no virtue in the cer-

tificate unless the stock had substantial value.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concurred.



MIRAMAR CO. v. CITY OF SANTA BARBARA.

Civ. 13244.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1942.

Hearing Granted April 23, 1942.

1. Eminent domain ⇐277

Constitutional provision that private property shall not be taken or damaged for public use without just compensation first having been made to owner does not permit maintenance of action to recover compensation, based on theory that private property was taken by city for construction and maintenance of public improvement, without complying with statute requiring verified claim to be filed within 90 days after occurrence of injury. Gen.Laws 1937, Act 5149, § 1; Const. art. 1, § 14.

2. Eminent domain ⇐2(1)

Under constitutional provision that private property shall not be taken or damaged for public use without just compensation first having been made to the owner, the state is liable only when the damage to, or taking of private property, is not so essential to the general welfare as to be sanctioned under the police power. Const. art. 1, § 14.

3. Municipal corporations ⇐857

Compliance with statute, requiring verified claim to be filed with secretary of city council within 90 days after occurrence of injury upon which alleged cause of action is based, is essential to the maintenance of an action against a city for damage resulting from a dangerous public property, since the act was intended to apply in every case in which the claimant's demand is based on injury to property resulting from dangerous or defective condition of public improvement. Gen.Laws 1937, Acts 5149, 5619.

4. Eminent domain ⇐277

Where in June, 1927, city began construction of breakwater which was completed in June, 1930, claim filed in May, 1937, for damages resulting from washing away and taking of certain sandy beach, did not satisfy statute requiring claim against city to be filed within 90 days after occurrence of injury, and precluded recovery of damages. Gen.Laws 1937, Acts 5149, 5619.

5. Municipal corporations ⇐741(1)

Under statute requiring verified claim against city for damages to be filed within 90 days after occurrence of injury, neither age nor infirmity will excuse a claimant from filing claim within 90 days. Gen.Laws 1937, Acts 5149, 5619.

6. Municipal corporations ⇐741(3), 742(5)

A city is powerless to waive compliance with statute requiring verified claim for damages to be filed with city within 90 days after occurrence of injury upon which alleged cause of action is based, and where a claimant fails to prove that he has complied with the statute, his action should be dismissed. Gen.Laws 1937, Acts 5149, 5619.

7. Municipal corporations ⇐741(1)

The statutory requirement, that claim against city be filed within 90 days after accident, is to enable the city promptly to investigate the claim and, if it is to be rejected, to prepare a defense to the potential action that may be filed to enforce payment of claim before facts have become stale and witnesses have departed. Gen.Laws 1937, Acts 5149, 5619.

8. Eminent domain ⇐277

The statute requiring claim against city to be filed within 90 days after occurrence of injury upon which alleged cause of action is based applies in case where municipality damages or takes without paying from an owner his private property in violation of constitution. Gen.Laws 1937, Acts 5149, 5619; Const. art. 1, § 14.

9. Constitutional law ⇐30

Even though the constitutional provision that private property shall not be taken or damaged for public use without just compensation having first been made to the owner is self-executing, the legislature is authorized to enact measures to facilitate its operation and to provide convenient limits for the protection of rights established and for the

determination thereof, and the regulation of claims thereto. Const. art. 1, § 14.

10. Eminent domain ⇐267

All claimants of compensation, under constitutional provision that private property shall not be taken or damaged for public use without just compensation having first been made to the owner, must comply with reasonable statutory procedural requirements. Const. art. 1, § 14.

11. Eminent domain ⇐98

City's construction of breakwater was a "governmental function" and where the swish and swirl of ocean waves and currents carried away sands of claimant's land, the destruction of the claimant's beach was not the "taking" or "damaging" of private property for public use within constitutional provision prohibiting the taking or damaging of private property for public use without just compensation. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Damaging", "Governmental Function" and "Taking".

12. Limitation of actions ⇐5(1)

The "public policy" of California favors statutes of limitations, since they are essential to the maintenance of a tranquil society.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

13. Municipal corporations ⇐741(1)

Under statute requiring claim to be filed against city within 90 days after occurrence of injury, the failure to assert a claim within the prescribed time constitutes a bar to any subsequent action thereon. Gen.Laws 1937, Act 5149, § 1.

14. Eminent domain ⇐2(10)

Where breakwater constructed by city in authorized development of harbor resulted in landowner's sandy beach being washed away by ocean waves and currents, the landowner had no right of recovery against the city notwithstanding constitutional provision prohibiting the taking or damaging of private property for public use without just compensation, since the construction of the breakwater was a lawful project done under police power. St.1927, p. 2064, § 2; Const. art. 1, § 14.

15. Eminent domain ⇐2(1)

Under constitutional provision prohibiting the taking or damaging of private property for public use without just compensation, liability of city arises only when damage to private property was not so essential to the general welfare as to be justified under the police power, and where in the proper exercise of that power by a municipality the construction of a public work inflicts, as a consequence thereof, injury to private land, the owner thereof has no right of recovery. Const. art. 1, § 14.

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Action by Miramar Company against the City of Santa Barbara for damage to real property as the result of erection and maintenance of a breakwater. From an adverse judgment, plaintiff appeals.

Affirmed.

Leland Crawford and Robert M. Jones, both of Santa Barbara, for appellant.

Norris Montgomery, City Atty., and Heaney, Price, Postel & Parma, all of Santa Barbara, for respondent.

MOORE, Presiding Justice.

Plaintiff appeals upon the judgment roll from the judgment entered following a trial upon the complaint and the 4th and 5th special defenses.

Plaintiff, an existing California Corporation, owned certain littoral lands adjacent to Miramar Bay, Montecito, in the county of Santa Barbara. Such lands lie 2½ miles east of the city of Santa Barbara, a municipal corporation. Plaintiff operated upon its property the Miramar Hotel and Cottages. Commencing at the shore line about 3 miles west of plaintiff's property, defendant city began the construction of a permanent breakwater about June 8, 1927. It was completed June 30, 1930. It extended from the line of high tide for a distance of about 2,500 feet into the waters of the Pacific Ocean.

The complaint alleged that as the littoral drift and current along the shore line is from west to east, the effect of the breakwater was to stop the normal and natural flow of sand so that plaintiff's property was in time denuded which condition allowed the waters of Miramar Bay to advance the line of ordinary high tide until plaintiff's property was covered by the sea. This action was progressive and continuous, always taking but never depositing sands

in the place of those carried away, which was at all times known to defendant; that with the disappearance of the sands the hotel ceased to be a beach resort.

On May 15, 1937, seven years after completion of the breakwater, plaintiff presented its written claim or demand to the city council of defendant for the sum of $750,000, consisting of two items: (1) loss of the sandy beach used in connection with the hotel "resulting from the washing away and taking of that certain sandy beach * * * said damages being caused by the erection and maintenance of a certain breakwater owned and constructed by the city of Santa Barbara and the consequent erosion of the shore to the east thereof, from May 15, 1932, to the date hereof", $500,000; (2) loss of the value of the remainder of the hotel property by reason of the severance of the beach, $250,000. The claim was disallowed by defendant on October 15, 1937, On October 4, 1939, plaintiff filed the present action upon its rejected demand.

Following the overruling of defendant's demurrer, answer was filed consisting of a general denial and six separate affirmative defenses. Pursuant to written stipulation of the parties, the case came on for trial before the court without a jury, upon the issues created by the complaint and the 4th and 5th special defenses on March 20, 1941. The 4th special defense alleged that plaintiff has failed to comply with the provisions of Act 5149 relating to the liability in damages of municipalities in the case of injuries to property resulting from the defective or dangerous condition of public works, etc. (Statutes of 1931, p. 2475, Deering's Gen. Laws 1937, Act 5149) in that plaintiff failed to present or file its verified claim with the secretary of the city council within ninety days after the occurrence of the injury upon which the alleged cause of action is based.

The 5th special defense was based upon an ordinance of defendant limiting the time of the filing of certain claims for damages against the city to six months. Inasmuch as the trial court properly made no finding upon that defense, further reference need not be made thereto.

The trial court found to be true all of the facts relative to the corporate existence of both parties, the date of the commencement and completion of the breakwater and the date of the filing of plaintiff's demand with the city council, all as hereinabove recited. Also it found to be true all of the facts set forth in the 4th special defense and that plaintiff had failed to file its claim in compliance with the provisions of Act 5149, Deering's General Laws, Stats. 1931, supra, which provides that

"Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received." Section 1.

Upon the findings made the court adjudged that the complaint did not state facts sufficient to constitute a cause of action; that defendant is entitled to judgment upon the 4th special defense and that plaintiff take nothing.

[1, 2] Upon this appeal plaintiff maintains that its failure to file its verified claim within 90 days after the commencement of the damage does not bar its right to recover compensation under the provisions of Act 5149 by reason of the fact that plaintiff's private property was taken by the city for the construction, maintenance and public improvement constructed by it and that defendant is entitled to compensation by virtue of section 14, article I of the Constitution which provides: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * * ." But notwithstanding the language of that section, plaintiff is not relieved of its duty to follow the procedural requirements contained in the cited act. The state is liable under the quoted section of the Constitution only when the damage to, or taking of private property "is not so essential to the general welfare as to be sanctioned under the 'police power' ". Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1, 19.

[3] Compliance with Act 5149 is the sine qua non to the maintenance of any action brought against a municipality for damage resulting from a "dangerous" public property. The act was intended to apply in every case, in which the claimant's

demand is based upon injuries to property resulting from the dangerous or defective condition of a public improvement. Act 5619, Deering's General Laws, 1937, Stats. 1923, p. 675. A careful reading of that statute will lead to no other conclusion.

[4-6] The claim of plaintiff did not meet the requirements of Act 5149 with respect to the dates upon which its beach was impaired. Neither was it filed within 90 days after the injury began nor within 90 days after the beach had all been washed away. The claim does not say when the "accident" occurred. It merely recites, that as a result of the erection and maintenance of the breakwater, the normal action of the tides, currents, and waves was changed and the natural drift of sand was intercepted, depriving the Miramar Beach of its normal supply of sand and causing the waters of the ocean "gradually, continuously and progressively to come upon, inundate, wash away and destroy, during the five years next preceding the filing of the claim attached hereto, all of the sandy beach included in the real property described. * * *" "From May 15, 1932, to the date hereof" is not a substantial compliance with Act 5149 for the reason that it failed to include occurrences of other dates not mentioned in the claim. Kahrs v. County of Los Angeles, 28 Cal.App.2d 46, 82 P.2d 29. To come within the language of the act, the claim must not only contain the dates of the occurrences but it must be filed "within ninety days after such accident has occurred." If the encroachment of the waters of the Pacific were progressive and continuous from May 15, 1932, to the date of the filing of the claim some five years thereafter, it is evident that plaintiff's property had suffered some detriment during this progressive and continuous encroachment. Neither age nor infirmity will excuse the claimant from filing within 90 days. Johnson v. City of Glendale, 12 Cal.App.2d 389, 55 P.2d 580. Even the city itself is powerless to waive compliance and when a plaintiff fails to prove that he has complied with the act, his action should be dismissed. Hall v. City of Los Angeles, 19 Cal.2d 198, 120 P.2d 13.

[7] The requirement that the claim be filed within 90 days after the accident is to enable the municipality promptly to investigate the claim and if it is to be rejected, to prepare a defense to the potential action that may be filed to enforce payment of the claim before the facts have become stale and the witnesses have departed. Young v. County of Ventura, 39 Cal.App. 2d 732, 104 P.2d 102. There is no date alleged in the complaint on which any damage occurred or when the erosion commenced. The only dates mentioned are those of the commencement of the construction and of the completion of the breakwater and of the beginning of consequent erosion "from May 15, 1932." Since the claim was not filed until May 15, 1937, clearly it was more than four years too late when computed from the last date mentioned in the claim.

[8, 9] But plaintiff contends that Act 5149 applies only to torts and not to the case of a municipality which damages or takes without paying from an owner his private property, forbidden by section 14, article I of the Constitution. The same contention was made to this court in the case of Young v. County of Ventura, supra, in which the plaintiff sought damages for the flooding of their lands after the county had widened a storm ditch and constructed upon privately owned lands a steel and wire revetment which diverted the storm waters from their natural channel and flooded plaintiff's land to its detriment. We there held that compliance with the 90-day provision of Act 5149 for filing of a claim is mandatory and that by failing to comply with the statutory procedure plaintiffs were deemed to have waived their right to enforce payment, citing Musto-Keenan v. City of Los Angeles, 139 Cal. App. 506, 34 P.2d 506. Even though the constitutional provisions were self-executing, the legislature is authorized to enact measures to facilitate its operation and to provide convenient limits for the protection of rights established and for the determination thereof and the regulation of claims thereto. Powers Farms, Inc., v. Consolidated Irrigation District,[1] — Cal.App.2d —, 110 P.2d 112. Since the facts alleged and found show that the invasion of plaintiff's land by the waters of the ocean was caused by a dangerous condition of the breakwater, Act 5619 unquestionably applies. Under the provision of 5149 a claim for damages to property as a result of a dangerous public improvement must be presented in the form and manner prescribed by the latter act. Davis v. East Contra Costa Irrigation District,[1] — Cal.App.2d —,

[1] Opinion of Supreme Court after hearing granted, 19 Cal.2d 123, 119 P.2d 717.)

109 P.2d 986; Yonker v. City of San Gabriel, 23 Cal.App.2d 556, 73 P.2d 623.

[10-13] In the foregoing we have referred to plaintiff's contention that it is entitled to compensation by virtue of section 14, article I of the Constitution. By nothing said have we intended to imply that the damage suffered by plaintiff is the result of a taking or damaging for public use. The detriment to plaintiff's land was not caused by the breakwater: it was caused by the swish and swirl of the ocean waves and currents which carried away the sands of Miramar Beach. The construction of that improvement was a governmental function. Yonker v. City of San Gabriel, supra. It was not intended by the authors of section 14, article I of the Constitution to relieve those who claimed damages under that section from following statutory procedure enacted for the guidance of claimants against a municipality for injuries to their properties. Neither was it intended to vouchsafe protection in a high degree to one owner and a low degree to another. Whatever the intention, all claimants of compensation for damages must comply with reasonable statutory requirements. By nothing contained in the cited constitutional section can we divine that the destruction of plaintiff's beach was the taking or damaging of private property for a public use. Green v. Swift, 47 Cal. 536; Green v. State, 73 Cal. 29, 11 P. 602, 14 P. 610; Lamb v. Reclamation District, 73 Cal. 125, 14 P. 625, 2 Am.St.Rep. 775. But if the section so provided there is not the slightest intimation therein that the owner of the property injured is immunized from the bar of the statute. Crescent Wharf & Warehouse Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028. The public policy of this state favors statutes of limitation. They are essential to the maintenance of a tranquil society. It is an established rule that a failure to assert a claim within the prescribed time shall constitute a bar to any subsequent action thereon. Sala v. City of Pasadena, 162 Cal. 714, 124 P. 539.

[14, 15] Finally plaintiff has no right of recovery. The construction of the breakwater was a lawful project done under the police power, authorized to be done in the development of defendant's harbor. § 2 of the Charter, Stats. 1927, Chapter 14, pp. 2061, 2064; Patrick v. Riley, 209 Cal. 350, 287 P. 455. Its charter specifically authorizes the acquisition and maintenance of streets, rights of way, harbors and other local improvements and the exercise of any and "all rights, powers, privileges and procedures now or hereafter established or authorized for municipalities" etc. Under that provision there is no doubt of the legality of the project. City of Long Beach v. Lisenby, 175 Cal. 575, 166 p. 333. Liability of a city for an act done under section 14 of article I of the Constitution arises only when the damage to private property was not so essential to the general welfare as to be justified under the police power. When, in the proper exercise of that power by a municipality, the construction of a public work inflicts, as a consequence thereof, injury to private lands, the owner thereof has no right of recovery. Archer v. City of Los Angeles, supra.

Judgment affirmed.

McCOMB, J., concurred.

W. J. WOOD, Justice (concurring).

I concur in the judgment. The ruling in Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1, prevents recovery by plaintiff. In my opinion the claim filed with the secretary of the council containing the statement that the damage was caused continuously "during the five years next preceding the filing of the claim" should not be held insufficient.

50 Cal.App.2d 146

PEOPLE v. CORDERO.

Crim. 3524.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1942.

Hearing Denied March 27, 1942.

1. Aliens ⇐17

The statute providing that no person not a citizen of the United States shall own or have in his possession any pistol, etc., authorized the conviction of a Filipino who possessed a prohibited weapon, since he was not a "citizen of the United States", in view of the express provision of the federal statute relating to immigration that Filipinos shall be considered as if they were aliens. Gen.Laws 1937, Act 1970, § 2; 48 U.S.C.A. §§ 1002, 1238.

See Words and Phrases, Permanent Edition, for all other definitions of "Citizen of the United States".

2. Aliens ⇐17

The statute providing that, when it is alleged in a pleading that a privilege was exercised by a defendant who was not a citizen, upon proof that privilege was exercised the burden is on defendant to establish that he was at the time a citizen and legally entitled to exercise the privilege, is valid. Code Civ.Proc. § 1983.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Bobby Cordero was convicted of having in his possession a firearm having a barrel less than 12 inches in length capable of being concealed upon his person, he being at the time of such possession not a citizen of the United States. From a judgment of conviction and an order denying a new trial, he appeals.

Affirmed.

Hearing denied; HOUSER, CARTER, and TRAYNOR, JJ., dissenting.

Harvey J. Lindstrom and Robert Porter, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant was convicted of having in his possession a firearm having a barrel less than twelve inches in length, capable of being concealed upon his person, he being at the time of such possession not a citizen of the United States. The statute under which he was accused is known as the Deadly Weapons Act, chapter 339, Statutes of 1923, p. 695, as amended statutes 1931, p. 2316; section 2, Act 1970, Deering's General Laws. His violation was evidently deemed to have been free of any criminal intent by reason of the fact that while the statute makes the offense a felony, appellant's punishment was fixed at one day in the county jail.

Two facts were established at the trial, namely that defendant is an unnaturalized native of the island of Luzon and that he did in fact possess the firearm in question. His only contentions before this court are: (1) That his conviction was in violation of the due process clause of the 14th amendment to the federal Constitution and (2) that section 1983 of the Code of Civil Procedure, which placed upon an alleged alien the burden of proving his citizenship, does not apply to members of the Filipino race.

The police power is the power inherent in the government itself to enact laws within constitutional limits for the protection of the order, safety, health and general welfare of society. 12 C.J. 904; 16 C.J.S., Constitutional Law, § 174. Since the right of the legislature to exercise that power is not to be denied on account of any grant heretofore made, it is appropriate to enact legislation restricting privileges commonly exercised by citizens by denying the enjoyment thereof to foreigners. The 14th amendment was not designed to interfere with the police power of the several states. Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923. Therefore if section 2 is a valid exercise of the police power no constitutional guarantee of the defendant has been violated. The enactment of such laws as the Deadly Weapons Act is a proper exercise of the police power. It was especially authorized by section 1, article XIX of the Constitution which requires the legislature to protect the state from "the burdens and evils arising from the presence of aliens, who are, or may become * * * criminals * * * and from aliens otherwise dangerous or detrimental to the well-being or peace of the State * * *." The section is proof that the people had taken cognizance of a social condition fraught with such peril to the state as to require regulation. Since the statute is equal in its

operation, it does not violate due process. In re Kemmler, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519; In re Rameriz, 193 Cal. 633, 226 P. 914, 34 A.L.R. 51. If the law makers find conditions that require regulation by statute, they are acting within the scope of their powers to enact appropriate legislation to meet the requirements. Miller v. Wilson, 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed. 628, L.R.A.1915F, 829.

[1] In proving its case against the defendant, the people relied on section 1983, Code Civ.Proc. It provides that, when it is alleged in a pleading that a privilege has been exercised by the defendant who is not a citizen of the United States, after it has been established that such privilege was exercised by defendant, then "the burden shall be upon such person * * * to establish the fact" that he was at the time a citizen of the United States and was legally entitled to exercise such privilege. Prior to 1927 it was the law that the foreign nativity of an accused person was a part of the corpus delicti of the offense denounced. People v. Quarez, 196 Cal. 404, 238 P. 363. But in that year the legislature enacted section 1983, supra. This statute established the "rule of convenience." Its purpose was to relieve the state of the burden of proving the alienage of the accused because such fact is "intimately and peculiarly within the knowledge of the person who by the exercise of certain rights has assumed to be native born." People v. Osaki, 209 Cal. 169, 192, 286 P. 1025; People v. Bruno, 209 Cal. 782, 286 P. 1037; People v. Guzman, 209 Cal. 783, 286 P. 1037; People v. Cortez, 112 Cal.App. 22, 296 P. 98. However, in 1934 the United States Supreme Court reversed a conviction (Morrison v. State of California, 291 U.S. 82, 92, 54 S.Ct. 281, 78 L.Ed. 664) where a citizen had been jointly convicted with an alien for conspiracy to violate section 9a of the Alien Land Law. But that case is not authority for appellant's position here for the reason that Morrison was an American and he could not be denied his rights under the due process clause. The court cited a long line of authorities holding that a statute which casts the burden of proving citizenship upon an alleged alien, after establishing his commission of the crime, is valid and holding that a former decision (Morrison v. People of the State of California, 288 U.S. 591, 53 S.Ct. 401, 77 L.Ed. 970) correctly held that section 9b of the Alien Land Law which cast the burden upon the accused of proving his citizenship was not an impairment of his immunities under the federal Constitution.

[2] Appellant contends that in the enactment of section 2 of the Deadly Weapons Act, it was not comtemplated that a native of the Philippine Islands should be included among those persons not citizens of the United States. He maintains that, since he owes allegiance to the Government of the United States, he is therefore a national and entitled to enjoy all privileges shared by citizens. He suggests that the absence from the law books of decisions involving the alienage of Filipinos indicates a universal view that they should not be subjected to the enforcement of this act. A review of the statutes discloses the futility of his claims.

Section 57 of the Political Code does not avail appellant. That section merely attempts to classify the population of California with a view of assigning to each its political rights. But, in enacting the Deadly Weapons Act the paramount aim was to protect the security and tranquillity of the state and of the members of each alien group. It was conceived that such purpose might be promoted by denying to all persons not citizens of the United States the right to possess firearms which could be concealed upon the person.

It might be conceded that a native of Luzon was not an alien insofar as he owed allegiance to the United States as against other sovereignties until the complete independence of the Philippines. Such allegiance was the natural reaction of a proud people to a benevolent protector.

Notwithstanding the fact that the Governments of the United States and the Philippines have amiably collaborated for the improvement of the economy, for the increase of liberty and for the upbuilding of the civilization of the islands, yet the Philippine Islands have never been incorporated into the United States. They constitute merely an insular possession appurtenant to the United States. By the Treaty of Paris in 1898, 30 Stat. 1754, the civil and political status of the Filipinos was to be determined by Congress. 42 Harvard Law Review, 809. No act of that body has ever conferred citizenship upon them. Ibid. The islands are a dependency until admitted into the union or until this government surrenders its jurisdiction over

that territory. Opinion U. S. Attorney General, 1924, 34 Op.Atty.Gen. page 287; 1925, 34 Op.Atty.Gen. page 460. The inhabitants of those islands are deemed and held to be citizens of the Philippine Islands and its people "shall be considered as if they were aliens." Secs. 1002, 1238, chap. V, title 48 U.S.C.A. "For [immigration] purposes the Philippine Islands shall be considered as a separate country." Sec. 1238, supra.

Finally, in 1933 at the request of the government of that domain Congress enacted a statute granting complete independence to the Philippine Islands effective as of July 3, 1946. See title 48, sec. 1231, U. S.C.A. If they are to be granted such independence, their people could not now be our citizens and the islands could not now be a part of the United States. If they were, their complete independence would be a secession—a right which perished forever in the flames of civil war. Their present status makes the natives of the Philippines our associates in peace and our allies in war. The policy of the government since the Treaty of Paris has been that of protecting the Filipinos as our nationals in foreign lands and of rendering paternal beneficences to them, to the end that they might take a dignified position among the commonwealth of nations as a separate and independent republic. No legislation was ever enacted nor any treaty approved which placed the Philippine Islands in the same status as that of territorial possessions belonging to the United States.

It has been repeatedly held that the inhibition against the possession of firearms by aliens applies to any unnaturalized foreign-born person. In re Rameriz, supra; People v. Cannizzaro, 138 Cal.App. 28, 31 P.2d 1066. Since a native of Luzon is an unnaturalized foreign-born, his possession of such firearm as that inhibited by the Deadly Weapons Act constitutes a violation thereof.

Judgment and order denying motion for new trial are affirmed.

W. J. WOOD and McCOMB, Justices (concurring).

We concur in the order affirming the conviction.

[1] The statute under which defendant was convicted provides that "no person not a citizen of the United States of America * * * shall own or have in his possession * * * any pistol * * *." Defendant does not present the contention that he is a citizen of the United States, a contention that would be futile in view of the express provision in a federal statute relating to immigration that the Filipinos "shall be considered as if they were aliens." (48 U.S.C.A. §§ 1002, 1238).

[2] The Supreme Court of California has on several occasions held that section 1983 of the Code of Civil Procedure, which places the burden on a defendant to establish citizenship, does not violate any constitutional provision. (People v. Osaki, 209 Cal. 169, 286 P. 1025; People v. Bruno, 209 Cal. 782, 286 P. 1037; People v. Guzman, 209 Cal. 783, 286 P. 1037).



50 Cal.App.2d 79

SOUTHERN PAC. MILLING CO. v. BILLI WHACK STOCK FARM, Limited, et al.

Civ. 12895.

District Court of Appeal, Second District, Division 3, California.

Feb. 24, 1942.

Rehearing Granted March 24, 1942.

1. Sales ⇐82(2)

When a contract for the sale of personal property does not fix the time for payment of the price, the law fixes the time of delivery as the time of payment, and, where the time for a part only of the price is fixed by the contract, the same rule applies to payment of the remainder. Civ.Code, § 1762.

2. Contracts ⇐168
Evidence ⇐448

As regards contracts, it is a well-settled principle that that which is implied by law becomes as much a part of the contract as that which is therein written, and if the contract is clear and complete, when aided by that which is imported into it by legal implication, it cannot be contradicted by parol in respect of that which is implied any more than in respect of that which is written.

3. Sales ⇐87(3)

In action by seller for breach of contract covering sale of rolled barley, evidence not fixing the time or the commodities covered was insufficient to show a course of dealing between the parties by which the buyer had 30 days in which to pay for all the purchases which became a part of the written contract.

4. Contracts ⇐238(2)

An oral modification of a written contract is effective only to the extent that it is "executed", that is, carried out. Civ.Code, § 1698.

See Words and Phrases, Permanent Edition, for all other definitions of "Executed".

5. Sales ⇐181(11)

In action by seller for breach of contract covering rolled barley, evidence did not show that seller had breached contract by failing to deliver barley that had been ordered.

6. Sales ⇐384(2)

Under contract providing for shipment of rolled barley as required in lots of ten tons or more during the month of August, 1937, to July 31, 1938, mere failure of buyer to order any more barley after February, 1937, was not a breach of contract so as to fix damages as of such time.

7. Sales ⇐153

Where buyer of rolled barley informed seller's agent that buyer did not intend to take delivery of undelivered balance and seller was not then in default and such refusal was not withdrawn, seller was excused from making a tender of the barley and invoicing it as provided by contract. Civ.Code, § 1440.

8. Sales ⇐151

Refusal by buyer to accept undelivered portion of contract for rolled barley did not relieve seller from the requirement that, in order to recover, seller must have been able to perform.

9. Sales ⇐181(11)

In action by seller for breach of contract covering rolled barley, evidence showed that seller was able to perform contract.

10. Witnesses ⇐247

The general statement of a witness can have no greater force or effect than his immediately ensuing explanation of the meaning of such statement.

11. Sales ⇐384(2)

Under statute providing that, where there is an available market for the goods in question, the measure of damages is the difference between contract price and the "market or current price" at the time or times when the goods ought to have been accepted, the words "market price" and "market value" mean the same thing, or the price or value of the articles established or shown by sales in the way of ordinary business; "market value" being the price at which goods are freely offered in the market to all the world. Civ.Code, § 1784(3).

See Words and Phrases, Permanent Edition, for all other definitions of "Market or Current Price", "Market Price", and "Market Value".

12. Sales ⇐383

In action by seller for breach of contract covering rolled barley, mere proof of what unrolled barley would have cost seller at time of breach and the cost of rolling it and transporting it with a profit added did not show the "market or current price" within statute fixing the measure of damages. Civ.Code, § 1784(3).

13. Appeal and error ⇐1178(6)

Where there was no error affecting the determination of buyer's liability for damages, but the evidence was insufficient to show what seller's damages were, only the issue of damages was required to be retried. Civ.Code, § 1784(3).

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Action by Southern Pacific Milling Company against Billiwhack Stock Farm, Limited, and another, for damages for breach of contract for the sale of rolled barley. From a judgment for plaintiff, the defendants appeal.

Judgment reversed with directions.

E. Neal Ames, of Los Angeles, for appellants.

Schauer, Ryon & McMahon, of Santa Barbara, and Charles F. Blackstock, of Oxnard, for respondent.

SHAW, Justice pro tem.

This is an action for damages for breach of a written contract for the sale of rolled barley by plaintiff to defendant. Plaintiff had judgment, from which defendant ap-

peals. Since the appeal requires us to construe several provisions of the contract, we set it forth here in full: "Santa Barbara, Calif. Aug. 12th, 1937 (Confirmation) Seller—Southern Pacific Milling Co. Santa Paula, Calif. Purchaser—Billiwhack Stock Farm, Ltd., Santa Paula, Calif. Article—Rolled Barley. Quantity—Two Hundred (200) tons. Quality—Good Field-run Barley. Price—Thirty-four ($34.00) Dollars per ton delivered to purchaser's dairy plant in Alisio Canyon, near Santa Paula, Calif. Shipment—As required in lots of 10 tons or more, during the months of Aug. 1937 to July 31,/38 purchaser to give seller sufficient notice to permit of rolling and making delivery as required. Payments—Purchaser to advance Five Hundred ($500.00) Dollars on Sept. 1st, 37, and * * * Five Hundred ($500.00) Dollars on Oct. 1st, 37, to apply on purchase price of 200 tons rolled barley. It is also understood and agreed that unless the full purchase price is paid on or before November 1st, 1937, an additional carrying charge of Twenty (20¢) cents per ton per month shall be added to the contract price of Thirty-four Dollars per ton; for example, all rolled barley delivered on this contract during month of November will be charged for at rate of Thirty-four and 20/100 ($34.20) Dollars per ton; all deliveries made during month of December will be charged for at rate of Thirty-four and 40/100 ($34.40) Dollars per ton, and so on. Any rolled barley remaining undelivered on this contract on July 31, 1938, will be invoiced to purchaser and is to be paid for immediately at the prices shown above. The Seller is not responsible for nondelivery, or delay of delivery caused by Strikes, Fire, Floods, Draughts, Accidents, Wars, Insurrections, Lockouts or any other contingencies beyond the Seller's control. Seller: S. P. Milling Co., By Lonnie Hobson, Agt. Accepted by: W. G. Schwindt Buyer."

Defendant made the payments called for by the contract on September 1, 1937, and October 1, 1937, but did not pay the remainder of the price on or before November 1, 1937. Deliveries of rolled barley were made to defendant, on its orders, until about February 23, 1938. The total amount delivered was 205,320 pounds, for all of which defendant made payment. The remainder of the 200 tons mentioned in the contract was never delivered, and plaintiff sued for and has recovered damages on the theory that defendant breached the contract by not taking and paying for that remainder.

[1] The two payments required by this contract on September 1, 1937, and October 1, 1937, cover the price of slightly less than 59,000 pounds of barley, leaving approximately 146,000 pounds of the barley received by the defendant to which the provision for these payments does not apply. The provision for payment on July 31, 1938, applies only to barley then remaining undelivered. The provision regarding payment on November 1, 1937, does not fix the time for payment of any part of the price; it merely provides for a sliding scale of increases in price, to become effective if payment is not made by the date stated. It gives defendant an option to avoid these price increases by paying in full on or before that date, but it imposes on him no obligation to do so. The contract is thus entirely silent as to the time for payment of the price of the 146,000 pounds of barley above mentioned, and of any additional amounts which defendant might order for delivery before July 1, 1938. When a contract for the sale of personal property does not fix the time for payment of the price, the laws steps in and fixes the time of delivery as the time of payment. Civ.Code, sec. 1762; Gilfallan v. Gilfallan, 1914, 168 Cal. 23, 29, 141 P. 623, Ann.Cas.1915D, 784; Stum v. Hadrich, 1907, 7 Cal.App. 241, 243, 94 P. 82; Romer v. Wehner, 1923, 61 Cal. App. 411, 417, 214 P. 993. Where the time for payment of a part only of the price is fixed by the contract, this rule applies to payment of the remainder. Gilfallan v. Gilfallan, supra, 168 Cal. at page 30, 141 P. 623, Ann.Cas.1915D, 784; see, also, Stum v. Hadrich, supra. It should be noted that the provision now in section 1762 of the Civil Code was formerly contained, in substance, in section 1784 of that code; hence the references to section 1784 in the cases cited.

[2] Defendant contends that there was a course of dealing between the parties by which defendant had thirty days' time in which to pay for all purchases, that this course of dealing became a part of the contract, and that when plaintiff demanded cash on delivery it therefore committed a breach of the contract which affords defendant a sufficient defense to this action. Regarding contracts in general, "It is a well-settled principle that that which is implied by law becomes as much a part of the contract as that which is therein writ-

ten, and, if the contract is clear and complete when aided by that which is imported into it by legal implication, it cannot be contradicted by parol in respect of that which is implied any more than in respect of that which is written." Standard Box Co. v. Mutual Biscuit Co., 1909, 10 Cal.App. 746, 750, 103 P. 938, 939. This application of the parol evidence rule has been approved and followed in several subsequent cases. See Calpetro P. Syndicate v. C. M. Woods Co., 1929, 206 Cal. 246, 252, 274 P. 65. However, section 1791 of the Civil Code, which is a part of the Uniform Sales Act, adopted in this state in 1931, seems to suggest a possible exception to the parol evidence rule in case of sales, for it provides, in part: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by * * * the course of dealing between the parties."

[3] The question whether this provision does make an exception to the parol evidence rule as applied by the cases need not be decided here, for on examination of the evidence relating to the supposed course of dealing we find it insufficient to raise that question. The evidence relied upon by defendant on this point came wholly from plaintiff's witness Hobson, who was and had been for several years plaintiff's agent in the territory in which defendant's place of business was situated, and who negotiated the contract for plaintiff. He testified on cross-examination:

"Q. Now, Mr. Hobson, Mr. Fratkin—Billiwhack Stock Farm had been purchasing rolled barley from you prior to entering into this contract, had they not? A. I believe they had. I can't say positively, because I don't remember exactly.

"Q. Didn't you handle the sales to them of rolled barley prior to August 1937? A. Yes. They were buying various things. There could have been rolled barley in that so far as I remember now.

"Q. And rolled barley and other things were all bought on 30 days time, were they not? A. For rolled barley?

"Q. Yes. A. It was bought on 30 days time, yes, they were supposed to clear their account every 30 days.

"Q. Did you have any discussion in regard to payments, the time of payment, at the time when you entered into this contract with Mr. Fratkin? A. They knew at the time it was supposed to be paid."

After further questioning had brought out the fact that before the contract was made the witness discussed with two of defendant's agents the time of payment, he testified:

"Q. Does the contract contain a statement of the method of payment which was discussed at that time? A. I don't remember. * * *

"Q. The question was, did you at any time in these conversations tell Mr. Fratkin this grain would be delivered only on cash with delivery, prior to the signing of the contract? A. No."

This witness also testified that on February 23, 1938, he insisted on cash payment for barley because defendant's account "wasn't kept up to a 30 day period."

We find no further evidence in the record on this subject. While this evidence may generate a suspicion of a previous course of dealing, it does not fix the time or the commodities covered thereby or enable us to determine whether there was a real course of dealing or were merely occasional purchases each separately agreed on. It is too nebulous and uncertain to justify us in holding, in the face of the trial court's decision adverse to defendant, that there was a prior course of dealing, even if such a course of dealing would become part of the contract.

[4] Insofar as the testimony relates to the handling of the account after the contract was made, it goes no further than to suggest an oral modification of the written contract, as the terms of that contract were fixed by the rule of law above stated. Such a modification of a written contract is effective only to the extent that it is executed, that is, carried out. Civ.Code, sec. 1698; Columbia Casualty Co. v. Lewis, 1936, 14 Cal.App.2d 64, 72, 57 P.2d 1010; Standard Box Co. v. Mutual Biscuit Co., supra, Rottman v. Hevener, 1921, 54 Cal.App. 474, 479, 202 P. 329. If there was any oral agreement here to modify the implied terms of the contract regarding the time for payment of the price, obviously that agreement was not executed as to the orders for which plaintiff demanded cash on delivery.

[5] Defendant claims, also, that on or about February 23, 1937, it ordered 10 tons of barley, and that when plaintiff demanded cash on delivery defendant acquiesced in that demand, but that plaintiff did not com-

pletely fill this order and thus committed a breach of the contract. The evidence does show that 2 tons of barley were delivered to defendant at this time and paid for on delivery. But we discover no evidence requiring a finding that any more than this 2 tons of barley was ordered on the cash basis and not delivered. Suggestion of a 10-ton order was made in questions asked of plaintiff's witness Hobson on cross-examination, but his answers were that he did not remember such an order. Defendant's witness, after stating that before plaintiff's demand for cash on delivery he gave an order for an unspecified amount, part of which was not delivered, further said:

"Q. How many tons had you ordered at that time? A. Well, they usually roll us about 100—about 10 ton at a time.

"Q. And that was—did you put in an order for about that much? A. Well, that is about what they would roll us every time I would order it * * *

"A. Well, after they called and after I called them and they told me it was cash I never did order any more at all."

On this testimony the trial court may well have concluded that no barley other than that delivered was ordered on the cash basis.

[6] Another contention of defendant is that the contract requires it to order a minimum of 10 tons of barley per month, that when it failed to order any more barley after February, 1937, it at once committed a breach of the contract and the damages should have been fixed as of the time of such breach. This contention is based on the clause of the contract headed "Shipment." We see no sufficient reason for so construing the contract. Had such been the intention it would have been easy so to provide by inserting the words "per month" after the reference to "lots of 10 tons or more," but those words or their equivalent do not appear. Instead the whole clause is introduced by the words "as required," which, with the subsequent provision for notice by the purchaser, give it an option as to the time for delivery and the amount thereof, limited only by the statement of the period of time in which this may be done, and by the specified minimum for a single order.

[7-9] The evidence shows that on July 31, 1938, the plaintiff did not have on hand for delivery under the contract an amount of rolled barley equal to that then remaining undelivered, that plaintiff made no tender of barley to defendant on that date, and that this undelivered barley was never "invoiced to the purchaser," as the contract provides. Defendant contends that by reason of these omissions on plaintiff's part it cannot recover. But the evidence shows that on July 31, 1938, Upton, the plaintiff's agent, had a conversation with Fratkin, representing the defendant, in which, as Upton testified: "I asked Mr. Fratkin if they expected to take delivery of the undelivered balance of the contract, and he stated to me that they didn't intend to, and I asked him why, and he said because we had refused delivery without the cash. * * * I told him that I was supposed to collect the account." This constituted an unequivocal refusal by defendant, made at a time when plaintiff was not in default, and not later withdrawn, to proceed further in performance of the contract, and excused plaintiff from the necessity it might otherwise have been under to make a tender of the barley and invoice it. Civ.Code, sec. 1440; Cossins v. Hershell, etc., Co., 1930, 103 Cal.App. 524, 529, 284 P. 1038. Such refusal does not relieve the plaintiff from the requirement that in order to recover it must have been able to perform on its part. Dickey v. Kuhn, 1930, 106 Cal. App. 300, 304, 289 P. 242. But such ability appeared here. While plaintiff did not have the necessary amount of rolled barley on hand on July 31, it did have that quantity of unrolled barley and the necessary machinery for rolling it and could have rolled and delivered the barley if defendant had been willing to accept it. The evidence shows that such a quantity of barley cannot be rolled and kept for any considerable time because of its tendency to spoil, and the contract allows plaintiff sufficient time for rolling after the barley is required.

[10-12] Finally, defendant contends that the evidence does not support the finding of damages, and this contention must be sustained. In discussing this point defendant erroneously assumes that the measure of damages here is fixed by section 3353 of the Civil Code. That section declares what is "the value of property to a seller" in estimating damages, and prior to the adoption of the Uniform Sales Act in this state in 1931, section 3311 of the Civil Code, which then fixed the measure of damages in such a case as we have here, adopted "the

value to the seller" as one of the factors to be used in estimating such damages. But in 1931 section 3311 was repealed, and the Uniform Sales Act was adopted, and the matter is now covered by section 1784 of the Civil Code, adopted as part of that act. Respondent contends that the applicable part of this section is subdivision (3) thereof, which provides that "Where there is an available market for the goods in question, the measure of damages is * * * the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted." The evidence does not suggest that any other part of section 1784 is to be considered. The only evidence on the subject is the hereinafter stated testimony of plaintiff's witness Furman. After testifying that he was familiar with the market value of rolled barley delivered in quantities of 10 tons or more in the Santa Paula area (defendant's place of business was in that area) on July 31, 1938, and that this market price was $23 per ton, he continued:

"Q. How do you arrive at that price, Mr. Furman? A. Because on that date the barley market, the barley was selling and was worth 90 cents a hundred in the valley where it was grown, Santa Inez. Santa Inez is a section where we buy our barley. We add 10 cents transportation and 10 cents for rolling, a dollar a ton profit, that makes an aggregate of $23."

On cross-examination he said that the price he added for rolling included a profit of about 75 cents per ton. The witness' first general statement of market price here can have no greater force or effect, even on appeal, than his immediately ensuing explanation of its meaning. According to the explanation, it merely states what would have been the cost to plaintiff at the time in question of buying whole barley elsewhere, rolling it and transporting it to Santa Paula, with a profit added, what the statute calls for is "the market or current price." " 'Market price' and 'market value,' when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales in the way of ordinary business. * * * 'Market value' is the price at which goods are freely offered in the market *to all the world.*" Kings County Packing Co. v. Sunland Sales Co-op. Ass'n, 1929, 100 Cal.App. 126, 133, 279 P. 1036, 1039—emphasis by the court. The evidence quoted does not show that there was an available market, or that there was a current or market price for rolled barley at the time and place of the breach. In the absence of all these factors, section 1784 Civil Code provides other rules for estimating damages, but there is no evidence by which they can be applied.

[13] However, since we find no error affecting the determination of defendant's liability for damages, only the issue of damages need be retried following the reversal which must be ordered.

The judgment is reversed with directions to the superior court to retry the issue of plaintiff's damages only, all the present findings on other issues to stand, and thereupon to enter judgment in plaintiff's favor for such amount of damages as it may find plaintiff to have suffered by the defendant's breach of contract.

SHINN, Acting P. J., and PARKER WOOD, J., concurred.



PEOPLE v. KELLEY.

Cr. 3531.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1942.

Hearing Granted March 27, 1942.

1. Gaming ⇐98(5)

Evidence was sufficient to warrant conviction of occupying an apartment with books, papers, apparatus, device and paraphernalia for the purpose of recording bets on results of horse races. Pen.Code, § 337a, subd. 2.

2. Criminal law ⇐1159(1)

If the circumstances given in proof of crime are such as would warrant a jury of reasonably minded persons in inferring guilt of accused, appellate court is not justified in disturbing verdict, even though innocence might as readily have been inferred.

3. United States ⇐22

An act of Congress does not have sanctity of constitutional provision, and even though the act is valid within orbit of activi-

ties of Congress, the operation of the act can affect only those subjects over which the central government has jurisdiction.

4. Telegraphs and telephones ⇐79

The provision in Federal Communications Act that no person not authorized by sender shall intercept or divulge contents of any communication to any person, and that no person not being entitled thereto shall receive any intercepted communication by wire or radio, was intended for activities of officials and courts of federal government and for no others. Communications Act 1934, § 605, 47 U.S.C.A. § 605.

5. States ⇐4

In matters involving procedure, state courts are not affected by acts of Congress, and the state can establish its own court procedure in accordance with the genius of its own laws and institutions, subject only to limitations of Federal Constitution.

6. States ⇐4

The provision in California Constitution making California an inseparable part of American union and acknowledging Federal Constitution as supreme law of land does not deprive California of its own sovereignty and of power to regulate its own adjective law. Const. art. 1, § 3.

7. United States ⇐1

The purpose of framers of Federal Constitution was to establish a government which should be supreme within its own sphere of action but which should not usurp any of powers reserved to states.

8. Constitutional law ⇐254

Whether provision in Federal Communications Act of 1934 that no person not authorized by sender shall intercept or divulge contents of any communication to any person, and that no person not entitled thereto shall receive any intercepted communication by wire or radio, should govern proceedings in state court, does not involve the principle of due process. Communications Act 1934, § 605, 47 U.S.C.A. § 605; U.S.C.A.Const. Amend. 14.

9. Constitutional law ⇐257

Whenever a criminal prosecution in state court is based upon a law not in itself repugnant to Federal Constitution, and trial of prosecution is conducted with due process and according to established procedure for judicial proceedings by law of state, no clause of Federal Constitution is violated.

10. States ⇐4

The power of state to regulate its own court procedure is substantially unrestricted by any power the state has granted.

11. Commerce ⇐7, 80

Under interstate commerce clause, Congress has power to regulate intrastate transactions when necessary for protection of interstate commerce, but such power does not enlarge authority of Congress to make rules of procedure for state courts. U.S.C.A.Const. art. 1, § 8, cl. 3.

12. Criminal law ⇐394

Since provision in Federal Communications Act of 1934 that no person not authorized by sender shall intercept or divulge contents of any communication to any person, and that no person not entitled thereto shall receive any intercepted communication by wire or radio, was designed as a rule for federal courts, evidence procured by means of intercepting any wire or wireless communication is not admissible in the federal courts. Communications Act 1934, § 605, 47 U.S.C.A. § 605.

13. Criminal law ⇐394
Telegraphs and telephones ⇐79

The provision in Federal Communications Act of 1934 providing that no person not authorized by sender shall intercept or divulge contents of any communication to any person, and that no person not entitled thereto shall receive any intercepting communication by wire or radio, does not extend to intrastate telephonic conversations, and it is only when an intrastate communication gained by tapping telephone wires is offered in a federal court that such communication is inadmissible. Communications Act 1934, § 605, 47 U.S.C.A. § 605.

14. Commerce ⇐28

The intercepting of intrastate communications is not violative of Federal Constitution.

15. United States ⇐5

The Federal Constitution was not intended to confer on central government power to prescribe rules of evidence for the courts of the several states, in absence of specific grant of such power to the central government.

16. Criminal law ⇐394

The admission into evidence by California court of telephonic communications obtained by the interception thereof is not prohibited by Federal Constitution or by provi-

sion in Federal Communications Act of 1934 that no person not authorized by sender shall intercept or divulge contents of any communication to any person, and that no person not entitled thereto shall receive any intercepted communication by wire or radio. Communications Act 1934, § 605, 47 U.S.C.A. § 605.

17. Criminal law ⇐394

In prosecution for occupying apartment with paraphernalia for purpose of recording bets on results of horse races, allowing police officers to testify without consent of sender of messages, to contents of messages which came to apartment over telephone after officers had gained entrance thereto, was not violative of the Federal Communications Act of 1934, since such act does not constitute a restraint on state court. Communications Act 1934, § 605, 47 U.S.C.A. § 605; Pen.Code, § 337a, subd. 2.

18. Criminal law ⇐394

In prosecution for occupying apartment with paraphernalia for purpose of recording bets on results of horse races, defendant could not assert that Federal Communications Act of 1934, if applicable, rendered inadmissible, without sender's consent, police officer's testimony as to contents of messages which came into apartment over telephone after officer gained entrance thereto, where identity of sender was never disclosed, and proof was not made of lack of consent of sender. Communications Act 1934, § 605, 47 U.S.C.A. § 605; Pen.Code, § 337a, subd. 2.

19. Constitutional law ⇐206(1)

In prosecution for occupying apartment with paraphernalia for purposes of recording bets on results of horse races, admission of testimony of police officers concerning contents of messages which came to apartment over telephone after officers had gained entrance thereto, even if interception of messages was violative of Federal Communications Act of 1934, did not deprive defendant of a privilege or immunity of national citizenship guaranteed by Fourteenth Amendment against abrogation by the states, where no sender of message objected to the interception and defendant at all times disclaimed all interest in the messages intercepted. Communications Act 1934, § 605, 47 U.S.C.A. § 605; Pen.Code, § 337a, subd. 2; U.S.C.A.Const. Amend. 14.

20. Criminal law ⇐394
Telegraphs and telephones ⇐79

The provisions of second and fourth clauses of federal statute regarding the intercepting and divulging of communications which on their face purport to relate to all persons do not relate to the regulation of communication carriers, and merely constitute a rule of evidence for federal courts. Communications Act 1934, § 605, 47 U.S.C.A. § 605.

21. Criminal law ⇐386

In prosecution for occupying apartment with paraphernalia for purpose of recording bets on results of horse races, telephonic communications which came to apartment of defendant at time of his arrest and which were received by officers were proper evidence in proof of use of apartment. Pen. Code, § 337a, subd. 2.

22. Criminal law ⇐448(7)

A person properly qualified may testify to the significance and meaning of signs and symbols used in the business of bookmaking.

23. Criminal law ⇐1169(1)

In prosecution for occupying apartment with paraphernalia for purpose of recording bets on results of horse races, testimony of officers in establishing from scratch sheet that a horse race was being run on day of defendant's arrest, was harmless, if error, where offense was complete when it was established that defendant occupied an apartment with paper and paraphernalia for purpose of recording bets on horse races, and whether the race was run was immaterial. Pen.Code, § 337a, subd. 2.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

George Kelley was convicted of occupying an apartment with books, papers, apparatus, and paraphernalia for the purpose of recording bets on results of horse races. From an order denying his motion for a new trial, he appeals.

Order affirmed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was convicted of occupying an apartment with books, papers, apparatus, devise and paraphernalia for the purpose of recording bets on the results of horse races in violation of section 337a,

subdivision 2 of the Penal Code. His appeal is based upon the grounds: (1) insufficiency of the evidence; (2) error in admitting intercepted telephonic messages without the consent of the sender as in violation of section 605 of the Federal Communication Act of 1934, 47 U.S.C.A. § 605, and of the fourteenth amendment to the Constitution of the United States; (3) error in the admission of evidence of discoveries made by unreasonable search and seizure, contrary to section 19, article 1 of the Constitution; (4) other errors in admitting evidence.

[1, 2] (1) A brief synopsis of the facts will serve as a complete refutation of the first claim. When the police knocked at the door of appellant's apartment, they were advised by the lady attendant that it was vacant and that the number they were looking for was upstairs. Having found the upstairs apartment vacant, they returned and rang appellant's door bell three times before he responded. In answer to the inquiry as to his immediate occupation, appellant replied that he was reading; but at that very moment the blinds were drawn and the room was dark. On their way upstairs, the officers heard appellant's telephone ringing; upon their entry into his apartment they found the telephone wires were cut. Upon reconnecting the wires, the telephone rang not less than fifty times, each of which calls was answered by an officer. Each patron gave his name and stated the bet that he wished placed. When the officers called appellant stated that his name was Jimmy. When a message came for Jimmy, appellant then stated that his name was George, the party addressed by practically all of the invisible clientele. The officers found in a drawer within the apartment a number of blank forms of A B C betting markers ordinarily used in bookmaking places. They found upon the person of appellant the key to the door of the apartment. The toilet contained small bits of paper containing figures. The dial of his radio was turned to the station which was at that time broadcasting horse races. Comparing the numbers given to them by the patrons who called over the telephone with names and numbers appearing in a racing bulletin of the same day, the officers found that each horse and each number designated over the telephone appeared in the bulletin and that the names of the race tracks mentioned in one of the telephonic requests were operating on that day in the United States.

The foregoing facts were sufficient to establish the purpose for which the room was occupied notwithstanding the denials of appellant of any knowledge of the use of the apartment for placing bets on horse races as well as claiming that he was a mere guest of the tenant for the time being. People v. Tepper, 36 Cal.App.2d 525, 527, 97 P.2d 1002; People v. Ryan, 15 Cal.2d 492, 102 P.2d 320. If the circumstances given in proof of the crime are such as would warrant a jury of reasonably minded persons in inferring the guilt of the accused, the appellate court is not justified in disturbing the verdict even though innocence might as readily have been inferred. People v. Martinez, 20 Cal. App. 343, 128 P. 952; People v. Newland, 15 Cal.2d 678, 104 P.2d 778.

[3-5] (2) Appellant contends that the court committed prejudicial error in allowing police officers to testify to the contents of messages which came to the apartment over the telephone after they had gained entrance thereto. This contention is based upon the inhibitions of section 605 of the Federal Communications Act of 1934, Title 47, U.S.C.A., which provides that no person not authorized by the sender shall intercept or divulge the contents of any communication to any person, and no person not being entitled thereto shall receive any intercepted communication by wire or radio. Appellant proceeds upon the theory that an act of Congress has the sanctity of a constitutional provision. This is so fundamentally erroneous as to make a refutation thereof super-erogation. Even though the act of Congress is valid within the orbit of the activities of that department of the government, the operation of the statute can affect only those subjects over which the central government has jurisdiction. Section 605 was intended for the activities of officials and courts of the federal government and for no others. In matters involving solely procedure, state courts are not affected by acts of Congress. Subject only to the limitations of the federal Constitution, the state may establish its own procedure, People v. Nolan, 144 Cal. 75, 80, 77 P. 774.

[6, 7] Section 3, article 1 of the Constitution which makes California an inseparable part of the American union and acknowledges the Constitution of the Unit-

ed States the supreme law of the land does not deprive the state of its own sovereignty and of the power to regulate its own adjective law. Ibid. The purpose of the framers of the federal Constitution was to establish a government which should be supreme within its own sphere of action but which should not usurp any of the powers reserved to the states. McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579. Accordingly the state may regulate its own court procedure in accordance with the genius of its own laws and institutions so long as it does not offend some vital principle, the protection and operation of which has been made a part of the organic law of the union. Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575.

[8-12] The principle of due process is not involved in the question as to whether section 605 should govern proceedings in a state court. Whenever a criminal prosecution in a state court is based upon a law not in itself repugnant to the federal Constitution and the trial of the action is conducted with due process and according to the established procedure for judicial proceedings by the law of the state, it violates no clause of the federal Constitution. Frank v. Mangum, 237 U.S. 309, 326, 35 S.Ct. 582, 59 L.Ed. 969. In truth the power of a state to regulate its own court procedure is substantially unrestricted by any power it has granted. Jordan v. Massachusetts, 225 U.S. 167, 176, 32 S.Ct. 651, 56 L.Ed. 1038. The cases of Weiss v. United States, 308 U.S. 321, 60 S. Ct. 269, 84 L.Ed. 298, and Nardone v. United States, 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed. 314, relied upon by appellant, do not support his contention. Both of these decisions arose out of prosecutions in the district courts of the United States. The proof offered in each case was such as congress sought to inhibit in the enactment of the Federal Communications Act. Merely because it was by those decisions held that under section 605 intrastate messages may not be divulged in a federal court they are not for that reason authority for controlling procedure in a state court. Under the interstate commerce clause, Congress has the power to regulate intrastate transactions when necessary for the protection of interstate commerce. Const. art. 1, § 8, cl. 3. But that power does not enlarge the authority of congress to make rules of procedure for state courts. Since the act was designed as a rule for federal courts the evidence procured by means of intercepting any wire or wireless communication is not admissible in such courts.

[13-17] The act does not extend to intrastate telephonic conversations. United States v. Bruno, 2 Cir., 105 F.2d 921; Bruno v. United States, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257. It is only when an intrastate communication gained by tapping telephone wires is offered in a federal court that it is inadmissible. Sablowsky v. United States, 101 F.2d 183, 189. No provision of the federal Constitution is violated by intercepting intrastate communications. Valli v. United States, 1 Cir., 94 F.2d 687; Id., 303 U.S. 632, 58 S.Ct. 760, 82 L.Ed. 1092. In the absence of a specific grant in the federal Constitution, it cannot be said that it was the intention of the framers of that instrument to confer upon the central government the power to prescribe rules of evidence for the courts of the several states. Cooley's Constitutional Limitations, 8th Ed., vol. 1, 68; Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376; Hawes v. State of Georgia, 258 U.S. 1, 42 S.Ct. 204, 66 L.Ed. 431. From the foregoing, we conclude that there is no constitutional inhibition upon the courts of this state to admit into evidence telephonic communications obtained by the interception thereof. Neither does section 605 of the Federal Communications Act constitute a restraint upon the state courts. Rowan v. State, 175 Md. 547, 3 A.2d 753; McIntyre v. State, 190 Ga. 872, 11 S.E.2d 5, 10, 134 A.L.R. 813.

[18] Even though section 605 applied to the interception of intrastate messages, it would not avail appellant here for the very good reason that there was no proof made of the lack of consent of the sender of any of the messages. In fact, his identity was never disclosed. If an invisible seeker of easy money by the bookmaking route would promote his forbidden venture by the telephone, he must pay the price of his intangibility when his message is intercepted by the agencies of the law. His position is not one to invoke unsolicited judicial protection.

[19, 20] (3) It is argued that the admission of the evidence received by the interception of telephonic communications by the police officers deprived appellant

of privileges granted to him by the federal constitution. There is no authority in support of such argument. The act of intercepting telephonic orders directed to the apartment of appellant was completed at the moment of its receipt by the police. The act of divulging the contents of such orders to the court was a totally different act from that of taking the messages over the wires. If a right of appellant was violated either by the interception of the messages or by divulging the contents thereof, appellant may pursue his appropriate remedy against the officer. But he cannot relate his quarrel with the police as a defense to a long series of crimes which he would extend without limit.

The interception of messages might not have been in accordance with the noblest of ethical standards but at the same time it is a fact of social significance that the history of crimes and criminals has demonstrated that the successful detection and apprehension of defiant evildoers has been in a large measure made successful by the bold conduct of those in authority who either apprehended the criminal in the commission of his crime or made themselves ostensible parties to the conspiracies in order to complete the chain of evidence against the miscreants. Olmstead v. United States, supra. If deception may with approval be practiced by law-enforcing agencies upon men engaged in the pursuit of organized crime, surely the conduct of an officer who, upon invading the lair of an offender and in his presence seizes evidences of the suspected crimes, does not so poison the stream of justice as to defeat the residual decree. For those reasons the construction of section 605 as suggested by appellant would be a subversion of a universal practice which is approved by the highest legal and judicial authorities. Olmstead v. United States, supra. Even though the officer violates the rights of a suspect by making an unreasonable seizure, the use of the seized effects is no part of his offense against the constitutional immunity. People v. Wong Toy, 131 Cal.App. 455, 21 P.2d 465.

There is no principle of the fourteenth amendment to the federal Constitution violated by the reception in evidence of intercepted telephonic messages as forbidden by section 605. In the first place the section was primarily designed to regulate the behavior of those "receiving or assisting in receiving or transmitting * * * any interstate or foreign communication by wire or radio * * *." The first and third clauses prohibit employees of communication agencies from divulging the contents of messages transmitted by the carrier. Clauses 2 and 4 of the section do not relate to the regulation of the carriers but are merely a rule of evidence for federal courts. Sablowsky v. United States, 3 Cir., 101 F.2d 183, 189. Following the Sablowsky decision, it was held that there is no fundamental difference between evidence obtained by tapping telephone wires or any other method of detection so long as the immunities of the federal Constitution are preserved. United States v. Polakoff, 2 Cir., 112 F.2d 888, 890, 134 A.L.R. 607. No such immunity was shown to have been violated because no sender of a message objected to the interception. Moreover, appellant at all times disclaimed all interest in the messages intercepted. If neither the sender nor the sendee objected, how can it be said that the act was violated? Such is not a privilege or immunity of national citizenship guaranteed by the fourteenth amendment against abridgement by the states.

[21] (4) It is urged that the court committed prejudicial error in permitting officers to testify to the contents of the telephonic communications which came to the apartment of appellant at the time of his arrest. It has been repeatedly held that such communications are proper evidence in proof of the use of the occupied premises. People v. Joffe, 45 Cal.App.2d 233, 235, 113 P.2d 901; People v. Reifenstuhl, 37 Cal.App.2d 402, 99 P.2d 564.

[22, 23] The contention that the court erred in allowing the officers to explain the meaning of the words, signs and symbols found in the bulletin is without support. A person properly qualified may testify to the significance and meaning of the signs and symbols used in the business of bookmaking. People v. Cohen, 48 Cal. App.2d 459, 119 P.2d 995. But the testimony of the officers against appellant was not in explanation of signs or symbols but was the result of his comparison of the numbers and names of horses given him by the patrons of appellant over his own telephone, with those appearing in a current scratch sheet. From such comparison the officer found the horses and numbers mentioned in the telephonic

conversations were found in the scratch sheet. The testimony of the officers in establishing from the scratch sheet that a horse race was being run on the day of appellant's arrest was harmless, if it was error, for the reason that the offense was complete when it was established that appellant occupied an apartment with paper and paraphernalia for the purpose of recording bets on horse races. Whether the race was run is immaterial. People v. Hinkle, 64 Cal.App. 375, 221 P. 693.

Order denying motion for new trial affirmed.

W. J. WOOD and McCOMB, JJ., concurred.



MacNICOL v. EAST COALINGA OIL FIELDS CORPORATION et al.

Civ. 6730.

District Court of Appeal, Third District, California.
Feb. 26, 1942.

Hearing Granted April 23, 1942.

1. Dedication ⇐19(4)

The filing of a subdivision map with the streets and avenues delineated thereon constituted an offer to dedicate the streets and avenues to a public use, and acceptance of all streets and avenues by county board of supervisors on behalf of the public constituted a complete paper "dedication".

See Words and Phrases, Permanent Edition, for all other definitions of "Dedication".

2. Dedication ⇐19(5)

Where the owner of a subdivision after recording a map showing streets and avenues sells lots designated thereon by reference to the recorded map, he irrevocably dedicates the streets and avenues shown thereon to the use of the public.

3. Dedication ⇐15

An intention to dedicate to a public use is a material element to be considered in determining whether there has been a dedication.

4. Dedication ⇐1

A "dedication" is a voluntary transfer which partakes both of the nature of a "grant" and also of a "gift", and it is governed by the fundamental principles which control those transactions.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift" and "Grant".

5. Dedication ⇐15, 31, 44

A dedication consists of an offer and acceptance, and to constitute a dedication there must be an intention on the part of the owner to dedicate to public use, clearly indicated by his words or acts, and unequivocal proof of acceptance.

6. Mines and minerals ⇐54(2)

Where deed conveying subdivision lots, drilling contract entered into in connection with conveyance, and corporation commissioner's permit to sell lots were all part of the same transaction, they were required to be considered together to ascertain the parties' intent on question whether conveyance carried title to center of proposed road on which lots were located. Civ.Code, §§ 831, 1112.

7. Dedication ⇐44

Evidence that subdivision was made for sole purpose of selling lots to finance drilling of oil wells, that grantor and grantees did not intend to lay out any streets or avenues, that approximately 20 years had elapsed since county board of supervisors had accepted streets and avenues designated on filed map, and that no streets or avenues had been constructed, showed that grantor and grantees intended that there should be no dedication vesting in grantees of lots and their successors any title to portions of lots embraced within boundaries of streets and avenues designated on map. Civ.Code, §§ 831, 1112.

8. Mines and minerals ⇐54(2)

Where deed to mineral lands, drilling contract, and corporation commissioner's permit to sell land were all executed as part of one transaction and were thus required to be construed together, facts as shown from dates of instruments to date of filing of complaint in action for declaratory relief, together with construction which parties placed on instruments, were also required to be considered in determining the respective rights of the parties.

9. Contracts ⇐147(1), 164

The intent of the parties at the time of the execution of several instruments as part

of a single transaction is controlling, and that intent must be ascertained from all of the instruments considered together.

10. Mines and minerals ⇐55(4)

Where an interest in minerals sold and conveyed or reserved is unlimited in duration, it is a "freehold" interest, that is, an "estate in fee in real property".

See Words and Phrases, Permanent Edition, for all other definitions of "Estate in Fee in Real Property" and "Freehold".

11. Mines and minerals ⇐55(4)

Under deed conveying title in fee and drilling contract limiting grantor's exclusive right to drill for oil to a period of 50 years but reserving to grantor the right to participate in profits perpetually, grantees were vested with fee-simple title to the surface, excepting therefrom rights expressly, inferentially, and incidentally reserved by grantor in deed and contract considered together.

12. Mines and minerals ⇐55(4)

Where it was stipulated that there was no intention at time of conveyance of mineral lands to vest title in grantees to any gas or carbohydrates, rights to gas and carbohydrates produced were reserved to grantor irrespective of whether title in fee was attempted or intended to be conveyed.

13. Mines and minerals ⇐55(5)

Casing-head gas was not intended to be governed by stipulation that there was no intention at time of conveyance of mineral lands to vest title in grantees to any gas or carbohydrates, since casing-head gas is a component part of "oil", and if any was produced it should be classified as oil.

See Words and Phrases, Permanent Edition, for all other definitions of "Oil".

14. Mines and minerals ⇐55(8)

Evidence was insufficient to show that oil company which reserved exclusive right to drill for oil on certain premises for 50 years and reserved the right to participate in profits perpetually waived anything more than its drilling rights by consenting to the execution and delivery of an oil and gas lease.

15. Appeal and error ⇐1008(3)

Where the construction given an instrument by a trial court appears to be reasonable and consistent with the intent of the parties making it, appellate courts will not substitute another interpretation even though it seems equally tenable.

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Action by Lee Alex MacNicol against the East Coalinga Oil Fields Corporation and others to quiet title and for declaratory relief. From a judgment for defendants, plaintiff appeals.

Judgment modified and, as modified, affirmed.

L. A. MacNicol, of Merced, in pro. per.

C. Ray Robinson and W. Eugene Craven, both of Merced, for respondents.

MONCUR, Justice pro tem.

This is an appeal from a judgment against appellants and in favor of respondents in an action brought to quiet title to certain lots and parcels of land and for declaratory relief under certain written instruments. The property involved is situated in Fresno County and the action was brought in the superior court of that county, and, by stipulation, was transferred to Merced County for trial. The action was tried before the court without a jury and certain of the facts were stipulated to by the parties. Oral and documentary evidence also was introduced in support of the respective issues raised by the pleadings.

Appellant's opening brief contains a statement of the facts and respondent, in its brief, states that the statement of facts set forth in appellant's opening brief is sufficient for a determination of the questions involved on this appeal. Therefore, for the purposes of this opinion, that statement of facts is adopted and it is as follows: About 1919 one George Schwinn and Mattie Kearns were the owners of a tract of land in Fresno County; the tract was subdivided into blocks and lots and a map of said subdivision showing certain portions to be designated as County Roads was filed for record on July 15, 1919; the subdivision contained 20 blocks, each block containing 120 lots, making a total of 2400 lots. 2160 of the lots of the subdivision were designated as single lots and 240 of the lots were designated as double lots.

On July 29, 1919, the respondent, East Coalinga Oil Fields Corporation was incorporated under the laws of the State of California, the incorporators thereof being

said George Schwinn, one Gordon Griffith, and P. B. Miller.

By deed dated September 1, 1919, the owners of said tract of land conveyed blocks 1 to 20 inclusive of said subdivision to the Alameda County Title Insurance Co., as trustee, with instructions to said title company to execute and deliver deeds to purchasers of lots upon receiving certain moneys therefor.

At about the time of the conveyance of said blocks and lots to said title company, the owners of said tract authorized the respondent, East Coalinga Oil Fields Corporation, to act as sole sales agent of said lots.

Pursuant to said authorization to act as sales agent of said lots, respondent made application to and obtained from the Commissioner of Corporations of the State of California, a permit, authorizing it to sell said lots for the amount and for the purposes and upon the conditions set forth in said permit.

According to the provisions of said permit, issued by the Commissioner of Corporations, respondent was authorized to sell lots in said subdivision and to issue to each purchaser of such lots an instrument representing the deed of the lot sold together with a contract or agreement to drill for and produce oil from said tract of land, said contract or agreement to be in the form and containing the terms and conditions as evidenced by a copy thereof attached to the amended complaint filed herein marked Exhibit "C."

Upon the issuance of said permit the respondent commenced the sale of lots in said subdivision by reference to the map thereof, appellant's predecessor purchasing the two lots described in the amended complaint.

At the time of the sale of each lot each purchaser, including appellant's predecessor, executed a drilling contract, according to the terms of which it was agreed, among other things, that each lot contained 2500 square feet; that lots in the northerly tier of blocks 1 and 2 and in the southerly tier of blocks 19 and 20, should be computed as double lots as to price and as to participation in profits; that each purchaser should receive a proportionate share of 80 per cent of all net profits arising from the sale of oil derived from any oil well or wells drilled on any part of said quarter section and respondent should retain 20 per cent of said profits which were reserved; that the tract was believed to be oil bearing and not otherwise productive and that the subdivision was made for mining purposes only; that the grantee was an independent purchaser of a parcel of land in fee simple, having as an incident thereto a right to receive a portion of the net proceeds from the sale of oil produced from any well or wells drilled upon said tract by respondent or its successors or assigns.

Prior to the date of the execution and delivery of any deeds covering any lots in said subdivision but subsequent to the execution of drilling contracts by purchasers of lots, the Alameda County Title Insurance Company, as trustee, by deed dated April 28, 1921, conveyed blocks 1 to 20, inclusive, of said subdivision to respondent, and about the same time the owners of said tract, George Schwinn and Mattie Kearns executed and delivered to respondent their deed to said quarter section subdivision.

Subsequent to the time that said blocks 1 to 20, inclusive, of said subdivision were deeded to respondent and commencing about May 10, 1921, respondent made, executed, and delivered numerous deeds covering lots in said subdivision to purchasers thereof. Respondent conveyed lots 58 and 59 in block 4 of said subdivision to one J. P. Cackler, appellant's predecessor in interest. Each purchaser of lots in said subdivision, including appellant's predecessor, executed and delivered to respondent a drilling contract, a copy of which is attached to the amended complaint and marked Exhibit "C."

Pursuant to the drilling contracts executed by purchasers of lots in said subdivision, and out of the funds received by respondent from the sale of lots therein, and pursuant to the permit issued by the Commissioner of Corporations and the rights reserved by respondent under its deeds of conveyance of said lots, respondent drilled an oil well on said tract to a depth of about 4780 feet. About May, 1923, respondent discontinued its drilling operations and abandoned said well, its funds being completely exhausted and the drilling fund being expended.

After May, 1923, no further drilling operations were attempted by respondent by reason of its inability to finance such operations.

About 1938 oil was discovered in paying quantities in the general locality of the sub-

division and efforts were made toward causing the tract to be prospected for oil.

As a result of these efforts, a community oil and gas lease was executed by the respondent, dated July 19, 1938, wherein one Zeb A. Terry was named as lessee, said lease covering property situated in said N. W. ¼ of said section 30 and numerous owners of lots in said subdivision, including appellant's predecessor, executed counterparts of said community oil and gas lease. According to the terms of said oil and gas lease the lessee is entitled to drill and to produce oil, gas, and other hydro-carbon substances from the quarter section and is required to pay to the lessors thereunder a royalty on oil equal to a ⅛th of the market price of oil produced and saved from the premises and a ⅛th of the proceeds from the sale of gas produced therefrom. Respondent consented in writing to the execution of counterparts of said lease by owners of lots.

Subsequent to the 19th day of July, 1938, and prior to the filing of this action the lessee under said community oil and gas lease assigned all of his right, title, interest, and estate in and to said lease and each of the counterparts thereof covering the N. ⅜ths of said subdivision, including the counterpart thereof executed by appellant's predecessor, to the Pure Oil Company, a corporation, and said lessee assigned to the Pacific Western Oil Corporation and George F. Getty, Inc., the S. ⅝ths thereof. Drilling operations were commenced in said subdivision by the owners of said lease and oil and gas are now being produced therefrom.

No county roads or streets or roads or streets whatsoever were ever laid out, maintained, or used on said quarter section as designated on the map thereof.

The land lies in the foothill area on the west side of the San Joaquin Valley. It is a general rolling foothill area used for sheep pasture, with no manifestation of ownership or development or subdivision.

In addition to the foregoing statements of fact, it was stipulated by the parties herein as follows: "That it was not the intention of the grantors or of the grantees of said property that any county roads or streets or avenues ever be laid out, maintained or used on, over or across said premises as designated and delineated upon said map of said subdivision, a copy of which said map is attached to plaintiff's amended complaint and marked 'Exhibit A', and that said subdivision was made for the sole purpose of selling pieces or parcels of land therein in order to finance the drilling of an oil well or oil wells thereon and for no other purpose whatsoever."

[1, 2] Under the first cause of action seeking to quiet title there is involved the question as to whether the conveyance of the two lots described in the complaint carried title to the center of the proposed road upon which these lots were located. Section 831 of the Civil Code of this state provides that an owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown; and section 1112 of the Civil Code provides that a transfer of land bounded by the highway passes the title of the person whose estate is transferred to the soil of the highway in front of the center thereof, unless a different intent appears from the grant.

The filing of the map with the streets and avenue delineated thereon constituted an offer to dedicate the roads, streets, and avenue to a public use. In supplement to the agreed statement of facts it was stipulated beween the parties that there was endorsed upon the map filed for record the following: "State of California, County of Fresno, ss. The Board of Supervisors, in and for said County and State, hereby approve the accompanying map and accept on behalf of the public and for public use, all the streets, avenues, Court, Highways, Alleys and Lanes, offered for dedication thereby. In Witness Whereof, said Board of Supervisors by resolution duly adopted has caused these presents to be signed by its Chairman, and attested by its clerk, this 14th. day of July, 1919. J. B. Johnson, Chairman, Attest: B. M. Barnwell, Clerk, By J. R. Schaeffer, Deputy."

The filing of the map and the foregoing acceptance by the board of supervisors constituted a complete paper dedication and when the owner, after recording such a map, sells lots designated thereon by reference to said recorded map, he thereby irrevocably dedicates the streets and alleys shown thereon to the use of the public. Larkey v. Los Angeles, 70 Cal.App. 635, 233 P. 991, and cases therein cited. In the case of Elliott v. McIntosh, 41 Cal.App. 763, 183 P. 692, 693, it is said: "Proceeding from this proposition it must follow that if lots are sold by number and not by metes and bounds, reference being made to such a map, the original dedicator is es-

topped to deny that the portions designated as streets on the map were not in fact dedicated or accepted. Furthermore, conveyances of such a character carry title to the center of the street. Colegrove Water Co. v. Hollywood, 151 Cal. [425] 426, 431, 90 P. 1053, 13 L.R.A.,N.S., 904; section 1112, Civ.Code. But this, of course, is not the case if the portion claimed as a street is not such in fact. Sanchez v. Grace Methodist [Episcopal] Church, 114 Cal. 295, 299, 46 P. 2."

[3] As to whether there is a valid and complete dedication, an intention to dedicate to a public use is a material element to be considered in determining if there has been in fact such a dedication. In People v. Rio Nido Co., Inc., 29 Cal.App.2d 486, at page 491, 85 P.2d 461, at page 465, it is said: "To constitute a valid and complete dedication, there must be an intention by the owner, clearly indicated by his words or acts, to dedicate the lands to public use (City of Venice v. Short Line Beach L. Co., 180 Cal. 447, 450, 181 P. 658), and an acceptance either by public user or formal resolution. (Brown v. Bachelder, 214 Cal. 753, 7 P.2d 1027)."

[4, 5] A dedication, being a voluntary transfer, as pointed out in County of Inyo v. Given, 183 Cal. 415, 191 P. 688, partakes both of the nature of a grant and also a gift, and is governed by the fundamental principles which control such transactions. It consists of an offer and acceptance and both of those elements must be clearly and definitely established. There must be the intention of the owner to dedicate to public use clearly indicated by his words or acts, and unequivocal proof of the acceptance.

In Manhattan Beach v. Cortelyou, 1938, 10 Cal.2d 653, at page 668, 76 P.2d 483, at page 490, the court said: "In order to constitute a valid dedication, there must be an intention on the part of the owner to devote his property to the public use. California Nav., etc., Co. v. Union Transp. Co., 126 Cal. 433, 58 P. 936, 46 L.R.A. 825; Niles v. Los Angeles, 125 Cal. 572, 58 P. 190."

[6, 7] In the instant case the public is not seeking the use of any of the roads or of the avenue specified on the map and it is not necessary to consider the rights of the public to their use. In the case of the City of Santa Clara v. Ivancovich, 47 Cal.App. 2d 502, 118 P.2d 303, 307, it is said: "There is a distinction between the rights accruing to the public generally and the purchasers of lots according to a map upon an offer of dedication. Eltinge v. Santos, 171 Cal. 278, 152 P. 915, (Ann.Cas.1917A, 1143); People v. Reed, 81 Cal. 70, 79, 22 P. 474, 15 Am.St.Rep. 22." The deed conveying the lots in question to the predecessors of applicant, the drilling contract entered into in connection with the conveyance and the permit of the corporation commissioner are all a part of the same transaction and must be considered together to ascertain the intent of the parties. The subject matter of the transaction was the sale and conveyance of the lots for the purpose of securing the necessary finances to drill for and produce oil from the quarter section of land of which the described lots were a part, and if oil was found and produced, to provide for its sale and the distribution of the proceeds thereof. The transaction was one for mining purposes only. Considering the stipulated fact that there was no intention on the part of respondent as grantor and the grantees that on the described subdivision no county roads, or streets, or avenues should ever be laid out, maintained, or used on, over, or across said premises as designated and delineated on said map of said subdivision, and that said subdivision was made for the sole purpose of selling pieces or parcels of land thereof in order to finance the drilling of an oil well or oil wells thereon, and for no other purpose whatsoever; the fact that the single lots were of the area specified and contained 2500 square feet and that the larger lots contained double the area of the single lots, and that a period of approximately twenty years elapsed after the acceptance by the Board of Supervisors of Fresno County and no streets, roads, or avenues were located on the ground or constructed, it seems apparent that as between the grantor, respondent herein, and its grantees, to whose rights appellant herein has succeeded, there was the clear intention that there should not be such a dedication as would vest in the grantee of the lots and their successors any title to the portion of the tract embraced within the boundaries of the streets, roads, and avenues delineated and designated upon the map.

We are satisfied that the finding of the trial court that no title is vested in appellants to the portion of the subdivided tract to the center of the street upon which the lots bounded as designated upon the map is sustained by the evidence, and that it

should not be the province of this court to disturb such finding.

The consideration of the second count of the amended complaint wherein a determination of the rights of the parties as to the declaratory relief sought also requires a construction of the several instruments upon which such rights are predicated and, specifically, as to the rights of the parties to the gas and other hydrocarbon substances produced in connection with the drilling operations for oil, which are to be ascertained. The question as to these rights will first be considered as they existed prior to the execution of the Zeb A. Terry leases.

[8] We have said that the deed, drilling contract, and corporation commissioner's permit must be construed together to ascertain the contractual relations between the parties to this action. Also, the facts as shown from the dates of these instruments to the date of the filing of the complaint, together with the construction which the parties have placed upon the transactions must be considered. This latter construction enters very materially into the determination to be reached as to the respective rights of the parties. In the statement of facts into which the parties entered, it is stipulated as follows:

"That at the time of the execution and delivery of the deeds by the East Coalinga Oil Fields Corporation covering said lots in said subdivision and at the time of the execution of said drilling contracts by the purchasers of said lots by the East Coalinga Oil Fields Corporation, 'gas' was of no particular or special value and the right of the grantees of said lots to participate in any profits derived from the sale thereof was not within the contemplation of the parties and it was not intended that any rights to any gas was to be transferred or conveyed by the grantor to said grantees of said lots."

The deed to J. P. Cackler, appellant's predecessor in interest, is in form a grant deed and conveys the lots involved, together with other lots of the subdivision, free and clear of all incumbrances other than therein contained, reserving unto said East Coalinga Oil Fields Corporation, for a period of fifty (50) years from the date hereof, the exclusive right to drill for oil upon said described quarter section. The drilling contract referred to provided that upon payment in full of the purchase price, the East Coalinga Oil Fields Corporation by good and sufficient deed, will convey, or cause to be conveyed, to each purchaser, the lot or lots so paid for, which conveyance shall provide that the grantee in said deed, his heirs or assigns, shall receive a proportionate share of the eighty per cent (80%) of all of the net profits arising from the sale of oil derived from any oil well or wells which the East Coalinga Oil Fields may drill on any part of the above quarter section, and in the proportion that the number of lots conveyed by said deed bears to the total number of lots in said quarter section subdivision, and the East Coalinga Oil Fields Corporation shall retain twenty per cent (20%) of the said net profits, as its share and proportion of the net production of said well or wells, which is hereby reserved, together with the exclusive right to drill for oil on said quarter section.

The corporation commissioner's permit provides that with the purchase of each lot, the purchaser received in addition to the conveyance of the tract purchased, a drilling contract, or agreement, of this corporation to drill for oil within certain reserved lots in said tract, together with the right of participation proportionately in 80 per cent of the net profits arising from the sale of oil derived therefrom.

Pursuant to its application, said company is permitted to sell 1000 lots at the price of $110 per lot for each single lot, or $220 per lot for each double lot, as indicated in the application herein, and to issue to each purchaser of such lots, an instrument representing the deed of the respective lot sold, together with a contract or agreement to drill for and produce oil from the drill sites in said tract.

[9] The above tract of land is believed to be oil bearing and not otherwise productive, and the subdivision is made for mining purposes only. It is further understood that the grantee is an independent purchaser of a parcel of land, in fee simple, having as an incident thereto a right to receive a portion of the net proceeds from the sale of any oil produced from any wells drilled upon said tract, by the East Coalinga Oil Fields Corporation, its successors and assigns. The deed, on its face, conveys title in fee and the drilling contract states the title to be one in fee. It is the intent of the parties at the time of the execution of the several instruments which is controlling, and this intent must be ascertained from all of the instruments considered together. This rule of construction we deem to be so well settled as

not to require a citation of authorities. In view of the provisions of the stipulation of the parties herein, a detailed analysis of the terms of the several instruments involved is considered unnecessary. It is sufficient to say that the whole transaction evidenced a scheme or method by which the oil from the whole subdivision might be developed and produced, and the resulting profits therefrom distributed.

[10, 11] The kind or character of title vested in the respective parties hereto under the conveyances and drilling contract involved herein has been before the courts of this state a number of times in cases wherein there were involved written instruments similar or analogous to those involved herein. In the drilling contract involved herein it is provided that "the East Coalinga Oil Fields Corporation shall retain twenty per cent (20%) of the said net profits, as its share and proportion of the net production of said well or wells, which is hereby reserved, together with the exclusive right to drill for oil on said quarter section." Under this drilling contract the exclusive right to drill for oil upon the premises was, by the deeds, limited to a period of fifty years but the rights of the grantor to participate in the profits resulting therefrom was not limited but was to continue perpetually. It appears to be well settled in this state that where the interest sold and conveyed or reserved is unlimited in duration, it is a freehold interest, an estate in fee in real property. Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871; Dabney-Johnston Oil Corporation v. Walden, 4 Cal.2d 637, 52 P.2d 237; Schiffman v. Richfield Oil Co., 8 Cal.2d 211, 223, 64 P.2d 1081; Dabney v. Edwards, 5 Cal.2d 1, 12, 53 P.2d 962, 103 A.L.R. 822; Pimentel v. The Hallbaker Co., 32 Cal. App.2d 697, 703, 90 P.2d 588; Lever v. Smith, 30 Cal.App.2d 667, 87 P.2d 66. We are of the opinion that grantees of the lots were vested with title not only to the surface of the lots but also with a fee simple title thereto but excepting therefrom the rights expressly, inferentially, and incidentally reserved by the grantor as contained in the deed and the drilling contract when considered together but that any title to the portion of the subdivision embraced within the proposed roads or avenue delineated upon the map did not vest either as to surface or soil but remained in the grantor.

[12] From the stipulated fact that there was no intention at the time of the conveyance to vest title in the grantees in and to any gas or carbohydrates taken in connection with the purposes of the transactions, as we construe the conveyances and drilling contract, it is clear that, irrespective of whether title in fee was attempted or intended to be conveyed, the rights to the gas and carbohydrates produced were reserved by the grantor. Those rights remained in the grantor unless relinquished by the Zeb A. Terry leases.

The record herein does not disclose whether casing-head gas has been found upon the quarter section subdivision involved and no mention of casing-head gas appears in the proceedings before the trial court but in the Terry lease the subject of casing-head gas is mentioned, the provision being as follows: "If casing-head gas is manufactured or extracted on the premises, or elsewhere, by lessee, or others under contract, or lease on a royalty basis, from gas produced from wells on said premises, the lessee reserves the right and option to add such gasoline to the oil produced on the premises, in which case it shall be classed as crude oil. No separate accounting or settlement shall be required of lessee; if sold as gasoline, then the lessee shall pay to lessor one-eighth of such royalty or proceeds received by lessee from the sale thereof * * *."

In respondent's brief the question of the classification of casing-head gas is discussed. Our attention is not directed to any California cases bearing upon this subject but we are referred to a discussion thereof appearing in 34 A.L.R. at page 291, and in 82 A.L.R. at page 1304. In 82 A.L.R., beginning at page 1304, it is said: "It will be observed that, while the question has frequently arisen as to whether casing-head gas is gas or oil, the solution of this question does not depend primarily on any abstract inquiry as to the nature of such gas, i. e., the question is not fundamentally an academic or scientific one, to be solved by an analysis of the component parts of the gas, but is a question of construction of the terms of the lease or other contract, in the effort to determine the intent of the parties thereto; and the popular rather than the scientific understanding of the term is the more important usually in determining the rights of the parties. * * So, casing-head gas was held in Livingston Oil Corp. v. Waggoner, Tex.Civ.App., 1925, 273 S.W. 903, to be a constituent of oil, as the term 'oil' was used in the contract of lease * * *." After referring to the

testimony of an expert witness concerning the method of extracting casing-head gas, the court says:

"'From this statement of the witness's testimony, it will be observed that casing-head gas is a constituent element of oil; that, in place, it is realty, not personal property. Whether gas or oil, it is, as announced by Chief Justice Hall, speaking for this court in the case of American Ref. Co. v. Tidal Western Oil Corp., Tex.Civ. App., 1924, 264 S.W. 335, writ of error denied in 1924, 114 Tex. 583, 278 S.W. 1114, the settled law in Texas that they are, in place, realty. It is conclusively shown by the testimony of appellant's own witness that casing-head gas is in liquid form in the earth, that it is a constituent of oil, and in order to remove it from the earth it must be vaporized and then carried to the surface, where it is again condensed in liquid form. We think the trial court, upon the evidence before him, rightly concluded that casing-head gas was included within the term "oil," and that the appellant (lessee) was required under his contract to account to appellee Waggoner for one-eighth thereof on the basis of oil.' The construction of the contract of lease placed by the parties upon it was one of the factors taken into consideration by the court in reaching the above conclusion. * * *

"And the view was taken in George v. Curtain, 1925, 108 Okl. 281, 236 P. 876, that, where the lease was made prior to the time when casing-head gasoline was known to have a special value, and no mention was made of casing-head gas to be taken from oil wells, it must be held that that subject was not within the contemplation of the parties when the contract was entered into, and was therefore not covered or controlled thereby.

"So, in Hammett Oil Co. v. Gypsy Oil Co., 1923, 95 Okl. 235, 218 P. 501, 34 A.L.R. 275, the position was taken that gasoline manufactured from casing-head gas is neither oil nor gas within the contemplation of an oil and gas lease which makes no reference to such gas, if nothing appears to indicate that the parties have contracted concerning the same.

"And in Ludey v. Pure Oil Co., 1932, 157 Okl. 1, 11 P.2d 102, the court in the syllabus says that 'casinghead gas is neither oil nor gas within the contemplation of an oil and gas lease which makes no reference to casinghead gas and nothing appears to indicate that the parties have contracted concerning the same.' The lease in this instance was the common one providing for a royalty of one-eighth of the oil and a fixed sum per year per well where gas was marketed and used off the premises. None of the wells produced gas only, but all were oil wells. And it was held that casing-head gas therefrom belonged to the landowners, because in the lease no mention was made of casing-head gas. * *

"* * * In Reynolds v. McMan Oil & Gas Co., Tex. [Com.App.], 1928, 11 S.W. 2d 778, rehearing denied in 1929, Tex. [Com.App.], 14 S.W.2d 819, in which the lease did not expressly refer to casing-head gas, and, at the time it was made, gas, whether wet or dry, was considered practically as waste, except for the purpose of fuel. The court held that the lessee must pay for casing-head gas as oil, where it used the same for the manufacture of gasoline.

"And in Gilbreath v. States Oil Corp., [5 Cir.], 1925, 4 F.2d 232, writ of certiorari denied in 1925, 268 U.S. 705, 69 L.Ed. 1167, 45 S.Ct. 639, it was held that casing-head gas or gasoline must be considered as part of the oil, since it partook of the nature of that substance, rather than what is ordinarily known as natural gas, so as to entitle the lessor to the stipulated royalty of one-eighth of the oil. * * *

"In Twin Hills Gasoline Co. v. Bradford Oil Corp. [D.C., 264] F. [440], supra, the court said that the evidence showed that casing-head gas is a component part of oil; that it is not made from dry gas, but is a product of wet gas, which exists only with oil."

[13] It appears from the foregoing authorities defining the term "casing-head gas" that casing-head gas is a component part of oil, and we are of the opinion that as the stipulation herein as to the fact of the intention of the parties as to the gas having been entered into subsequently to the determination reached in the foregoing cited cases, that as between the parties herein casing-head gas was not intended to be covered by the stipulation and that casing-head gas, if any was produced, should be classified and considered as oil.

[14] It is the contention of appellant that respondent waived any interest it may have had in and to the proceeds derived from the sale of oil and gas produced, saved and sold from the premises by consenting to the execution and delivery of the Terry oil and gas lease. On the other

hand, respondents contend that by this consent it did not waive any of its rights, except its right to drill and prospect the premises for oil and gas as provided in the Terry lease. In determining this question the situation existing at the time of the execution of that lease to Terry by respondent and its consent to the execution of identical Terry leases by the lot owners, must be considered.

In connection with this situation, C. Ray Robinson, president of the East Coalinga Oil Fields Corporation, testified substantially that "under the deeds and in accordance with the stipulated facts, the East Coalinga Oil Fields Corporation had a reserved right to drill for oil on this property for a period of fifty years, and had a right to take twenty per cent received from the sale of oil under the terms and conditions reflected by the contract and deed; the lots had been sold for taxes, a substantial portion of them, and, in addition to that, the thing was in a hopeless state of confusion by virtue of diversified ownership. I might say at the present time there are approximately eight hundred owners in this subdivision. Various interests and groups were seeking, through one theory or another, to get control of this property or some part of it, the thought being to get an acre drilling site or something in a position where you could put down a well. I acquired an interest and represented others who owned the balance of the interest in the corporate stock. * * * Various large lot owners and those of us interested in the corporation, and I might say that the corporation owns interests in some of the lots there, finally worked out a plan to where this property could be developed or drilled if we could get our title cleared under this community lease. The community lease was then signed by a large number of people. The question of whether the lease was of any effect or not by virtue of our reserving drilling rights was of vital importance. The land owners took the attitude they put their money in and were entitled to a play on the situation. In other words, entitled to have the property developed. We had no desire to hinder the matter so we simply worked together with them, consenting that they could lease the property under the drilling contract, reserving to us whatever rights that we had in the particular subdivision at that time. In other words, the main thought being to get the property developed and see whether or not there was any oil there and whatever the rights of the parties were would be retained in status quo by virtue of these agreements."

The consent of respondent to the Terry lease is as follows:

"Whereas, East Coalinga Oil Fields Corporation is the owner of the exclusive right to drill on the Southwest Quarter (SW¼) of Section Thirty (30), Township Nineteen (19) South, Range Sixteen (16) east, M. D. B. & M., Fresno County, California, said right to drill being reserved in deeds issued by East Coalinga Oil Fields Corporation covering the lots sold in the East Coalinga Oil Fields Subdivision in said quarter section to various grantees; and

"Whereas, under date of July 19, 1938, the owners of various lots or parcels of land in the aforesaid quarter section, have executed lease agreements to Zeb A. Terry, reference to which lease agreements is hereby made; and

"Whereas, at a regular meeting of the board of directors of the East Coalinga Oil Fields Corporation, duly convened and held on Saturday, December 17, 1938, at eleven o'clock A. M., at the office of said corporation, it was agreed that the said East Coalinga Oil Fields Corporation would consent, upon certain conditions, to each and every lease in similar terms and import to said lease agreement dated July 19, 1938, heretofore or hereafter given to Zeb A. Terry or the Pure Oil Company on any lot or lots in the above described quarter section, and that the President and Secretary of this corporation be authorized to execute such consent for and on behalf of this corporation; and

"Whereas, all of the stockholders of the East Coalinga Oil Fields Corporation agreed to said action by the Board of Directors of said Corporation;

"Now, therefore, the East Coalinga Oil Corporation hereby consents to each and every lease agreement bearing date July 19, 1938, heretofore given to Zeb A. Terry by the owners of any lot or lots in the above described quarter section, and to each such lease agreement in similar form hereafter given to Zeb A. Terry or the Pure Oil Company, bearing the same date, by the owners of any lot or lots in the aforesaid quarter section, provided, however, that all such leases shall be executed prior to July 1, 1940.

"It is specifically understood and agreed that nothing herein stated shall affect the rights of the East Coalinga Oil Fields Cor-

poration in, on or to any lot or lots in the said quarter section not leased to Zeb A. Terry or the Pure Oil Company, in accordance with the aforesaid lease agreement."

The successors in interest under the so-called Terry leases are not parties to this action and we are not called upon to consider the effect of such leases between respondent and the successors in interest under the Terry leases, on the one hand, and as between the lot owners and such successors in interest on the other hand, as we have held that the lot owners had no right or title in or to the land embraced within the proposed roads and avenue delineated upon the map and in or to any gas, as distinguished from casing-head gas, produced in connection with the drilling for any production of oil. Therefore, specifically, we are called upon to determine whether respondent, by its consent intended to and did waive the rights which it had in and to the oil, gas, and other carbohydrates, and by such consent, to vest the title so waived in appellant and the other lot owners, or that such consent was intended to be a waiver only of its drilling rights. Also, there should be taken into consideration the fact that respondent's consent is limited to the oil and gas leases referred to as the Zeb A. Terry oil and gas leases, and that in the event of forfeiture or surrender of the lessee thereunder, respondent's right to drill the premises would be restored; and, further, that respondent's interests extended to the whole subdivision and that only a part of the subdivision was covered by the Terry leases. Under all of the circumstances appearing, we are of the opinion that if there was intent on the part of respondent, by its consent to waive more than its drilling rights, such intent should be made to appear by clear, convincing and unequivocal evidence. Such intent is not so shown but, on the contrary, considering the evidence, the written instruments in connection with all of the transactions and the circumstances appearing from the record, we are satisfied that there was no intent on the part of respondent to waive, by its consent, anything more than its drilling rights.

In its finding of fact and conclusions of law the trial court, in finding X, found that the said quarter section was subdivided only for the purpose of selling the surface rights in and to the lots and parcels of land therein. In finding XV it found that plaintiff is the owner and entitled to the possession of the surface of a total of 2500 square feet represented by lot 58 of block 4 of said subdivision, and the sum of 2500 square feet in lot 59 of block 4 of said subdivision. In finding XVI, referring to the lots, "the surface of which is owned by plaintiff," and in its conclusions of law in paragraph I, it is found that plaintiff, Lee Alex MacNicol, is the owner of and entitled to the surface rights, in, over, and upon all that certain real property (describing said lots) and that in the decree it is determined that plaintiff, Lee Alex MacNicol, is the owner of, and entitled to the surface rights in, over, and upon all that certain real property (describing said lots).

We are of the opinion that it is not necessary to a decision in this case to limit plaintiff's ownership merely to the surface rights but that plaintiff is the owner of a fee title in the lots subject to the rights, reservations, and exceptions as hereinbefore indicated. Therefore, the findings and conclusions of law and decree should be amended so as to effect this modification.

[15] The whole situation was before the trial court and it reached its determination of the intention of the parties from a construction of the instruments involved, together with the evidence and stipulated facts. This construction appears to be reasonable and in accordance with the intent of the parties. Under these circumstances, the principle set forth in the case of Bodkin v. Silveira, 49 Cal.App.2d 1, 120 P. 2d 910, 914, particularly applies: "It is a well established principle of law that when the construction given an instrument by a trial court appears to be reasonable and consistent with the intent of the parties making it, courts of appellate jurisdiction will not substitute another interpretation, even though it seems equally tenable. Estate of Bourn, 25 Cal.App.2d 590, 78 P.2d 193; Adams v. Petroleum Midway Co., Ltd., 205 Cal. 221, 270 P. 668; Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 300 P. 34; Estate of Boyd, 24 Cal.App.2d 287, 74 P.2d 1049; Estate of Burnett, 42 Cal.App.2d 427, 109 P.2d 26; Coviello v. Moco Fruit Co., Inc., 42 Cal.App.2d 637, 109 P.2d 765."

Modification of the findings of fact and conclusions of law by the trial court is directed in accordance with the foregoing ruling, and it is ordered that upon such modification the judgment be affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

50 Cal.App.2d 164

PEOPLE v. WALSH.

Cr. 469.

District Court of Appeal, Fourth District, California.

Feb. 25, 1942.

1. Criminal law ⇐1160

A finding of the jury which has been approved by the trial court on motion for new trial is conclusive on appeal, and reviewing court may disturb it only where it can be said as matter of law that there was no sufficient and substantial evidence to support it.

2. Criminal law ⇐1144(13)

The reviewing court must assume in favor of decision of jury which has been approved by the trial court, the existence of every fact which the jury could reasonably have deduced from the evidence, and then determine whether guilt is deducible therefrom.

3. Homicide ⇐253(1)

Evidence sustained conviction for first-degree murder.

4. Criminal law ⇐308

Accused who was charged with first-degree murder and entered plea of not guilty was conclusively presumed to have been sane at the time the offense was alleged to have been committed. Pen.Code, § 1026.

5. Criminal law ⇐761(12)

Where jury was repeatedly told that it must be convinced of accused's guilt beyond a reasonable doubt before it could find him guilty, and that unless it was convinced beyond a reasonable doubt that accused and no other person committed the homicide charged, jury must find accused not guilty, an instruction that accused was conclusively presumed to have been sane at time of commission of offense charged was not objectionable on ground that instruction insinuated that accused committed the crime. Pen.Code, § 1026.

6. Criminal law ⇐822(1)

All the instructions given must be taken together to see whether the instruction complained of is erroneous.

7. Criminal law ⇐761(12), 822(1)

Instruction on first-degree murder, when construed with other instructions, was not objectionable on ground that it informed jury that if a homicide was committed, not necessarily by accused but by any other person, jury would be justified in finding accused guilty and that it impressed on jury a definite assumption that the accused committed the homicide.

8. Criminal law ⇐808½

An instruction concerning expert testimony, which was in the language of the Penal Code provision relating thereto, was sufficient and the trial court did not err in refusing instruction proffered by accused, which involved question of weight to be given opinions of expert witnesses. Pen.Code, § 1127b.

9. Criminal law ⇐829(1)

The refusal of instruction which was sufficiently covered by given instructions was not error.

10. Criminal law ⇐807(1)

The refusal of purely argumentative instructions was not error.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Joseph F. Walsh was convicted of first-degree murder, and he appeals.

Affirmed.

Geo. A. Westover and Edward W. Goodman, both of San Diego, for appellant.

Earl Warren, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and H. Pitts Mack, Deputy Dist. Atty., both of San Diego, for respondent.

GRIFFIN, Justice.

Appellant was charged with the crime of murdering his wife Olga Walsh, on May 7, 1941. He entered a plea of not guilty and stood trial before a jury, resulting in a verdict of guilty of murder in the first degree with punishment fixed at life imprisonment. Appellant sets forth no statement of facts in his brief and relies upon the court to review the evidence set forth in over 2,000 typewritten pages of reporter's transcript. Respondent has prepared a brief resume of the evidence produced and it is a fair statement of the facts as disclosed by the record. The case is one of circumstantial evidence. The murder is claimed to have been committed at 4249 Morena Boulevard, in San Diego, in the home of the deceased and the appel-

lant. The house was a wooden frame type of residence, of a story and a half variety, painted white, surrounded by considerable foliage and trees of various kinds and was located on a lot about one and three-quarters acres in size at the time appellant and the deceased were living together as man and wife. They were married July 22, 1938, and had no children. The appellant had met the deceased about September, 1936, at which time she was Mrs. Eckhardt. The deceased was then living on the premises with her then husband, Mr. Eckhardt. Prior to Mr. Eckhardt's death and Walsh's subsequent marriage to the deceased, he (appellant) lived on the premises in a trailer. The appellant, at the time of the trial, was 56 years of age and the deceased at the time of her death was 62 years of age. On May 7, 1941, at about 7 a. m. the appellant claimed to have discovered the dead body of his wife in the ground-floor bedroom north of the living room lying on a bed. He called the police. The police arrived a few minutes later. They were met at the front gate by appellant, who took them to the rear door of the house into the bedroom where they saw the body of the deceased. There were no tears in appellant's eyes. The officer asked appellant if he (the officer) could leave by the front door to call the police station. The appellant said "Yes," glanced at the front door and stated: "My God, it is unlocked. He went through this way." No one was then allowed by the officer to pass through that door. The body of the deceased had blood about the face and mouth and a club commonly referred to as a "billy club" was protruding from her mouth. This "billy club" belonged to deceased and was ordinarily kept under her pillow. Appellant had knowledge of this fact. The autopsy surgeon testified that death was caused by the separation of the atlas and axis, the first and second cervical vertebra, caused by some form of violence not self-inflicted, which separation of the atlas and axis was caused by some blunt instrument. From the entire testimony of the autopsy surgeon, the injury which caused death was violent and brutal, the injuries being practically confined to the face and head bruises in addition to the separation of the atlas and axis. There was no evidence to indicate any rape or attempted rape on the body of the deceased. There was no evidence of any property of any kind missing from the premises or that anything else was disturbed. The only thing of any value in the house was approximately $35 in cash which was found under the pillow on the bed, in the room of the deceased, by the police officer on the morning after the body had been removed from the premises. The dining room of the house had a French bay window composed of three sections in the south part thereof. The appellant pointed out the window in the dining room to one of the officers upon his arrival after viewing the body. The officer observed that the shade to this window was up, that it was open and the screen to it was hanging unhooked with an "L" shaped tear in it. The front door was observed by the officer to have three locking devices. In addition, there was a piece of wire which apparently was used to loop around the knob and then inserted through the key so that the key could not be pushed out of the lock from the outside. This piece of wire was lying on the floor.

The officer testified that when he first arrived at the home there was a large dog (Great Dane type) chained to a nearby tree in the rear of the house near the back door; that this dog barked at him and lunged at him when he approached and so continued until appellant threatened the dog with his cane and waved him back. Another large barking dog (Police dog type) was chained a short distance from the French window, and a third dog was running loose about the premises. There were two signs "Beware of Dogs" on the front fence. The appellant stated to the officer that on the preceding evening, May 6th, he, the appellant, had gone to bed a few minutes before 11 p. m., and had gone to sleep almost immediately, hearing nothing during the night; that he awakened a few minutes before 6 a. m. on May 7th, when he heard one of the dogs barking and a car pull away from the house; that he later went downstairs where he dressed in the kitchen, obtained his clothes from the living room, and then unlocked the back door and went outside where he turned off some alarms on the chicken houses; that he then went to the front of the house and obtained the morning paper and took it to the kitchen where he made some coffee; that he looked at the paper for a few minutes and then at about 7 a. m. he went into the sitting room to put up the shades on the windows; that he raised the shade on the above-mentioned window, at which time he saw that it was open and the screen unhooked and cut; that he immediately thought something was

wrong and went to his wife's room where he found her lying as described; that he immediately left to telephone the police by way of the back door, which he locked.

No one touched the window, the window sill ledge, screen, or shade after the officers arrived. All officers used the rear door to enter the premises. No one went out or in the front door. Appellant at all times denied that he had killed the deceased. He claimed that the reason he had been sleeping upstairs and his wife downstairs was that in April he had injured his foot and that the injury caused him considerable pain; that he was taking "Seconal" to ease the pain and to produce sleep; that he therefore heard no noises during the night. The deceased was killed sometime between 11 p. m. on May 6th and 5 a. m. on May 7th. The last known person to see deceased alive other than appellant was a dog-license collector, who lived about 400 yards northwest of the Walsh house. He saw the deceased and the appellant together at about 7 p. m. on May 6th, when he called to see about collecting for a dog license tax for the dogs on the Walsh property. He testified that on the evening of May 6th, when he went to the appellant's house, the dogs barked at him. He further stated that he was at home on the night of May 6th-May 7th, and did not hear the dogs bark during any of that time. The collector's wife corroborated this testimony and testified that about 4:30 a. m. on December 7th she heard the rear screen door of the Walsh house slam and that she heard no dogs bark. No finger prints or foot prints which would indicate the presence of any stranger on the Walsh premises were found by the police officers. One officer examined the window and the cut screen which were pointed out to him by appellant. He observed a film of dust and black particles on the outside portion of the sill or ledge. On the outside and on the ground immediately under this window was planted some sort of a succulent plant, the foliage of which was undisturbed. The side of the house below the window and cut screen was composed of wooden side boards painted with white paint. This portion was examined and no marks of any kind were found. The wires on the cut screen were pointed upward and outward. All of the other windows of the house were examined and no evidence was found of any disturbance of any other window or screen. There was observed a cobweb about waist high which stretched between the two posts at the head of the steps leading up to the front porch. There was no evidence of any entry into the house other than through the cut screen and window which the appellant claimed to have found open with the screen open and hanging in the position already referred to. The window screen with the cut in it was introduced into evidence at the trial and in its original condition was turned over to a forensic chemist for examination, together with certain other evidence in the case which will be referred to later. The front door was examined and found to lead onto a wooden porch from which steps led down to the walk in front of the house. This door had not been used by anyone other than the alleged unknown assailant, according to the appellant. The surface of the porch was observed to have an even coat of dust with no footmark or disturbance in the dust. The property on which the appellant and deceased were living was free and clear of incumbrances and stood of record in the name of the deceased as her separate property. The coroner produced a will dated June 21, 1939, which was found June 24, 1941, in the safe deposit box of the deceased. By its terms appellant was named sole beneficiary of her estate. Although appellant denied knowledge of the existence of the will, the evidence indicates that he was quite familiar with all of her financial and legal affairs. One witness testifying for the people and who qualified as an expert in forensic chemistry, said that to duplicate the "L" shaped cut as bent in the screen, it would be necessary to groove the screen with his fingers; that he examined certain glass phials which contained the scrapings from underneath the respective fingernails on the fingers of each hand of the appellant; that from a spectro-chemical examination of the four largest particles taken from the fingernails of the appellant and from a miscroscopic examination of the particles of paint from the screen, the particles were "similar"; that in his opinion, from an examination of the screen (being cut from the inside), the dust particles in the sill and the surrounding circumstances, no one went through that window on the occasion related. Several pin-point scratches were noticed on appellant's hand. He said they were caused by his "pet rooster."

[1, 2] Appellant contends that this evidence is not sufficient to support the ver-

dict. We must keep in mind and be guided by the rule that after the finding of the jury has been approved by the trial court on a motion for a new trial, it is conclusive upon appeal and the appellate court may disturb it only when it can be said as a matter of law that there was no sufficient and substantial evidence to support it, and we must assume in favor of the decision of the jury, the existence of every fact which the jury could reasonably have deduced from the evidence and then determine whether guilt is deducible therefrom. People v. Hennessey, 201 Cal. 568, 258 P. 49; People v. Rose, 26 Cal.App.2d 513, 79 P.2d 737; People v. Tedesco, 1 Cal.2d 211, 34 P.2d 467. With the foregoing in mind, we find that there is substantial evidence upon which the jury could have based its verdict.

[3] A summary of the evidence referred to in the statement of facts bears out this contention, for it will be remembered that (1) appellant had a motive for killing the deceased in that he was the sole beneficiary under her will, and if she died he would take her entire estate. (2) There is some evidence that appellant had threatened the deceased. (3) If the deceased were murdered by appellant, naturally he would not expect to partake of the fruits of her estate. It would therefore be necessary for the killing to be made to appear to have been done by an unknown intruder, which evidence indicates that the appellant attempted to do, thus further illustrating his preconceived intention to do away with the deceased and to make it appear that he had nothing to do with it. (4) There was ample evidence to justify the jury in believing that the screen was cut from the *inside* of the house. Once the jury concluded that no one went through the window, upon which there was ample evidence to base this conclusion, the appellant could naturally be concluded to be the killer, as the evidence is also uncontradicted that the deceased could not have inflicted the injuries of which she died by her own hand or accidentally. (5) There was evidence that the cut in the screen was creased by someone's hand, and that the cut had many pointed wires. The right wrist of appellant had some pin-point abrasions on it. The jury could have found that these abrasions were caused by appellant cutting and creasing this screen. (6) As to the presence of the dogs on the premises, it will be remembered that the neighbors did not hear them bark the night of May 6th-7th. There was ample evidence to show that they ordinarily barked on the approach of strangers. (7) The noise of the rear screen door slamming at 4:30 a. m. is also significant. This would indicate that appellant was up an hour or so earlier than he stated. (8) The evidence shows that appellant claimed that the back door was locked when he came downstairs and that he unlocked it when he went out on the morning of May 7th. The unlocked front door with no disturbance in the dust on the porch leading from the door, and the presence of the spider web woven between the posts over the porch steps indicated that no one went out the front door that night and that appellant himself unlocked the three locks on it to further the appearance that someone left by that exit. (9) No valuables in the house were missing, which dispels any intent to rob the deceased or burglarize the house. Considering all the circumstances and evidence produced, when taken in a light most favorable to the conclusion reached by the jury, we are convinced that there is sufficient evidence to support the verdict and judgment.

[4, 5] The only remaining question involved the claimed error of the court in giving and refusing to give certain designated instructions. In this respect appellant states that the court gave 60 instructions to the jury and then he sets them forth in what he terms "synoptic enumerations." The first instruction about which appellant complains reads: "You are instructed that the defendant in this case is conclusively presumed to have been sane at the time of the commission of the offense charged." It is argued that the instruction as worded strongly insinuates that appellant committed the crime. There is no merit to this argument. Appellant entered the single plea of "not guilty." He was conclusively presumed to have been sane at the time the offense "is alleged to have been committed." Sec. 1026, Pen.Code. While the instruction is not worded in the language of the statute, the jury was repeatedly told in other instructions that it must be convinced of the defendant's guilt beyond a reasonable doubt before it could find him guilty and that unless it was convinced from the evidence beyond a reasonable doubt "that the defendant and that no other person committed the offense charged, then they must find the defendant not guilty." The challenged instruction,

even standing alone, clearly means that the appellant is conclusively presumed to have been sane at the time of the commission of the offense charged in the information, regardless of who committed it.

The next instruction given as to the definition of murder and its degrees was in the same language as the instruction given on that subject and approved in People v. Nichol, 34 Cal. 211, and reapproved in People v. Dowell, 204 Cal. 109, 266 P. 807. The instruction as given, when considered with the other instructions on the subject, is not erroneous.

[6, 7] The next instruction criticized is this: "If you find from the evidence and beyond a reasonable doubt that there was a homicide and that it was neither justifiable nor excusable, and that said homicide was wilful, deliberate and premeditated and with malice aforethought and accomplished by a clear intent to take life, you would be justified in finding the defendant guilty of murder in the first degree." It is argued that this instruction told the jury that if a homicide was committed, "not necessarily by the defendant but by any other person, then the jury would be justified in finding defendant guilty of murder in the first degree," and that it "impressed upon the jury a definite assumption that the defendant committed the homicide." This argument disregards the complete set of instructions and the rule of law that all of the instructions must be taken together to see whether the complained of instruction is erroneous. People v. Ellena, 67 Cal.App. 683, 228 P. 389; People v. Jordan, 24 Cal.App.2d 39, 74 P.2d 519; People v. Countryman, 115 Cal.App. 36, 300 P. 871; People v. Maggio, 140 Cal.App. 246, 35 P.2d 369; People v. Brittan, 118 Cal. 409, 50 P. 664. Considered with the other instructions given, the jury was fairly told that the defendant could under no circumstances be convicted unless the jury believed from the evidence and beyond a reasonable doubt that the defendant *and no one else* committed the offense alleged in the information. There is no merit to this complaint.

[8-10] Appellant next complains because of the refusal of the trial court to give three of his proffered instructions. One involved the question of the weight to be given the opinion of expert witnesses. The trial court gave an instruction in the language of Penal Code, section 1127b. This was sufficient. People v. Norton, 138 Cal.App. 70, 31 P.2d 809. We have examined the other refused instructions. They were sufficiently covered by other instructions given or were purely argumentative.

Appellant next contends that the court erred in "certain decisions of law" and makes certain assertions as to particular parts of the evidence without citing any specific error or giving any authority in support of the assertion. The following is but an example. Complaint is made that certain witnesses for the prosecution were shown to be enemies of the defendant and his deceased wife; that over objections, their "testimony was admitted by the court"; that the prosecution "flaunted" gruesome photographs in front of the jury; that an expert witness demonstrated that it was "his whole effort * * * to seek evidence that would incriminate the defendant"; that "how could the jury believe that it was normal and reasonable that the defendant cut the screen from the inside of the house when had he been guilty, it would have been much easier with the means and opportunity at hand, for him to cut it from the outside?"; that "the evidence in this case points much more convincingly to the perpetration of the homicide by some outsider than it does to the defendant." The claimed errors of law, if they may be classified as such, are not meritorious. We have read the argument of counsel and sufficient evidence in the voluminous transcript to satisfy ourselves that appellant had a fair and impartial trial. Appellant was accorded every opportunity by the trial judge to fully cross-examine all witnesses who testified and he allowed eleven days of trial in the examination of witnesses and jurors. The jury was fully and fairly instructed as to the law. There was ample evidence on which the jury was justified in reaching its verdict.

The judgment and order denying a new trial are and each of them is affirmed.

BARNARD, P. J., and MARKS, J., concurred.

50 Cal.App.2d 40

BARR v. MOUNTJOY et al.

Civ. 12814.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1942.

1. Appeal and error ⇐302(6)

Where trial court granted a new trial to plaintiff upon grounds stated in notice of motion, and order granting new trial did not specify as a ground the sufficiency of evidence to sustain decision, such ground was eliminated on appeal. Code Civ.Proc. § 657.

2. Appeal and error ⇐854(6)

If order granting motion for new trial can be justified upon any of the grounds stated in the notice of motion, it must be sustained though reasons given by the court for its action are immaterial. Code Civ.Proc. § 657.

3. Automobiles ⇐160(4)

Where motorist making a left turn at an intersection on a green light struck pedestrian who was also crossing on green in crosswalk, motorist's failure to yield right of way to pedestrian constituted "negligence per se". Vehicle Code, § 560, St.1935, p. 188.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se"

4. Appeal and error ⇐1008(1)

In action tried by court by pedestrian to recover for injuries received when struck by an automobile, whether failure of motorist to yield right of way to plaintiff, who was using a crosswalk, considered with all the circumstances, required a holding against plaintiff, was for trial court to determine. Vehicle Code, § 560, St.1935, p. 188.

5. New trial ⇐79

In action by pedestrian to recover for injuries received when struck by automobile at crosswalk, where motorist was guilty of negligence per se in failing to yield right of way, failure of trial court to consider that element on trial of case constituted error in law justifying order granting a new trial. Code Civ.Proc. § 657; Vehicle Code, § 560, St.1935, p. 188.

6. Appeal and error ⇐977(2)
New trial ⇐95

Where plaintiff moved for new trial and filed an affidavit in support of claim of accident and surprise, the sufficiency of affidavit to show proper diligence on part of plaintiff to obtain a witness or seek a continuance was addressed to discretion of trial court and its action thereon will not be disturbed on appeal. Code Civ.Proc. § 657.

7. Appeal and error ⇐901, 933(1)

All presumptions are in favor of order granting new trial, and burden is upon appellant to make it affirmatively appear by a proper record that the order complained of is erroneous.

8. Appeal and error ⇐1078(6)

In action against wife as driver of an automobile which struck plaintiff, and husband as principal, where parties on appeal from order granting new trial did not discuss the several grounds upon which order granting new trial was based, except as to sufficiency of evidence to fasten liability upon husband and there was nothing in record upon which it could be determined whether order was justified as to husband upon any of those grounds, order granting new trial both as to husband and wife was affirmed. Code Civ.Proc. § 657.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action to recover for injuries sustained in automobile accident by Mary Barr against Jeannette Mountjoy and another. From an order granting a new trial, after judgment for defendants, defendants appeal.

Affirmed.

Thomas F. McCue, of Los Angeles, for appellants.

Paul Palmer, of Hollywood, for respondent.

J. E. STEPHENS, Justice pro tem.

Action for damages resulting from a collision between an automobile driven by defendant Jeannette Mountjoy and plaintiff, a pedestrian. Defendant Holton C. Mountjoy is the husband of Jeannette Mountjoy, and the complaint alleges "that in operating said automobile as aforesaid said Jeannette Mountjoy was acting as the agent of and for and on behalf of the other defendants named herein." The only defendant served or appearing herein other than the driver is the husband. The trial was before the court without a jury and resulted in judgment for defendants.

Plaintiff made a motion for new trial upon all the statutory grounds and filed an affidavit setting forth the testimony which would have been given by an absent witness, alleging that plaintiff had relied upon his testimony, reciting the circumstances of his failure to be present and claiming "accident and surprise which ordinary prudence could not have guarded against." The testimony of this witness concerned the accident itself and had no bearing upon the alleged agency or other facts connecting the defendant husband with liability. No answering affidavit was filed. After argument the court granted the motion for new trial, and appeal is taken by both defendants from this order.

There is no reporter's transcript of the proceedings before us, but only the clerk's transcript which includes therein an engrossed bill of exceptions. From the record it appears that the accident occurred on September 11, 1939, at about 6:35 p. m., at the intersection of Hollywood and Cahuenga boulevards in the city of Los Angeles. The traffic signal system was in operation at the time, and upon the "Go" signals appearing plaintiff started to walk southerly in the marked pedestrian lane across Hollywood Boulevard on the west side of Cahuenga. Defendant Jeannette Mountjoy at the same time, and in compliance with the "Go" signal, drove northerly on Cahuenga Boulevard into the intersection and made a left turn into the pedestrian lane, after hesitating in the intersection to allow a southbound automobile to pass in front of her. In the pedestrian lane the front bumper or fender of her car struck plaintiff causing the injuries complained of.

In its findings of fact the court found that neither plaintiff nor defendant driver was guilty of negligence, and that the collision was an unavoidable accident. The findings also state that defendant Jeannette Mountjoy "was driving her own separately owned automobile upon her own personal business," and declare that the allegation in the complaint heretofore referred to concerning agency is untrue.

At the conclusion of the hearing on motion for new trial the trial judge announced that "he had come to the conclusion that the decision was against law, in that he had made an error in law in failing to bear in mind that the conduct of defendant driver in entering the pedestrian zone while plaintiff was there located, and regardless of whether or not defendant driver saw plaintiff, constituted negligence per se on the part of defendant driver." Thereupon the court caused a minute order to be entered granting the motion for new trial "upon the grounds stated in the notice of intention to move for new trial filed herein."

[1, 2] As the order did not specify that it was granted upon the ground of insufficiency of the evidence to sustain the decision this ground must of course be eliminated. Code Civ.Proc. sec. 657. If the order can be justified upon any of the other grounds stated in the notice of motion it must be sustained. While the reasons given by the court for its action are immaterial (Power v. Fairbanks, 146 Cal. 611, 615, 80 P. 1075), the statement does indicate that the court failed to consider an element that is vital to the decision, and this amounts to error in law.

[3-5] Section 560 of the California Vehicle Code, St.1935, p. 188, requires the driver of an automobile to yield the right of way to the pedestrian using the crosswalk, and defendant driver's failure to do so constituted negligence per se. Nicholas v. Leslie, 7 Cal.App.2d 590, 594, 46 P.2d 761; Coursault v. Schwebel, 118 Cal.App. 259, 264, 5 P.2d 77. Whether this, considered with all the other circumstances present in the case, required a holding against plaintiff was of course for the trial court to determine. Clearly, however, it was an element to be considered by the court, and its failure to do so constituted error in law justifying the order granting a new trial.

[6] It is to be noted also that the affidavit based upon accident and surprise was before the court; and while it might not appear to this court that the affidavit shows proper diligence on the part of plaintiff to obtain the presence of a witness or to seek a continuance when he did not appear, this was addressed primarily to the discretion of the trial court, and action thereon will not be disturbed except where abuse of discretion is shown.

[7, 8] Appellants contend that in any event the granting of a new trial as to the husband is not justified in view of the court's findings. Respondent replies that the court having at that time taken the view that the wife, who was driving, was not liable, the question of whether the husband would share her liability, if she

had been liable, became moot. Respondent also claims there is testimony indicating that the car was purchased with community funds and was a community asset; and also that the wife was on an errand for the benefit of the husband at the time of the accident. No further discussion appears in the briefs concerning the several grounds upon which the order granting a new trial was based, and there is nothing in the record before us upon which it can be determined whether or not said order, so far as the husband was concerned, was justified upon any one or more of these grounds.

All presumptions are in favor of an order granting a new trial, and the burden is upon the appellant to make it affirmatively appear by a proper record that the order complained of is erroneous. Stoneburner v. Richfield Oil Co., 118 Cal. App. 449, 5 P.2d 436. In Laumann v. Conner, 12 Cal.App.2d 631, 55 P.2d 1225, 1226, quoting from Power v. Fairbanks, supra, it was said: "We must assume in favor of the action of the trial court that the motion for a new trial was based upon some one or more legal grounds upon which a sufficient showing was made to warrant the action of the trial court in regard thereto. The record before us does not show the contrary." See, also, Petroff v. Nunes, 136 Cal.App. 416, 29 P.2d 293, and Phillips v. Powell, 210 Cal. 39, 290 P. 441.

The order granting the motion for new trial is affirmed.

MOORE, P. J., concurred.

W. J. WOOD, Justice (concurring). I concur in the judgment. The appellants have not shown by a proper record that the order from which the appeal is prosecuted was erroneous. The bill of exceptions repeats the findings and judgment and sets forth the notice of intention to move for a new trial and an affidavit (which in my opinion is wholly insufficient) in support of the motion for a new trial. The bill of exceptions also contains the "memorandum for decision" in which the trial judge states that the accident was "unavoidable" and the statement made by the judge upon granting the new trial. The bill of exceptions is barren of any reference to the evidence or to the rulings made by the court during the course of the trial. For aught that appears in the record the order may have been granted because of errors occurring during the course of the trial. The record being in this condition, no course is open to us other than to affirm the order.



50 Cal.App.2d 211

PECKWITH et al. v. LAVEZZOLA.

Civ. 6703.

District Court of Appeal, Third District, California.

Feb. 26, 1942.

Hearing Denied April 23, 1942.

1. Waters and water courses ⇐101, 154(1)

In action to quiet title to water from springs appurtenant to defendant's land and to an easement for its conveyance, evidence, including showing that plaintiffs tapped water pipes belonging to defendant and his predecessor in title, not with a claim of right but by defendant's consent and with his permission, showed that plaintiffs did not acquire title to any portion of the water or to the easement either by purchase or by adverse possession.

2. Appeal and error ⇐930(1), 931(1)

Knowledge of facts obtained by a judge or a jury in viewing premises may be presumed on appeal in support of findings or a judgment, but mere speculation regarding the effect of impressions which may have been obtained in that manner may not be indulged to offset the judgment when there is substantial evidence in the record to the contrary.

3. Trial ⇐28(1), 375

Conditions observed by a judge or a jury while inspecting premises constitute "independent evidence" which may be considered by them in determining issues involved.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Evidence".

4. Appeal and error ⇐931(1)

Where the trial court found in an action to quiet title to water from springs and to an easement for its conveyance that water was taken by plaintiffs and necessarily

used by them for the benefit of the public, the reviewing court could not assume that the finding was nullified by contrary facts ascertained by the judge while he was viewing the premises in absence of proof thereof in the record, since an appeal must be determined on the record which is properly presented for review.

5. Waters and water courses ⇐152(11)

Where plaintiffs continued to use water from springs appurtenant to defendant's land for eight years with defendant's knowledge to augment their supply of a privately-owned utility company which sold water for domestic and irrigation purposes, defendant was "estopped" from asserting his right to water and could not interfere by injunction or otherwise with the public right to continued use of water in that manner, and hence he was not entitled to an absolute decree quieting title to the water and an easement for its conveyance in him.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

6. Eminent domain ⇐288(1)

Where water from springs or from any other private source is appropriated and used for the benefit of the public for a considerable period of time with full knowledge on part of owner, he may be "estopped" from interfering with that vested use by means of injunction, ejectment, or a suit to quiet title, and his remedy will be confined to a mere right to recoup adequate damages to compensate him for the loss of his property on account of the appropriation. Const. art. 1, § 14.

7. Eminent domain ⇐288(1)

Where water from springs or from any other private source is appropriated and used for the benefit of the public for a considerable period of time with full knowledge on part of owner, though intervening public rights prevent interference with use and control by owner, he is entitled to compensation on the principle applicable to a proceeding in reverse condemnation. Const. art. 1, § 14.

8. Eminent domain ⇐122

Private property may not be taken even for the benefit of the public without just compensation. Const. art. 1, § 14.

9. Eminent domain ⇐271

In an equitable action to quiet title, damages for the taking of property for the public use may be awarded under a general prayer for such other and further relief as may seem meet in the premises. Const. art. 1, § 14.

10. Eminent domain ⇐271

Where there was no evidence in action to quiet title to water from springs appurtenant to defendant's land to support plaintiffs' claim to water either by purchase or by adverse possession, but it did appear that water was appropriated by plaintiffs and used with defendant's consent to augment their supply of a privately-owned public utility company which sold water for domestic and irrigation purposes, the only theory on which judgment for plaintiffs could stand was that water was used incident to a public utility, and defendant was entitled to just compensation for his property which was converted to a public use. Const. art. 1, § 14.

Appeal from Superior Court, Sierra County; Arthur Coats, Judge Assigned.

Action by W. J. Peckwith and others against Antone Lavezzola to quiet title to water from springs and to an easement for its conveyance, wherein defendant filed a cross-complaint. From the judgment, defendant appeals.

Judgment reversed with directions.

A. J. Just, of Downieville, for appellant.

James Snell, of Grass Valley, and Thomas McCraney, of Los Angeles, for respondents.

THOMPSON, Acting Presiding Justice.

This is a suit to quiet title to water from springs and to an easement for its conveyance, which are appurtenant to the land of the defendant. The water was appropriated by the plaintiffs and used by consent of the defendant to augment their supply of a privately owned public utility company which for many years has sold water to the inhabitants of Downieville for domestic and irrigation purposes. This is not an action to partition the water of springs. Each party sought to quiet title to the water of the springs. The plaintiffs' chief contention is that the defendant is estopped from interfering with the use of the water because for several years it was used with his knowledge for sale to the public, as an essential exercise of the power and duty of a public utility company.

The complaint alleges, in effect, that the plaintiffs acquired title to the water of the

McDougall Springs, and to the easement for its conveyance to their plant, in 1932, by adverse possession, and that all of the water has been used by them in connection with their Durgan Flat Water Company, a public utility, to supply the inhabitants of Downieville, Sierra County, with water for domestic and irrigation purposes.

The answer denies the material allegations of the complaint. In a cross-complaint, the defendant asserts that plaintiffs only temporarily used a portion of the water from said springs, by express consent of the defendant and that the water was not essential for public use. It is alleged that the water was appurtenant to and necessary for use on defendant's land situated on Piety Hill in Downieville. The cross-complaint asks that title to the water of said springs and to said pipe line and easement be quieted in the defendant. It also prays for such other and further relief as may be meet in the premises.

At the trial it was stipulated that plaintiffs own and operate the Durgan Flat Water System in Downieville, Sierra County, as a public utility, and that they have supplied the families at twenty-five dwelling houses in that town, for a period of twelve years, with water for domestic and irrigation purposes; that the bulk of the water of plaintiffs' system is obtained from sources other than the springs in question; that the water piped from McDougall Springs, which is sometimes called Davidson Springs, was stored temporarily in a large tank which is situated 350 feet below the springs, from which tank a pipe conveys the water to defendant's land on Piety Hill, and that said water, for many years, has been and now is beneficially and necessarily used on said land for domestic and irrigation purposes; that plaintiffs tapped said pipe in 1932, at a point 150 feet below the tank, and diverted said water into their Durgan Flat Water System, and sold it to the inhabitants of Downieville for a period of eight years; that in 1939, shortly before the commencement of this action, the defendant disconnected said pipe and thus prevented plaintiffs from continuing to use the water from said springs. The evidence satisfactorily shows that the water of McDougall Springs was acquired by the defendant's predecessors in title to his Piety Hill land in 1864, as an appurtenance thereto and that it has been used continuously for the benefit of that land ever since that time.

The court found that the defendant's predecessors in title owned, and that the defendant still owns, several lots on Piety Hill, to which the water from said springs and the pipe line are appurtenant, and from which source he has continuously supplied his land and premises with necessary water for domestic and irrigation purposes.

The court further found that plaintiffs own and operate the Durgan Flat Water System as a public utility, by means of which they have supplied water for domestic and irrigation purposes for a period of twelve years to twenty-five families who reside on Piety Hill in Downieville; that plaintiffs, in effect, acquired title in 1932 to the water of McDougall Springs by adverse possession, and by purchase from the defendant and his predecessors for a valuable consideration; that the plaintiffs are now the owners and entitled to possession of said water subject to the right of defendant to use the residue thereof which is not consumed by plaintiffs. It is also found that plaintiffs mingled said water from the McDougall Springs with the water of their Durgan Flat Water System, a public utility, and sold it to the residents of Downieville, for a period of eight years, with full knowledge thereof on the part of the defendant, and that he is therefore estopped from claiming title thereto or from interfering with such vested public rights to the water of said springs.

[1] The finding that plaintiffs purchased for a valuable consideration, from the defendant's predecessor in title, the water of McDougall Springs, or the easement in question, is not supported by the evidence. We are directed to no evidence that plaintiffs ever purchased from the defendant or any other person, the springs, or any portion of the water therefrom, or the easement appurtenant thereto; nor does the record support title in the plaintiffs to any portion of the water, or to the easement, by adverse possession. Indeed, the court did not specifically find that plaintiffs acquired title to the water of the springs, or to the easement, by adverse possession. We do not understand that the respondents now contend they acquired title by adverse possession. Their use of the water from those springs lacks the elements necessary to constitute title by adverse possession.

We are thoroughly convinced the plaintiffs did not acquire title to any portion of the water of the McDougall Springs, or to the easement, by either purchase or by adverse possession. On the contrary, it clearly appears that the defendant and his predecessors held title to the water of those springs as an appurtenance to the land which they owned on Piety Hill in Downieville. Those springs were commonly known as the McDougall Springs or the Davidson Water Works. It does not satisfactorily appear those water rights were ever abandoned. They were appurtenant to the land on Piety Hill which was owned by the defendant and his predecessors in title since 1864. They used the water from those springs whenever they had occasion to do so. Those springs were always taxed with their land. The records show that they paid taxes on the "Davidson Water Rights."

The court found that the defendant owns four particularly described lots on Piety Hill; that he and his predecessors in interest "have owned, possessed and occupied said Piety Hill for more than eighty years last past"; that "the predecessors in interest of defendant acquired and constructed said McDougall Springs Water System * * * (which) ever since has been and now is appurtenant to Piety Hill, subject to the rights of plaintiffs as hereinafter set forth." The last mentioned findings are supported by the evidence.

The court then finds that for a period of twelve years the plaintiffs owned and operated the Durgan Flat Water System at Downieville as a public utility by means of which they supplied and sold to twenty-five of the inhabitants of that town water for domestic and irrigation purposes, and that they connected the water pipes of the McDougall Springs Water System, about 1929, with their Durgan Flat Water System, and appropriated the water from said springs, thus augmented, to supply the public needs; that plaintiffs have ever since maintained such diverting pipes and have used the water from said springs "openly, continuously and uninterruptedly," without objection. But the court did not find that plaintiffs diverted or used the water with a claim of title thereto. The court then found that the plaintiffs and the defendant were joint owners of the water of said springs on the theory, we assume, that the defendant is estopped from denying title to such portion thereof as he has permitted plaintiffs to use for public purposes. Finally, as a conclusion of law, the court found that plaintiffs are the owners and entitled to possession of the water of said springs and to the pipes and easement incident thereto, subject to the right of the defendant to use so much of the remainder of said water of the springs as is necessary and beneficial to his Piety Hill property for domestic and irrigation purposes, each party to pay one-half of the expense of maintaining the McDougall Springs Water System.

The evidence clearly shows that the plaintiffs tapped the water pipes belonging to the defendant, and his predecessor in title, not with a claim of right, but by defendant's consent and with his permission. Mr. Charles E. Herron, a former owner of the defendant's land, to which the springs are appurtenant, testified that Mr. John Peckwith told him they were short of water sufficient with which to supply their customers and that he asked permission to connect their water system with defendant's pipes leading to the McDougall Springs, and that he, Mr. Herron, replied, "I don't care if you use it temporarily until I get ready to hydraulic." That permissive use of the water was testified to by another witness. That evidence is not contradicted. It appears to be undisputed and conclusive in that regard. Pursuant to that request, the plaintiff tapped the pipes of the defendant and continued to use at least a portion of the water from those springs for several years without opposition. We assume the record establishes the fact that plaintiffs used the water from the springs by mere permission and not with a claim of ownership. That evidence refutes the theory of possession of the water by either purchase or by adverse possession.

[2] Incidentally it is contended plaintiffs are not entitled to retain the use of the water from the McDougall Springs because they maintained a defective system of pipes which permitted waste of a great quantity of water. It is conceded the record does not establish that fact, but it is asserted the trial judge observed that fact while he was viewing the premises. We have no way of determining what facts the judge may have acquired in viewing the premises. His impression of conditions observed on the premises remain hidden in his own mind. They are not a part of the record on appeal. Knowledge of facts secured by a judge or a

jury in viewing premises may be presumed on appeal in support of findings or a judgment, but mere speculation regarding the effect of impressions which may have been secured in that manner may not be indulged in to upset a judgment when there is substantial evidence in the record to the contrary.

[3, 4] It is true that conditions observed by a judge or a jury, while inspecting the premises, constitute independent evidence which may be considered by them in determining the issues involved. Gibson Properties Co. v. City of Oakland, 12 Cal.2d 291, 83 P.2d 942; Hatton v. Gregg, 4 Cal.App. 537, 88 P. 592. Since the court found in this case that the water was taken by plaintiffs and necessarily used by them for the benefit of the public, on appeal we may not assume that finding is nullified by contrary facts ascertained by the judge while he was viewing the premises in the absence of proof thereof in the record. An appeal must be determined on the record which is presented for review pursuant to the method required by the statute.

The remaining and the most important question to be determined on this appeal is whether the defendant is estopped from asserting title to the water of the springs and to the easement, so as to interfere with plaintiffs' use and control thereof, as a public utility, for the reason that the water was sold to the public for several years with defendant's knowledge, and that the public interest is therefore paramount to defendant's title to the water. Apparently that is the theory upon which the court quieted title to the water and to the easement, in plaintiffs. If that public interest prohibits the defendant from asserting his title and control of the water on account of the public utility nature of the use to which the property is devoted, is it not necessary that a court of equity should award the defendant just compensation for the appropriation of his property, on the theory that the doctrine of reverse condemnation is involved?

[5] There is no doubt the record contains ample evidence to support the findings of the court that plaintiffs continued to use the water from McDougall Springs for a period of eight years, to augment the supply of their Durgan Flat Water System, a public utility, from which they continuously sold water to the inhabitants of Downieville with knowledge thereof on the part of the defendant. It follows that the defendant may not interfere by injunction or otherwise with that public right to the continued use of the water in that manner. The defendant is therefore not entitled to an absolute decree quieting title to the water and easement in him.

[6-8] Where water from springs, or from any other private source, is appropriated and used for the benefit of the public for a considerable period of time, with full knowledge on the part of the owner, he may be estopped from interfering with such vested public use by means of injunction, ejectment or a suit to quiet title. Under such circumstances, his remedy will be confined to a mere right to recoup adequate damages to compensate him for the loss of his property on account of such appropriation. This remedy is based on the theory that although the intervening public rights prevent interference with the use and control of the property on the part of the owner, he is, nevertheless, entitled to compensation on the principle applicable to a proceeding in reverse condemnation. Private property may not be taken, even for the benefit of the public, without just compensation. That principle has been frequently announced by the decisions of our courts. Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 P. 906, 36 L.R.A.,N.S., 185; Collier v. Merced Irr. District, 213 Cal. 554, 563, 2 P.2d 790; Peabody v. City of Vallejo, 2 Cal.2d 351, 377, 40 P.2d 486; Hillside Water Co. v. City of Los Angeles, 10 Cal.2d 677, 688, 76 P.2d 681. In the Collier case, supra [213 Cal. 554, 2 P.2d 793], it is said in that regard:

" 'It is perfectly true that not even a corporation possessing the power of eminent domain may under the Constitution (article 1, § 14) take or damage private property without first making adequate compensation. But this right may be waived by the owner, and, in order to prevent the obstruction of progress, he must be held to diligence in asserting his right as against a concern administering such a public use. If he allows his property right to be invaded and either taken or damaged for a public use, and the public right has so far intervened as to justify the belief that objection has been waived, then in law the property right so taken or damaged is to that extent dedicated to the public use.' Conaway v. Yolo Water & Power Co., 204 Cal. 125, 131, 266 P. 944, 946, 58 A.L.R. 674."

In the Gurnsey case, supra, 160 Cal. at page 709, 117 P. at page 910, 36 L.R.A.,N.S., 185, quoting with approval from page 53 of

Jones on Telegraph and Telephone Companies, the court says with respect to the foregoing principle:

"'In many cases Telegraph and Telephone Companies enter upon the land of another without the latter's knowledge or consent, but the fact that they do, *or that he permitted them to do so,* does not give the company a title or right of way or estop him from maintaining an action for damages; and yet it may preclude him from maintaining any action of ejectment; * * * and should he stand by until the line is completed and in operation, and public interests *have become involved,* he will be denied the right to maintain an action of ejectment or the right to enjoin them. His only remedy under such circumstances is a proceeding brought to recover damages.'" (Italics added.)

After citing many cases in support of the foregoing principle, the court continues to say:

"In these latter cases, it is true, there were oral agreements under which the railroad companies went into possession of the land, and in the last case the construction of the canal was with the tacit consent of those who sought to have it abated and removed from their land as a nuisance. The principle, however, upon which the right to maintain ejectment *or to quiet title* or to abate the canal was denied in those cases was that, as public interests had intervened through the construction and operation of these public agencies before the actions in those cases were commenced, any right of the parties to disturb them in their possession of the property was thereby lost, and only an action to recover compensation for the land taken could be available. In principle there can be no difference, as far as the application of the rule of public policy is concerned, whether the entry is by original consent of the owner, or he permits it to be made and attempts to assert no right until after the public interests have intervened." (Italics added.)

In both the Peabody case and the Hillside Water Company case, supra, the courts held that the defendants, under such circumstances, could not interfere with vested public rights acquired in property by means of injunction or otherwise, but on the contrary that the owners were confined to their remedy for damages for the appropriation of the property, on the theory of reverse condemnation.

[9, 10] In the present case the court has properly held that the defendant is not entitled to a decree quieting title to that portion of the water of McDougall Springs which has been appropriated and used by the plaintiffs for a number of years in operating a public utility in the name of Durgan Flat Water System, by selling the water to the inhabitants of Downieville, because of the intervention of the public right, and that the defendant is therefore estopped from asserting his right to the water. But the court neglected to ascertain and fix the amount of damages to which the defendant is entitled as just compensation for the value of the property thus appropriated and used for the public benefit. This is a suit in equity. It is inequitable to deprive the defendant of his property, even though it be taken for public use and benefit, without awarding him just compensation therefor. Such damages may be awarded in an equitable action to quiet title under the general prayer for "such other and further relief * * * as may seem meet in the premises." Having acquired jurisdiction in this equitable action complete justice should be afforded by compensating the defendant for the value of his property which is taken. Since there is no evidence to support plaintiffs' claim of title to the water by either purchase or by adverse possession, the only theory upon which the judgment for plaintiffs may stand is that the water was used incident to a public utility. That being so, the defendant is entitled to just compensation for the property which is converted to a public use.

The judgment is reversed and the trial court is directed to ascertain the value of the water and easement taken and appropriated for the benefit of the public, and award judgment to the defendant for that amount. Title to the water and easement should be quieted in plaintiffs, subject to payment of compensation therefor, and subject also to defendant's right to use and enjoy the benefit of whatever portion thereof is not required for public use, as heretofore decreed by the court. It is so ordered. The appellant may recover his costs.

TUTTLE, J., concurred.

49 Cal.App.2d 550

PRATT et al. v. ROBERT S. ODELL & CO. et al.

Civ. 11906.

District Court of Appeal, First District, Division 1, California.

Feb. 9, 1942.

Rehearing Denied March 11, 1942.

Hearing Denied April 8, 1942.

1. Appeal and error ⇐138

It is not necessary that a receiver authorize an appeal by a corporation claiming to be aggrieved by order appointing him if the corporation is a party of record to the proceedings from which the appeal is taken. Code Civ.Proc. § 938.

2. Appeal and error ⇐138

Where receiver appointed for corporation did not object to corporation's appeal taken by attorneys who represented corporation, its officers and directors sued in representative action by minority stockholders, there was no sufficient divergence of interest between the corporation and its officers and directors to preclude the corporation in behalf of stockholders from a fair presentation of issues involved in appeal. Code Civ. Proc. § 938.

3. Appeal and error ⇐776

An appeal should not ordinarily be dismissed on motion of a respondent without the consent of appellant.

4. Appeal and error ⇐138

Where corporation retained its corporate entity after appointment of receiver for it in stockholders' derivative action against officers and third persons, appeal by defendants would not be dismissed when upon its face there was no evidence of alleged lack of good faith.

5. Corporations ⇐665(3)

A foreign corporation doing business in California is amenable to process of the state courts and relief may be granted against such corporation, irrespective of the effect upon its internal affairs.

6. Corporations ⇐636

California has power to reasonably regulate foreign corporations doing business in the state and to determine by legislative enactment the law of which state shall be applicable to the settlement of controversies between such corporations and others.

7. Statutes ⇐179

Under codal provision that corporation unless otherwise expressly provided refers only to a domestic corporation, a provision referring to loans and obligations incurred by officers of a "corporation" applied only to a domestic corporation. Civ.Code, §§ 278, 366.

See Words and Phrases, Permanent Edition, for all other definitions of "Corporation".

8. Corporations ⇐640, 665(3)

The liability of a director of a foreign corporation doing business in California may be enforced in California but only according to the laws of the state of incorporation. Civ.Code, § 412.

9. Corporations ⇐207½

A representative action against corporate directors and others is not an action by minority stockholders against majority stockholders.

10. Evidence ⇐35, 43(4)

In action against directors of foreign corporation doing business in California, judicial notice of the laws of Delaware and the interpretation thereof may be taken. Civ. Code, § 412.

11. Contracts ⇐1

A "loan" is a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows.

See Words and Phrases, Permanent Edition, for all other definitions of "Loan".

12. Corporations ⇐316(1), 432(12)

Where there was no evidence that signing of contract by corporate president was detrimental to other party, nor that president did not believe he was authorized to sign it, and contract met with approval of corporation, no reasonable inference could be drawn that president knew he was not authorized to make the contract so as to make moneys paid to other party by parent Delaware corporation an advancement to president personally contrary to Delaware statute. Rev.Code Del.1935, § 2068.

13. Corporations ⇐212

In representative action against directors and third persons because of money unlawfully expended, evidence as to the good faith of the defendants is vital and admissible where it is alleged that expenditure

was not in good faith for corporation's benefit.

14. Building and loan associations ⇐42(3)

The corporate entity of a building and loan association continues for purpose of contesting seizure by commissioner. Gen. Laws 1937, Act 986, § 13.12.

15. Building and loan associations ⇐42(3)

Where statute gave right to building and loan association to contest seizure by commission, it must be assumed that there was no intention to deprive association of right to prepare for contest and use all proper means in good faith to maintain it to successful conclusion. Gen.Laws 1937, Act 986, § 13.12.

16. Building and loan associations ⇐42(3)

The statutory provision that building and loan association may contest seizure by commissioner must be liberally construed. Gen.Laws 1937, Act 986, § 13.12.

17. Building and loan associations ⇐42(3)

It cannot be assumed that commissioner would expend funds of seized building and loan association in defense of seizure and at the same time advance funds to support an attack thereon, as regards right of association to seek financial assistance to contest seizure. Gen.Laws 1937, Act 986, § 13.12.

18. Building and loan associations ⇐42(3)

An appeal by seized building and loan association to trial court for allowance of fees to attorneys and expenses in action to enjoin seizure would make proper for the court's consideration whether the action was brought in good faith, a finding on which would rest in the court's reasonable discretion. Gen.Laws 1937, Act 986, § 13.12.

19. Building and loan associations ⇐42(3)

A seized building and loan association may in good faith secure financial assistance from stockholders or others to contest in the interest of the stockholders seizure by commissioner. Gen.Laws 1937, Act 986, § 13.12.

20. Building and loan associations ⇐42(3)

A building and loan association which had been seized by commission had power to contract for appraisement of its property and pay salaries of its officers who performed services in assisting company to contest the seizure. Gen.Laws 1937, Act 986, § 13.12.

21. Corporations ⇐439

If a corporation acts in good faith it may expend funds in prosecution of litigation to which it is not a party but in which it has an interest, or in assistance of other organizations from which it lawfully expects to benefit.

22. Corporations ⇐439

A parent corporation may ordinarily expend money in defense of its subsidiary.

23. Corporations ⇐439

A parent corporation could not expend money in contesting seizure of its subsidiary building and loan association if it knew or ought to have known that no defense existed to the seizure. Gen.Laws 1937, Act 986, § 13.12.

24. Corporations ⇐312(1)

Where directors of parent corporation act in good faith in expending money to defend seizure of subsidiary building and loan association, they are not liable for such expenditure, but they are liable where they know or should have known that commissioner had valid grounds for the seizure and that the contest was brought in bad faith. Gen.Laws 1937, Act 986, § 13.12.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Anthony F. Pratt and others on behalf of themselves and other minority stockholders of State Guaranty Corporation against such corporation, its officers and directors, and others, to compel restitution of funds expended on behalf of such corporation. From a judgment for plaintiffs, the defendants appeal.

Judgment reversed.

Hearing denied; CARTER, J., dissenting.

Freston & Files, Gordon L. Files, and John L. Mace, all of Los Angeles, for appellants.

Baldwin Robertson and Russell Breckenridge, both of Los Angeles, for respondents.

WARD, Justice.

This is an action brought by plaintiffs on behalf of themselves and other minority stockholders of the State Guaranty Corporation against that body, its officers and directors and others to compel restitution of funds alleged to have been unlawfully expended on behalf of such corporation by said officers and directors. The appeal is

by the defendants from the whole of the judgment in plaintiffs' favor, which also brings here for review an order appointing a receiver.

Respondents presented to this court a motion to dismiss the appeal upon the grounds that it was not taken by the Guaranty Corporation or pursuant to its authority; that the notice thereof was signed by attorneys for the individual judgment debtors not purporting to act for such corporation, and that the appeal was not prosecuted in good faith.

[1, 2] It is not necessary that a receiver authorize an appeal by a corporation claiming to be aggrieved by the order appointing him if the corporation is a party of record to the proceedings from which the appeal is taken. Code Civ.Proc. sec. 938; Luckenbach v. Laer, 190 Cal. 395, 212 P. 918; Golden State Glass Corp. v. Superior Court, 13 Cal.2d 384, 90 P.2d 75; Berylwood Investment Co. v. Graham, 43 Cal. App.2d 659, 111 P.2d 467; Braun v. Brown, 13 Cal.2d 130, 87 P.2d 1009; Lilienkamp v. Superior Court, 14 Cal.2d 293, 93 P.2d 1008. It is not the receiver but the plaintiffs who object to the appeal of the corporation taken by the same attorneys who at the trial represented such body, its officers and directors. There is not sufficient divergence of interest between the corporation and its officers and directors to justify precluding the corporation, in behalf of its stockholders, from a fair presentation of the issues involved on this appeal.

[3, 4] State Guaranty Corporation retains its corporate entity and has regularly appealed. Ordinarily an appeal should not be dismissed on motion of a respondent without the consent of appellant. Woodbury v. Nevada, etc., Ry. Co., 120 Cal. 367, 52 P. 650. An appeal will not be dismissed upon such a technical objection (Sharick v. Galloway, 12 Cal.App.2d 733, 55 P.2d 1196), when upon its face there is no showing of lack of good faith. The motion to dismiss was denied after oral argument before the submission of the cause upon its merits.

There was also filed by respondents an application for leave to produce additional evidence under section 956a of the Code of Civil Procedure. The purpose of the application was to introduce a certified copy of a decision, in the form of a memorandum opinion, directing counsel to prepare findings in an action wherein Pacific States Savings & Loan Company, a corporation (subsidiary of the State Guaranty Corporation, appellant herein), was plaintiff, and Ralph W. Evans, individually and as Building and Loan Commissioner of the State of California, and others appeared as defendants. The order, subsequently signed, set forth that the Pacific States Savings & Loan Company, hereinafter referred to as Pacific States, did not commence that action in good faith; and that a petition for allowance and payment of attorneys' fees on its behalf was denied but that there was reserved to plaintiff or its attorneys the right to subsequently apply for a proper allowance "for legal services heretofore rendered." In the opinion rendered by the trial court in that case, the court stated: "The justification or non-justification of the seizure [of the assets of Pacific States] will not be and cannot legally be determined until there is a decision rendered in the main case."

The parties to the action by the Pacific States are different from those in the present case, and the above-mentioned order is not final, but subject to possible reversal by a reviewing court, the legal effect thereof simply being that a particular controversy in the trial of that action has been decided, but its correctness and conclusiveness is an open question until affirmed on appeal or it becomes final by failure to appeal. Eliminating questions of difference in parties in the respective actions, and of the *identical* issues involved—which need not be definitely stated or determined at this time—the litigants herein would be placed in an awkward and anomolous position if on review the above order should be regarded as binding, and subsequently it should be set aside on motion for a new trial on the merits of that case, or reversed on appeal. The application for leave to produce additional evidence before this court was denied, without prejudice, prior to submission of the present appeal.

The Guaranty Corporation is a holding company whose principal asset is all of the guarantee stock of Pacific States. It also owns investment certificates of the latter company of the face value of approximately $80,000, and, through the Pacific States Auxiliary Corporation, of which it owns all of the outstanding capital stock, the Guaranty Corporation owns additional investment certificates in Pacific States of the face value of approximately $88,000.

The board of directors of the Guaranty Corporation is composed mainly of persons who are officers and directors of its subsidiary, Pacific States.

On March 4, 1939, under the authority of section 13.11 of the Building & Loan Act (Stats.1931, pp. 483, 539; Deering's Gen.Laws, 1937, Act 986), the Building & Loan Commissioner of the State of California, to whom we will refer as the commissioner, took possession of the property, business and assets of Pacific States. Two days thereafter, under the provisions of section 13.12 of the same act (Stats. 1931, p. 540), Pacific States as an aggrieved party filed an action against the commissioner in the Superior Court of the City and County of San Francisco to enjoin the seizure. Pacific States v. Evans, Superior Court Civil No. 286,830. A final judgment has not as yet been rendered in that action.

The material facts do not seem to be a subject of controversy. The trial court herein found that, following the seizure by the commissioner, "Robert S. Odell, as President of Pacific States Savings and Loan Company, acting in the name of the said corporation, entered into a contract with the American Appraisal Company, engaging that company to make an appraisal of the properties of Pacific States Savings and Loan Company." The latter thereupon requested its parent company, Guaranty Corporation, to pay any and all expenses incurred in connection with the prosecution and resistance of a liquidation of its affairs, including salaries of its officers whose employment was necessary to the success thereof, agreeing to reimburse the parent company for any and all amounts and expenses advanced upon its written request, signed by its president, or any vice-president, and secretary, and under the corporate seal of the company. These matters were duly set forth by resolution in the minutes of regular meetings of the Guaranty and Pacific States corporations. The resolutions in this respect refer to the seizure as unauthorized and unjustifiable, and state that the retention of the assets of Pacific States by the commissioner will have a detrimental effect upon such company and its investors; that the Guaranty owns all of the outstanding capital stock of the Pacific States, and through subsidiary companies, a large block of its investment certificates; that liquidation would result in the sacrifice of properties to the great loss of Pacific States and the Guaranty Corporation. In its resolution the Guaranty Corporation agreed to assume indebtedness incurred and to pay certain salaries of officers of Pacific States from the date of the seizure until further order of the board of directors. These amounts were subsequently paid by Guaranty. It does not appear that any of the funds were used in any manner except as authorized by the resolutions of the two companies.

Subsequently an investors' committee, composed originally of about 30 certificate holders of Pacific States, was formed. There is evidence that the organization was inspired by officers of Pacific States. From a small body it grew until there were over 8000 members, "who owned face value of investment certificates of about $12,000,000." Its purpose was to intervene in the suit of Pacific States v. Evans, supra; subsequently it took an active part in legislative matters wherein Pacific States and Guaranty were materially interested. The Guaranty Corporation paid all expenses incurred through the activities of the investors' committee. The record shows that in excess of 85 per cent of the Pacific States investors favored the return of management from the commissioner to the directorate of that company. During this period the commissioner served upon the Guaranty Corporation, the sole stockholder of Pacific States, an assessment upon the stock of the Pacific States in the amount of $628,600.

Judgment was entered herein that plaintiffs "for the benefit of State Guaranty Corporation, and, State Guaranty Corporation * * * do have and recover * * * jointly and severally" from named defendants certain specified sums. In addition the judgment provided: "That plaintiffs, for the benefit of State Guaranty Corporation, and State Guaranty Corporation, a corporation, do have and recover from defendants Robert S. Odell, A. E. Falch and C. F. Adams, Jr., jointly and severally, the sum of one hundred fifty-eight thousand, two hundred two and 65/100 dollars ($158,202.65), making in the aggregate the sum to be had and recovered against said last-named defendants, jointly and severally, the sum of one hundred eighty thousand four hundred seventy-two and 65/100 dollars ($180,472.65), together with interest thereon at the rate of seven per cent (7%) per annum from

the 4th day of May, 1940, until the same be repaid into the treasury of State Guaranty Corporation." The officers and directors of the Guaranty Corporation, individually and as such officers and directors, were restrained from paying from the treasury of the Guaranty Corporation or that of the Pacific States Auxiliary Corporation any debts or obligations incurred by Robert S. Odell, Robert S. Odell & Company or any defendant individually or jointly in the name of such parties or of the Pacific States. Payment of salaries to any officers, agents or employees of Pacific States was likewise enjoined, as was the payment of any further sums for the account of the investors' committee, or the advancing of any funds on behalf of the prosecution or defense of Pacific States. A receiver was appointed for the Guaranty Corporation for the purpose of enforcing the collection of the judgment in his own name as such receiver. Plaintiffs were awarded counsel fees of $5,000, plus "a sum equal to thirty-three and one-third per cent (33⅓%) of the first thirty thousand dollars ($30,000) so recovered; fifteen per cent (15%) of the next fifty thousand dollars ($50,000) so recovered; and ten per cent (10%) of all of the balance of such recovery." The $5,000 amount was based upon a finding that $50,000 drawn from the Guaranty treasury several days prior to the filing of this action and placed in a San Francisco bank as a "defense fund," and repaid to the Guaranty several days after the commencement of this suit, would not have been so repaid except for the force of a restraining order.

The trial court found that it was unlawful for the Guaranty Corporation to finance the action of Pacific States v. Evans, supra. For the purpose of consideration herein such expenditures consisted of: $35,000 to the investors' committee, and the remainder, salaries of officers and directors as compensation, fees and charges of an appraisal company, etc. The first amount, $35,000, was declared to be "an unlawful use and diversion of the assets of State Guaranty Corporation"; the others, to be "a loan of money and a payment of the obligation of the officers and directors of State Guaranty Corporation and * * * of Pacific States Savings and Loan Company * * * in violation of the provisions of sec. 366 of the Civil Code of the State of California."

Among the various questions raised on appeal are the following: Is the injunction proper? Did the trial court have the right or power to appoint a receiver for the Guaranty Corporation? Is plaintiffs' counsel entitled to $5,000 additional attorney's fee for "saving" money which the Guaranty Corporation merely reserved and never expended? May a judgment be properly entered against the Odell Company, which merely received, and later paid out, some of the money alleged to have been wrongfully used? Are plaintiffs estopped and barred by laches? In view of the conclusion on the main issue of this case, which follows, it is not necessary to determine the foregoing questions.

In support of the declaration in the conclusions of law that the acts and conduct of the defendants were in violation of the provisions of section 366 of the Civil Code, respondents contend (1) that Guaranty is a foreign corporation only nominally, and that under its Delaware articles of incorporation it is bound by the laws of California; (2) that payment of the amounts authorized by its board of directors was a payment by individuals, and constituted a loan to individual directors of Pacific States; upon the theory that after the seizure of such company by the commissioner, its officers and directors became personally liable for any obligations assumed by them in the name of the corporation.

[5-7] A foreign corporation doing business in this state is amenable to process of the courts of this state, and relief may be granted against such corporation irrespective of the effect upon its internal affairs. Sharp v. Big Jim Mines, 39 Cal.App. 2d 435, 103 P.2d 430; Wait v. Kern River Mining, etc., Company, 157 Cal. 16, 106 P. 98. California has power to reasonably regulate foreign corporations doing business in this state, and to determine, by legislative enactment, the law of which state shall be applicable to the settlement of controversies between such corporations and others. The regulation in the instant controversy is plain and specific. Section 366, found in div. 1, pt. 4, tit. 1, ch. 14 of the Civil Code, refers to loans and obligations incurred by officers of a corporation. The definitions of the terms used in title 1 are found in section 278, Civil Code, which in part read: "'Corporation,' unless otherwise expressly provided, refers only to a domestic corporation." There is

no express provision otherwise in section 366. It must be held, therefore, that the section does not apply in the present case. The liability of a director in a foreign corporation is determined by Civil Code, section 412: "The directors of a foreign corporation transacting business in this State shall be liable to the corporation, its shareholders, creditors, receiver, liquidator, or trustee in bankruptcy for the making of unauthorized dividends, purchases of its shares, or distributions of assets, or false certificates, reports or public notices or other violations of official duty, *according to the laws of the State of incorporation,* whether committed or done in this State or elsewhere. Such liabilities may be enforced in the courts of this State." (Italics added.)

[8] Respondents place great weight upon Thomas v. Wentworth Hotel Co., 158 Cal. 275, 110 P. 942, 139 Am.St.Rep. 120, citing Pinney v. Nelson, 183 U.S. 144, 22 S.Ct. 52, 46 L.Ed. 125. In the Thomas case, a stockholder appealed from a judgment against him for his proportionate share of indebtedness evidenced by promissory notes payable in this state. The court said at page 281 of 158 Cal., at page 944 of 110 P., 139 Am.St.Rep. 120: "The law of this state declares in express terms that 'the liability of each stockholder of a corporation formed under the laws of any other state or territory of the United States, or of any foreign country, and doing business within this state, is the same as the liability of a stockholder of a corporation created under the constitution and laws of this state.'" Section 322 of the Civil Code at that time specifically mentioned foreign corporations. Section 366 makes no reference to foreign corporations. The liability of a director of a corporation for a violation of official duty may be enforced in this state, but according to the laws of the state of incorporation.

[9] In some respects respondents argue upon the theory that the present action was instituted by minority against majority stockholders. It may be assumed that the subject of plaintiffs' cause of action is of general interest to all owners of capital stock of the Guaranty Corporation, and that all shareholders who so elected could assist in the prosecution thereof. However, the suit is brought by plaintiff shareholders on behalf of themselves and all other stockholders of the Guaranty Corporation against the Odell Company, Robert S. Odell, as president thereof, his wife, the Guaranty Corporation, its officers, directors and subsidiaries and others. It is respondents' claim that the various corporations are interlocked in interest, and that Odell is the dominating figure and controller of the official acts of all officers and directors. The action, therefore, is not by "minority stockholders against majority stockholders," so that arguments and citations applicable to that situation may be disregarded. The interests of the stockholders of the Guaranty Corporation are in proportion to the number of shares held, but their rights and privileges are identical, though there may be an honest difference of opinion as to the best method to pursue in the protection of such rights and interests.

So far as the judgment is based upon section 366, Civil Code, the determination of the appeal could be reached at this point. However, respondents urge that a loan to an officer is equally unlawful under the laws of the State of Delaware.

[10, 11] In the interests of justice, with the purpose if possible of making findings of fact different from those of the trial court, but in accord with the evidence adduced, it has been determined to examine such evidence in order to discover whether it comes within the purview of the law of the State of Delaware. Code Civ.Proc., sec. 956a. To that extent it will be proper to take judicial notice of the laws of Delaware and the interpretation thereof. Code Civ.Proc. sec. 1875. Section 36 of the Delaware corporation law provides: "No corporation created under this Chapter shall make any loan of money to any officer of such corporation." Rev.Code 1935, § 2068. In the present case, as stated, the Guaranty advanced various sums of money. A loan is "A contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows." 38 C.J., p. 126. There is no evidence in this case that a loan was made by Guaranty to any officer of that corporation as an individual. Assuming, but not deciding, that the section is broad enough to include officers of a subsidiary corporation, there is no evidence that a loan was so made to such an officer.

[12] It is respondents' theory that the officers and directors of Pacific States became personally responsible as individuals

for all monies so paid by Guaranty on behalf of Pacific States. It is also urged that Odell, as president, in signing the contract with the appraisal company on behalf of Pacific States, assumed an authority which he did not possess. It is not contended that had the seizure not been made, Odell would not have been authorized to sign such a contract. Respondents' theory is that, the seizure having been made, Odell assumed an agency for which there was no authorization in law or in fact, and that he thereby became responsible as principal to the appraisal company (Civ.Code, sec. 2343); and that the credit so given by that company was bestowed upon him personally. Respondents' position would be worthy of consideration if the appraisal company had been injured thereby, or if Odell had entered into the written contract in the name of his principal without believing in good faith that he was authorized to do so, or if the act was wrongful in its nature. There is no evidence that the signing of the contract by the president of Pacific States was to the detriment of the appraisal company; nor is there evidence that Odell did not believe he was authorized to make the contract, or that it was in excess of his authority. On the contrary, his action in this respect met with the approval of Pacific States. In the absence of evidence herein that Odell imposed upon the appraisal company—respondent does not call attention to such evidence, nor have we been able to find substantiation therefor in that adduced—it would be highly technical to hold in the face of the record that a reasonable inference could be drawn that Odell knew he was not authorized to make the contract.

[13] Was Odell's act wrongful in its nature? There was no evidence of fraud or misrepresentation. The burden of respondents' contention is that all of the acts by the interested companies were made to serve the private interests of Odell. They stated in the application to produce additional evidence "that the trial court * * * refused to permit plaintiffs to introduce any evidence respecting" the necessity of the take-over and that "the action of the defendants herein in resisting said take-over was for the purpose of serving the private interests and desires of Robert S. Odell." The good faith of the defendants in this case was a vital question to determine. In the event that this matter should be reheard, and the pleadings should so allege, such evidence would be admissible.

As the record stands, the important question appears: Was the agreement by Guaranty to pay the salaries of Pacific States' officers, and other expenditures, after the seizure, an unlawful act on the part of the Guaranty? The answer depends in a great measure upon the construction that may be placed upon section 13.12 of the Building and Loan Act. In reaching a conclusion on this question, and on all other questions raised on this appeal, the opinion herein is not to be construed as a determination of the issues involved in Pacific States v. Evans, supra.

[14-18] Under the provisions of section 13.12, whenever the property, business and assets of any building and loan association have been taken possession of by the commissioner, the aggrieved *association* may seek to enjoin further proceedings. No provision is made for such a direct contest by a stockholder, certificate holder, director or officer of the company, the statute confining the institution of such action to the association. A practical question is immediately suggested. The commissioner is in control of the association, and while the corporate entity of that body continues for the purpose of contesting the seizure (sec. 13.12, supra; Hill v. Bank of San Pedro, 41 Cal.App.2d 595, 107 P.2d 399), there is no immediate means financially of prosecuting the action against the commissioner. It must be assumed that when the legislature gave to the association the right to declare an offensive legal war on the acts of the commissioner, there was no intention to deprive the challenger of the right to prepare for and use all proper and fair means in good faith to maintain the contest to a successful conclusion. It would appear to be the duty of the association, if in fact aggrieved, to protect and maintain its integrity against the possibility of mistaken judgment on the part of the commissioner. "The successful achievement of the object of the statute requires broad rather than limited powers, and justifies a liberal rather than a strict construction." Wilson v. Superior Court, 2 Cal.2d 632, 637, 43 P.2d 286, 288. Such conclusion applies equally to a statutory right or privilege bestowed upon an association as upon a commissioner. It cannot be assumed that the commissioner would expend the funds of the association in defense of the seizure (Evans

v. Superior Court, 14 Cal.2d 563, 96 P.2d 107), and at the same time advance funds to support an attack thereon. The right to enjoin further proceedings would be without avail if the association, acting in good faith, were precluded from seeking financial assistance for the prosecution of the action. An appeal to the trial court for the allowance of fees to attorneys and for expenses of conducting the litigation would make proper for the court's consideration whether the suit was brought in good faith, a finding on which would rest in the court's reasonable discretion. Anderson v. Great Republic Life Ins. Co., 41 Cal.App.2d 181, 106 P.2d 75. Ordinarily the trial court would not be able to determine this question until evidence had been presented on behalf of the association, whose solvency might depend upon the value of the assets, real estate and otherwise. This might require the employment of appraisers, a great deal of consultation between officers of the association and the attorneys representing it as to factual matters and figures, and services and expenses of various kinds. The association, without financial aid, is called upon to protect its position against the commissioner, who is empowered to employ special counsel, accountants and appraisers, and pay therefor out "of the funds of the particular association involved." Evans v. Superior Court, supra, at page 572, of 14 Cal.2d, at page 112 of 96 P.2d. In a word, while the association is given the right to continue its corporate existence for the above limited purpose, such existence as a practical matter seems to depend upon its ability to finance itself; otherwise the aggrieved party must forego its right to enjoin the commissioner.

[19, 20] There is no statutory provision prohibiting the association from obtaining financial aid from other sources. Seeking aid from a stockholder, personal or corporate, seems a reasonable and practical method of procedure, particularly if the stockholder owns the controlling interest in the association. If the stockholder, or any other party, and the association, without intent to defraud, in good faith and in the interests of other stockholders and certificate holders, make financial arrangements within statutory provisions for the conduct of a suit to enjoin the commissioner, we can see no legal objection thereto, and certainly cannot hold the contract with the appraisal company, or the payment of salaries to officers of Pacific States, who actually performed services in assisting that company in its action against the seizure, to be wrongful in nature or violative of any statute to which attention has been called on this appeal. To hold otherwise would in some instances result in the abolishment of a right granted by the legislature.

One further point remains for consideration. The trial court found that the Guaranty, a corporation organized under the laws of the State of Delaware and doing business exclusively in the State of California, is a holding company. Respondents contend that as such it had no right to advance $35,000 to the investors' committee; "that Pacific States, as a corporation, in truth has no case against the Building and Loan Commissioner. The real parties opposing the Building and Loan Commissioner are those who prior to the seizure had control of the assets of Pacific States. This means one man only—Robert S. Odell." There is nothing in the record from which this court may determine that the advancement was improper. The all important question of good faith on the part of defendants is not an issue on this appeal.

As stated, the court found that the $35,000 expenditure was "an unlawful use and diversion of the assets." Relative to the diversion of assets, it did not find that the funds were embezzled or that a loan or obligation was created on the part of the individual directors within the purview of section 366, supra. The original complaint alleged that $25,000 of this amount had "been expended by said defendants in connivance and conspiracy with and under the direction of Robert S. Odell." This theory was abandoned. During the trial "to conform to the proof," an amended complaint was filed which alleged that the $35,000 was paid by Guaranty "through the unlawful and unwarranted acts of said individual defendants * * * without consideration."

The investors' committee, though not always successful in its undertakings, did perform services. It sought to enjoin the commissioner from expending funds of Pacific States in defending the action to enjoin seizure by him, and an injunction was granted by the trial court so restraining him. An application by the commissioner to the superior court for relief from the restraining order was denied, but a rehearing granted. In a prohibition proceeding, the commissioner was upheld, three of

the justices dissenting. Evans v. Superior Court, supra. Other services were also performed by the investors' committee consisting in taking an active part in legislative matters. There is no proof that any of the funds were unlawfully, unethically, improperly or unwisely expended.

[21] If a corporation acts in good faith, it may expend funds in the prosecution of litigation to which it is not a party but in which it has an interest, or in the assistance of other organizations from which it expects lawfully to benefit. In Woods Lumber Co. v. Moore, 183 Cal. 497, 502, 191 P. 905, 907, 11 A.L.R. 549, the court said: "With respect to the means which the corporation may adopt to further its objects and promote its business its managers 'are not limited in law to the use of such means as are usual or necessary to the objects contemplated by their organization, but, where not restricted by law, may choose such means as are convenient and adapted to the end, though they be neither the usual means, nor absolutely necessary' for the purpose intended." Singh v. United States American Malwa Sudharak Soc., 5 Cal.2d 405, 54 P.2d 1099; Rabbitt v. Union Indemnity Co., 140 Cal.App. 575, 35 P.2d 1066; 19 C.J.S., Corporations, § 1145, pp. 718–720; 13 Am.Jur., p. 824.

[22, 23] Independently of section 13.12 of the Building and Loan Act the rule is well-settled that a parent corporation may ordinarily expend money in defense of its subsidiary. But neither that rule nor any other rule mentioned in this opinion would warrant Guaranty in expending any sum of money at all if it knew or under the circumstances should have known that Pacific States did not have a defense to the seizure. As already pointed out, Pacific States could be reimbursed for expenditures made in the action brought to challenge the seizure only if it acted in good faith. Anderson v. Great Republic Life Ins. Co., supra; Barker v. Southern Bldg. & Loan Association, C.C., 181 F. 636; Esarey v. Pierson, 84 Ind.App. 109, 141 N.E. 87; Annotation, 89 A.L.R. 1527. The trial court found that "all of the officers and directors of defendant State Guaranty Corporation, and all of the officers and directors of Pacific States Auxiliary Corporation, and all of the officers and directors of State Guaranty Auxiliary Corporation, and all of the officers and directors of Pacific States Savings and Loan Company, a savings and loan association, were and all other officers and directors of said corporation have been since their respective organizations placed in their respective offices and directorships by Robert S. Odell and Robert S. Odell & Company and all of said persons and each of them that are now officers and directors remain in their said offices and in the said directorships at the nomination and pleasure of Robert S. Odell and Robert S. Odell & Company, and at all times in these findings mentioned have acted, now act and in the future will act in their respective positions, solely and only upon the command of Robert S. Odell and Robert S. Odell & Company." If it could be shown that Odell in bringing the contest proceedings in behalf of Pacific States acted in bad faith, *it could be logically argued* that he acted in bad faith in securing the agreement of Guaranty to advance money to finance the contest. In the final analysis, therefore, the liability of appellant would seem to turn on the good faith issue.

[24] On the retrial, if one be had, evidence should be taken on that issue and findings made. If it should be found that the directors of Guaranty acted in good faith, based on a reasonable belief that good cause to challenge the seizure existed, then they are not liable in this action for any sum expended for the defense of Pacific States. But if it should be found that the directors of Guaranty knew or should have known that the commissioner had valid grounds for the seizure and that the contest action was brought in bad faith, then the directors of Guaranty are liable for any sums expended for the defense of Pacific States.

Subsequent to the submission of the appeal herein, upon stipulation of the parties the appeal of Gerald R. White was ordered dismissed. As to all other appellants, the judgment is reversed.

PETERS, P. J., and KNIGHT, J., concurred.

50 Cal.App.2d 179

VETERANS' WELFARE BOARD v. LIEBHART et al.

Civ. 12756.

District Court of Appeal, Second District, Division 1, California.

Feb. 26, 1942.

1. Husband and wife ⇐262(1)

Under statute, property acquired during marriage is presumed to be community property. Civ.Code, § 164.

2. Husband and wife ⇐264

Statutory presumption that property acquired during marriage is community property can be overcome only by clear and satisfactory proof that the property in question was separate property. Civ.Code, § 164.

3. Army and navy ⇐51

The general scheme of the Veterans' Welfare Act is to provide for the purchasing and improving of land and selling of the land in small parcels to veterans who will become actual settlors, the purchase price to represent the pro rata proportion of the actual cost of such land and improvements, and the purchase price to bear interest at five per cent. per annum and to be compounded if not paid. St.1921, p. 969.

4. Husband and wife ⇐250

Where war veteran entered into contract for purchase of land with Veterans' Welfare Board under authority of the Veterans' Welfare Act, and down payment was made with community funds of veteran and his wife as were the monthly payments made prior to separation of the parties, and subsequently the parties were divorced and wife was awarded the community property, fact that only small down payment was required, that long period of time was given for payment of balance, and that only five per cent. per annum interest was charged, did not make the purchase contract a "gift" from the state, so as to render rights thereunder the "separate property" of the husband, and the rights were "community property" and vested in the wife pursuant to the divorce decree. St.1921, p. 969; Civ.Code, § 164.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property", "Gift", and "Separate Property".

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by the Veterans' Welfare Board against Herman Liebhart and others to quiet title to property described in a certain contract of sale executed by the board, and for declaratory relief. From an adverse judgment, the board appeals.

Affirmed.

Warren H. Atherton, of Stockton, and Thomas J. Riordan, of San Francisco, for appellant.

O. Benton Worley, of Canoga Park, for respondents.

DRAPEAU, Justice pro tem.

A California veteran of the first World War entered into a contract of purchase and sale of real property with the Veterans' Welfare Board, under the authority of the California Veterans' Welfare Act, St.1921, p. 969. The contract was dated July 26, 1923. The down payment was $119.30, and the balance of the purchase price was to be paid in 240 monthly installments of $14.97 each.

On the date of the contract the veteran was married and living with his wife. The down payment was made from community funds. Subsequent monthly payments were also made from community funds until the veteran and his wife separated in 1936. In 1937 there was an interlocutory decree of divorce, which awarded all community property to the wife, thereafter confirmed by a final decree in 1938. After the separation the wife made all of the monthly payments, and there is no question of default under the terms of the contract.

This action is brought by the Veterans' Welfare Board to quiet title to the property described in the contract of sale, and for declaratory relief.

Upon the facts stated the trial court found the defendant, the former wife of the veteran, to be the sole owner of all of the right, title and interest in the contract of purchase and sale, and quieted title in her, subject to the rights of the Veterans' Welfare Board as provided by the contract. The veteran husband did not appeal. The case comes to this court upon the appeal from the judgment of the superior court by the plaintiff, Veterans' Welfare Board.

On appeal the plaintiff contends, as it did before the superior court: (a) that such

rights as the contract granted to the veteran were a gift to him from the State of California, because of the small down payment, the long period of time to pay the balance of the purchase price in monthly installments, and the low rate of interest (5 per cent per annum) on deferred balances of the purchase price; and (b) being a gift to the veteran, the rights under the contract were his separate property, which did not vest in the wife pursuant to the terms of the divorce decree awarding the community property to her.

[1, 2] It needs only to state this contention to demonstrate its impossibility under our California law. Property acquired during marriage is presumed to be community property. Civ.Code, § 164; Estate of Jolly, 196 Cal. 547, 238 P. 353. This presumption can only be overcome by clear and satisfactory proof that the property in question was separate property. Estate of Rolls, 193 Cal. 594, 226 P. 608. To hold that merely because a contract of purchase and sale has a small first payment, or small subsequent payments spread over a long period of time, the property so purchased is separate property, would be to defeat the intent and purpose of the community property laws of this state. An interest rate of 5 per cent per annum in a contract of purchase of real property is not so low as to make that purchase a gift, and thus take the property purchased out of the purview of our community property laws.

[3, 4] In Veterans' Welfare Board v. Riley, 188 Cal. 607, 206 P. 631, the Supreme Court of California held that a loan made by the Veterans' Welfare Board was not a gift or a loan in violation of sections 31 and 32 of article IV of our Constitution, which sections forbid the gift or loan of the credit or of any money or thing of value of the state. From a careful study of the California Veterans' Welfare Act, the court declared, at page 614 of 188 Cal., at page 634 of 206 P.: "The general scheme of this statute, then, is to provide for the purchasing and improving of lands and the selling of the same in small parcels to veterans who will become actual settlers, the purchase price to represent the pro rata proportion of the actual cost of such land and improvements, the purchase price to bear interest at 5 per cent. per annum, and to be compounded if not paid." And at page 616 of 188 Cal., at page 635 of 206 P. the court further states: "So far as the purchase and sale of the land is concerned, it is not a gift. If it is not a gift, is it a loan of the credit of the state within the meaning of article 4, §§ 31 and 32? The answer is that, so far as the appropriation made is concerned, the state is not lending its credit, but, if the arrangement for the purchase and sale of land at all partakes of the nature of a loan, it is a loan of money and not of credit."

This decision is decisive of the case now before us.

The judgment is affirmed.

YORK, P. J., and Doran, J., concurred.



STARK v. COKER et al.

Civ. 2734

District Court of Appeal, Fourth District, California.

Feb. 17, 1942.

Hearing Granted April 16, 1942.

1. Appeal and error ⇐1058(1)
Corporations ⇐1

In action on trust deed note against corporate maker and individuals, where corporation was found to be individuals' alter ego, detailed statement of corporation's original issue of stock and subsequent transfers offered in evidence by corporation and individuals was erroneously excluded on objections of plaintiff, though prejudice resulting from ruling was to some extent reduced by receipt in evidence, without objection, of an incomplete statement of stock issued and transferred.

2. Evidence ⇐589

In action on trust deed note against corporate maker and individuals, plaintiff was not bound by one individual's testimony concerning structure of corporation and ownership of its stock, but, where that was the only evidence in the record on those questions, plaintiff had to rely on it to support his judgment against individuals on theory

that corporation was their alter ego. Code Civ.Proc. § 2055.

3. Mortgages ⇐309(2)

Under trust deed empowering trustee to compromise indebtedness and execute reconveyance of security only upon payment of all sums secured and surrender to trustee for cancellation of trust deed and note secured, and upon receipt from beneficiary of a written request reciting fact of payment and surrender, trustee, who was also one of the beneficiaries, had no authority to reconvey security without payment of obligation and request from beneficiaries.

4. Mortgages ⇐315(1)

Where defendants defended action on trust deed note on ground of accord and satisfaction allegedly negotiated with trustee and consummated by reconveyance of security and various payments made to trustee, there was no basis for invoking an "estoppel" against plaintiff with respect to reconveyance, where he testified that he was totally ignorant of any negotiations conducted by trustee, that he received no part of the payments, and that he did not know of reconveyance until some time after it had been recorded.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

5. Joint tenancy ⇐12

The act of one joint tenant without express or implied authority from or consent of his cotenant cannot bind or prejudicially affect the rights of the cotenant.

6. Joint tenancy ⇐12

Where trust deed note was made payable to trustee and her husband as joint tenants, trustee had no power or authority growing out of relation of joint tenancy to compromise or reduce husband's portion of joint debt without authority from him, express or implied, and hence an accord and satisfaction allegedly negotiated with trustee could not bind husband.

7. Tenancy in common ⇐55(3)

The rule that all cotenants or any number less than all may bring an action to protect or enforce the rights in the cotenancy property is especially true where the plaintiff joins his cotenant as a party defendant. Code Civ.Proc. § 384.

8. Judgment ⇐720

Generally, under the rule of "res judicata" matters which have been judicially determined cannot be again drawn into controversy between the same parties.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

9. Judgment ⇐540, 713(1)

The judgment of a court having jurisdiction directly on the point in controversy is, as a plea, a "bar" and, as evidence, competent and conclusive as between the same parties and their privies in a subsequent action not only where the subject matter is in all respects the same, but where the point comes incidentally in question in relation to a different matter.

See Words and Phrases, Permanent Edition, for all other definitions of "Bar".

10. Judgment ⇐713(2)

An adjudication is final and conclusive not only with respect to the matter actually determined, but with respect to every other matter which the parties might have litigated and have had decided as incident to or essentially connected with the subject matter of the litigation, and also with respect to every matter of claim and defense coming within the legitimate purview of the original action.

11. Judgment ⇐951(1)

With respect to matters which might have been litigated and decided in a former suit as within the scope of the issues, but which were not actually or expressly in issue and adjudicated, only a presumption is indulged that they were decided, and that presumption is disputable.

12. Judgment ⇐713(2)

The rule that a judgment operates as an "estoppel" to the maintenance of a subsequent action as between persons who were parties to former action not only as it may affect each issue actually raised, but also every other issue which properly might have been litigated and determined, does not apply to rights, claims, or demands growing out of the same subject matter but constituting separate or distinct causes of action and not put in issue in the former action.

13. Judgment ⇐566

The judgment in an action involving only the issue of cancellation of trustee's reconveyance of security was not a "bar" to an action on trust deed note, where it was clear from findings and judgment in earlier action that trial court intended to withhold

from adjudication and reserve for further consideration in another action question of effect of reconveyance on plaintiff's interest in security.

14. Limitation of actions ⇦127(18)

Where action was originally brought to foreclose trust deed, but the security had been lost and had become worthless, amendment to complaint seeking judgment on trust deed note without foreclosure did not state a "new and distinct cause of action" which was barred by limitations because filed more than four years after due date of note, since a foreclosure action and an action on the note both seek to collect the debt secured.

See Words and Phrases, Permanent Edition, for all other definitions of "New and Distinct Cause of Action".

15. Mortgages ⇦306

Where original trust deed note was made payable to wife, the fact that renewal note was made payable to wife and her husband as joint tenants did not change the status of the note as a renewal of a prior indebtedness and an extension of the due date of the indebtedness.

16. Corporations ⇦1

The mere fact that one or two individuals or corporations own all of the stock of another corporation is not of itself sufficient to cause the courts to disregard the corporate entity and treat that corporation as the "alter ego" of the individuals or corporations owning its stock, but it must also be shown that there is such a unity of interest and ownership that the individuality of the corporation and the owners of its stock has ceased, and that the observance of the fiction of separate existence would under the circumstances sanction a fraud or promote injustice.

See Words and Phrases, Permanent Edition, for all other definitions of "Alter Ego".

17. Corporations ⇦1

In action on trust deed renewal note executed by defendant corporation, evidence was insufficient to support judgment against individual defendants who were husband and wife on theory that corporation was their alter ego.

18. Corporations ⇦1

In action on trust deed renewal note executed by defendant corporation, plaintiff had burden of proving that corporation was the alter ego of individual defendants who were husband and wife.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Emil Stark against John B. Coker and others to foreclose a deed of trust. After amendment of the complaint, the action proceeded as an action on the trust deed note. From a judgment for plaintiff, defendants appeal.

Affirmed in part and reversed in part.

Monroe & McInnis, of San Diego, for appellants.

Johnson & Johnson, E. L. Johnson, and C. Ashley Johnson, all of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment against appellants for one-half of the principal sum of a promissory note, plus accrued interest and attorney's fees, which note was made payable to Hilda A. Stark and Emil Stark as joint tenants and executed by Southern California Home Building Company. The judgment against John B. Coker and Regina W. Coker is based on the theory that the corporation was their alter ego.

[1] The Southern California Home Building Company (hereinafter referred to as the corporation) was incorporated on October 2, 1923. Its permit to issue stock was received about October 25, 1923. A detailed statement of its original issue of stock and subsequent transfers, offered in evidence by appellants, was erroneously excluded by the trial judge on objections of plaintiff. However, the prejudice resulting from this ruling was to a certain extent reduced by the introduction in evidence of an incomplete statement of stock issued and transferred, which evidence was received without objection during the early days of the trial.

This evidence shows that the corporation originally issued 150 shares of its capital stock of an undisclosed par value. Ten shares of stock were issued to John B. Coker and ten shares to M. B. Thornton on October 30, 1923. Twenty shares were issued to J. B. Coker on April 26, 1924. Thirty-two shares were issued to J. B. Coker on April 26, 1924. The record contains the following as to other stock issues and transfers: "Two shares issued to J.

B. Coker on the 26th of April, 1924. One share issued to J. B. Coker on the 20th day of August, 1924. One share issued to Regina W. Coker, transferred from J. B. Coker to Regina W. Coker, on October 4, 1924. Seventy-three shares issued to J. B. Coker, transferred from R. D. Shepard to Hilda A. Henderson and transferred from Hilda A. Henderson to J. B. Coker on June 3, 1927."

The record shows that for a time Hilda A. Stark's name was Hilda A. Henderson; that she married plaintiff either in the latter part of 1924 or in 1925. It also appears that Mrs. Stark only owned about twenty-two shares of the corporate stock so part of the foregoing testimony is to that extent erroneous. However, it sufficiently appears from the record that Mr. and Mrs. Coker did not own a majority of the stock until June 3, 1927.

It is probable that R. D. Shepard was secretary of the corporation until December 24, 1926, when he resigned and Mrs. Coker was appointed to succeed him. The record on this question is not entirely clear. John B. Coker was at all times president of the corporation. He managed its affairs and kept its books. He first received a salary of $50 per week. This was increased to $75 per week in 1927 and continued through 1932. In 1934 he received about $1,100 salary, which is probably the last year he was paid. He received nothing else from the corporation. Mrs. Coker received a salary of $25 per week as secretary, probably through 1934.

The business of the corporation was that of building and selling houses, lending money, buying and selling notes, mortgages, deeds of trust and other securities. Prior to 1929, it built and sold over two hundred houses, financed the construction of others and did considerable business in securities. In common with many other corporations conducting a like business, the value of its assets commenced to shrink in 1929. Thereafter its business was confined to efforts by Coker to liquidate its affairs. Much of its assets consisted of second incumbrances on properties it had sold and, perhaps, the ownership of residences upon which there were incumbrances held by others. In 1934 it held the record title to various parcels of real property which probably were incumbered. The value of the equities of the corporation in those properties in that year is not disclosed. Later, just when does not appear, these properties were lost so that finally the corporation had no assets at all.

Mrs. Stark, then Mrs. Henderson, had her first financial dealings with the corporation in 1924. She loaned it $8,000, which was evidenced by its note dated July 10, 1924. This note was secured by the pledge of securities. This loan was negotiated on the part of the corporation by Edwin S. Kerr, who was then a stockholder in it. Insofar as the record shows, the only connection Coker had with this loan was to sign the note to Mrs. Henderson (Stark) as president of the corporation.

Mrs. Stark's mother loaned the corporation $4,000 and took its note dated April 30, 1925. She made another loan of $2,200 in October of 1925. The mother died and Mrs. Stark succeeded her as owner of the indebtedness.

Various payments were made on these indebtednesses and other loans were made by Mrs. Stark, the last of which was $350, on June 1, 1928. The net result of these transactions left the corporation indebted to Mrs. Stark in the sum of $12,000. From evidence in the record we believe we are safe in assuming that the notes evidencing this indebtedness were secured by a deed of trust. All of this money went into the treasury of the corporation and was used by it in its business. Mr. and Mrs. Coker received none of it. Insofar as the record shows, these transactions were made in good faith, in the ordinary course of business, without any suggestion of fraud or deceit on the part of anyone. The corporation was then doing a rather considerable business and there is nothing in the record to suggest its future insolvency when the last loan was made on June 1, 1928. Of course, had the parties then had knowledge of the small value to be given second encumbrances after 1929, no one could have regarded the corporation a good credit risk. This lack of foresight on the part of Mrs. Stark and the officers of the corporation was common, not only to them, but to many other citizens of this country.

It is admitted that no stockholders' or directors' meetings were held after (probably) 1930; that thereafter no board of directors was elected or functioned; that thereafter there were no minutes of meetings of stockholders or directors; that thereafter the affairs of the corporation and their liquidation were controlled by and in the hands of Coker.

Interest on the indebtedness was regularly paid to Mrs. Stark monthly until at least the latter part of 1933, though at progressively reduced rates, which Mrs. Stark testified she agreed to.

[2] The foregoing summary is taken largely from the testimony of Coker, both while under cross-examination by plaintiff under the provisions of section 2055 of the Code of Civil Procedure, and while he was a witness on his own behalf. There is no other evidence concerning the structure of the corporation and the ownership of its stock with the exception of the evidence of Mrs. Stark that at one time she was a stockholder. Her description of her dealings with the corporation is very meager. Of course, plaintiff is not bound by the evidence given by Coker but as this is the only evidence in the record on these important questions plaintiff must rely upon it to support his judgment against Mr. and Mrs. Coker upon the ground that the corporation was their alter ego.

Under date of January 29, 1934, the corporation executed its promissory note in the principal sum of $12,000, due January 1, 1936, payable to Emil Stark and Hilda A. Stark as joint tenants with full rights of survivorship. On the bottom of the note, under the signature, appears the following: "This is a renewal of a Trust Deed Note recorded in Book 225 at page 355." This is the first time Emil Stark's name appears in the transaction. He testified that he advanced Mrs. Stark, then Mrs. Henderson, $4,500 to make up the amount of her original loan to the corporation. He had no dealings with the corporation or Mr. or Mrs. Coker concerning the several loans and the deed of trust of January 29, 1934, and no claim is made that either Mr. or Mrs. Coker, or any one else, connected with the corporation other than Mrs. Stark, knew that he had any financial interest in any of the transactions prior to January 29, 1934. The note was secured by a trust deed of even date which was duly recorded, in which the Southern California Home Building Company was trustor, Hilda A. Stark was trustee, and Emil and Hilda A. Stark were beneficiaries. It is undisputed that this note and deed of trust were given to renew the indebtedness of the corporation to Mrs. Stark and that there was no other consideration for their execution.

The next document of particular interest is a reconveyance of the property described in the deed of trust of January 29, 1934. It bears the signature "Hilda A. Stark" and an acknowledgment before a notary public. It is dated March 14, 1936. It was recorded on March 23, 1936. This reconveyance was purportedly executed by Hilda A. Stark, trustee, under the deed of trust.

Probably it was during the last of August, 1937, that Hilda A. Stark, as trustee, Hilda A. and Emil Stark instituted suit against Southern California Home Building Company to cancel the reconveyance on the ground of lack of consideration and that Hilda A. Stark never "executed or acknowledged the same."

The findings in that case contain the following:

"IV. That it is true that plaintiff, Hilda A. Stark, as Trustee, did on March 14, 1936, execute, acknowledge and deliver to defendant said full reconveyance.

"V. That it is true that on the 23rd day of March, 1936, there was recorded in Book 491, at page 87, of Official Records of the County of San Diego, State of California, a full reconveyance of the property mentioned in said deed of trust, which said reconveyance was executed, acknowledged and delivered by plaintiff, Hilda A. Stark, as Trustee, on or about March 14, 1936.

"VI. That it is true that the plaintiff, Emil Stark, had no notice or knowledge of the execution, acknowledgment and delivery of said full reconveyance by the plaintiff, Hilda A. Stark, as Trustee."

The trial court drew the following conclusions of law from those findings:

"I. That said full reconveyance so executed and delivered was a valid and effectual reconveyance and binding upon the plaintiff, Hilda A. Stark.

"II. That the plaintiff, Hilda A. Stark, is entitled to take nothing by reason of her said complaint, and that the defendant, Southern California Home Building Company, a corporation, is entitled to a judgment against the said plaintiff for its costs herein incurred.

"III. That by reason of the facts set forth in finding number VI the judgment herein should be without prejudice to the right of the plaintiff, Emil Stark, to establish or determine his rights, if any, in and to the real estate covered by said trust deed, in another section."

Judgment was entered on November 30, 1938, that Hilda A. Stark take nothing by

the action, but "that this judgment shall be without prejudice to the right of the plaintiff, Emil Stark, to establish his right, if any, in and to the real estate covered by the trust deed involved herein in another action. * * *"

The present action was filed on September 5, 1939. It sought foreclosure of the deed of trust, judgment against the corporation and Mr. and Mrs. Coker in the sum of $6,000, plus interest from January 1, 1937, and attorneys' fees, for sale of the property described in the deed of trust and for a deficiency judgment against the three named defendants.

The answer of appellants admitted the corporate existence of the corporation and its execution of the note and deed of trust of January 29, 1934, and placed in issue the other material allegations of the complaint. It also pleaded the judgment of November 30, 1938, as a bar to the action.

During the trial plaintiff filed an amendment to his complaint, in which he alleged that the security described in the deed of trust had been lost and was valueless. He also amended the prayer of his complaint by omitting the portion seeking foreclosure of the deed of trust. Thereafter the action proceeded in the trial court upon the theory that it was an action to obtain a money judgment on a promissory note though the allegations which supported the original prayer for foreclosure remained in the complaint as amended.

Appellants amended their answer by alleging an accord and satisfaction entered into between J. B. Coker and Hilda A. Stark whereby the debt was satisfied and the reconveyance of the security was accomplished. They filed a further answer to the amendment to the complaint wherein they pleaded the bar of the statute of limitations to the portion of the action seeking judgment on the note without foreclosure.

The trial court found in favor of plaintiff and rendered the judgment we have outlined. The judgment against Mr. and Mrs. Coker was rendered on the theory that the corporation was their alter ego and the conduit through which they conducted their business. There is no other ground on which this portion of the judgment can be sustained.

Appellants rely upon the defense of an accord and satisfaction which they maintain was negotiated with Mrs. Stark and was consummated by the reconveyance dated March 14, 1936, and various payments made to her both before and after that date.

Coker testified that in 1935 he negotiated the accord and satisfaction with Mrs. Stark; that by its terms he agreed to pay or be responsible for the payment of $3,000 in full satisfaction of the indebtedness evidenced by the trust deed note; that $1,537.56 was paid on account of the $3,000, leaving a balance which he owed of $1,464.44; (the sum total of these amounts is $3,002); that the reconveyance was given in carrying out this agreement; that he was to give a note for $3,000. but that he delayed its execution until their delivery of the corporation note and deed of trust; that the last payment was made on November 10, 1937; that payments were suspended because of the suit to cancel the reconveyance, but that he still recognized the indebtedness. He produced a number of checks drawn by the corporation payable to Mrs. Stark, which he testified represented payments made on the $3,000. On some of these checks the words "To apply on Principal," and other words to the same effect, appear over the signature of Mrs. Stark.

Mrs. Stark testified that there had been no agreement to compromise the indebtedness; that her name signed to the reconveyance was a forgery; that she had neither signed nor acknowledged that instrument. She further testified that the $1,537.56 was paid to her as interest on the $12,000 note; that the words "To apply on Principal," and other words of similar import appearing over her signature on the backs of some of the checks, were not on the checks when she endorsed and cashed them.

It should be observed that Mrs. Stark appeared in the deed of trust in two capacities. She was trustee and also one of the beneficiaries.

[3, 4] We find nothing in the deed of trust empowering the trustee to compromise the indebtedness nor to execute a reconveyance except "upon payment of all sums secured hereby and (the) surrender to Trustee, for cancellation, of this Deed of Trust and the note secured hereby," and "upon receipt from beneficiary of a written request reciting the fact of such payment and surrender." We therefore conclude that Mrs. Stark, as trustee, had no au-

thority to reconvey the security without payment of the obligation and a request from the beneficiaries. Of course, if Coker's evidence be accepted as true, Mrs. Stark might be estopped from disputing the validity of the reconveyance, and her consent to it in her capacity as beneficiary might be presumed. However, this question is not presented as she did not seek or recover any judgment against appellants. There is no basis for invoking an estoppel against plaintiff as he testified he was in total ignorance of any negotiations conducted by Mrs. Stark, received no part of the payments, and did not know of the reconveyance until some time after it had been recorded.

The next question is the authority of one co-tenant to enter into an accord and satisfaction and compromise a debt without the knowledge and consent of the other.

The right of one joint tenant to dispose of a specific portion of the co-tenancy property was considered in Swartzbaugh v. Sampson, 11 Cal.App.2d 451, 54 P.2d 73, 75, where it is said:

"The case of Stark v. Barrett, 15 Cal. 361, discusses the rights of a grantee of one cotenant of a specific parcel of property. It is there said: 'The case has been argued as though the question presented was to be determined by the rules of the common law, and in that view we have examined it. For its determination, considered by the common law, it is immaterial whether the grantees took the land embraced in their grant as joint tenants or as tenants in common. During the lives of the tenants, the rules regulating the transfer of their interest are substantially the same, whether they hold in joint tenancy or in common. Neither a joint tenant nor a tenant in common can do any act to the prejudice of his cotenants in their estate. This is the settled law, and hence a conveyance by one tenant of a parcel of a general tract, owned by several, is inoperative to impair any of the rights of his cotenants. The conveyance must be subject to the ultimate determination of their rights, and upon obvious grounds. One tenant cannot appropriate to himself any particular parcel of the general tract; as, upon a partition, which may be claimed by the cotenants at any time, the parcel may be entirely set apart in severalty to a cotenant. He cannot defeat this possible result whilst retaining his interest, nor can he defeat it by the transfer of his interest. He cannot, of course, invest his grantee with rights greater than he possesses. The grantee must take, therefore, subject to the contingency of the loss of the premises, if, upon the partition of the general tract, they should not be allotted to the grantor. Subject to this contingency, the conveyance is valid, and passes the interest of the grantor. And, this we consider the result of the several cases cited by the counsel of the appellants. They go to the extent that the conveyance can have no legal effect to the prejudice of the cotenant, not that it is absolutely void, that it is ineffectual against the assertion of his interest in a suit for partition of the general tract, but is good against all others. Until such partition, the grantee will be entitled to the use and possession as cotenant, in the parcel conveyed, with the other owners. (Bartlet v. Harlow, 12 Mass. 348, 7 Am.Dec. 76; Varnum v. Abbot et al., 12 Mass. 474, 7 Am.Dec. 87; Nichols v. Smith, 22 Pick. (Mass.) 316.) * * *'

[5] "It is a general rule that the act of one joint tenant without express or implied authority from or the consent of his cotenant cannot bind or prejudicially affect the rights of the latter. Simpson v. Bergmann, 125 Cal.App. 1, 13 P.2d 531; Oberwise v. Poulos, 124 Cal.App. 247, 12 P.2d 156; Sumner v. Vinson, 211 Ky. 571, 277 S.W. 849; Lawrence v. Fielder, 186 Ky. 324, 216 S.W. 1068."

[6] While the rule last quoted is subject to certain exceptions, it must be held to cover the question we have before us here. Therefore, it must be held that Mrs. Stark had no power or authority growing out of the relation of the joint tenancy with her husband to compromise or reduce his portion of the joint debt without authority from him either express or implied. It follows that the accord and satisfaction between Mrs. Stark and Mr. Coker could not bind plaintiff.

[7] It is not disputed that all co-tenants or any number less than all may bring an action to protect or enforce the rights of such person or persons in the co-tenancy property. Sec. 384, Code Civ.Proc. This is especially true where, as here, the plaintiff joined his co-tenant as party defendant.

Appellants urge that the judgment of November 30, 1938, is a bar to this action as plaintiff cannot split his demand into separate actions.

Of course, it is generally true, as said in Re Estate of Bell, 153 Cal. 331, 95 P. 372, 376, that:

[8] "The general rule as to res adjudicata is that: 'Matters which have been judicially determined cannot be again drawn into controversy between the same parties.

[9] "'The judgment of a court having jurisdiction directly upon the point in controversy is, as a plea, a bar; and, as evidence, competent and conclusive as between the same parties and their privies; not only where the subject-matter is in all respects the same, but where the point comes incidentally in question in relation to a different matter.' Garwood v. Garwood, 29 Cal. 514; Green v. Thornton, 130 Cal. 482, 62 P. 750.

[10] "'An adjudication is final and conclusive not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to, or essentially connected with, the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and defense.' Harris v. Harris, 36 Barb., N. Y., 88; Gray v. Dougherty, 25 Cal. 266."

We need not consider the question of the bar of the judgment as it affects Mrs. Stark as she neither sought nor recovered any judgment in this action. Its effect on the claim of Emil Stark is the only question open for argument.

It is admitted by all counsel that a trial court may withdraw from consideration and withhold from adjudication issues presented in the trial of a case; that such matters may be reserved for further consideration in another proceeding. 15 Cal. Jur. 150. It is rather clear from the findings and judgment in the first action that the trial court intended to withhold from adjudication and reserve for further consideration in another action the question of the effect of the reconveyance on the interest of plaintiff in the security described in the deed of trust. The only question at issue and decided in that action was the fact of the reconveyance. The debt was not an issue. It may be true that the finding and judgment in that case might be conclusive on this plaintiff of the fact that the reconveyance was executed by the trustee, for a fact once adjudicated in an action is binding on the parties and their privies in the same or any other action where the same issue is presented. Shannon v. General Petroleum Corp., 47 Cal.App. 2d 651, 118 P.2d 881, and cases there cited. If this rule be given effect here, the only effect of the first judgment is to establish as a fact that the reconveyance was actually executed by the trustee.

It is admitted by all counsel that the release of the security does not necessarily indicate a satisfaction of the debt for which it was given. It will appear from authorities hereafter cited that as the note involved here was a renewal note the original obligation was not extinguished and that the creditors mistook their remedy when they sought to have the reconveyance cancelled, that proceeding being unnecessary.

[11] In United Bank & Trust Co. v. Hunt, 1 Cal.2d 340, 34 P.2d 1001, 1004, it was held that: "As to matters, however, which might have been litigated and decided in a former suit as within the scope of the issues, but which were not actually or expressly in issue and adjudicated, only a presumption is indulged in that they were decided. This presumption is, however, a disputable one * * *."

[12] In Title Guarantee & Trust Co. v. Monson, 11 Cal.2d 621, 81 P.2d 944, 949, the following rule was announced: "Although it is a general rule that a judgment operates as an estoppel to the maintenance of a subsequent action as between those persons who were parties to the former action, not only as it may affect each issue that actually was raised in such action, but also as to every other issue which properly might have been litigated and determined therein, nevertheless, in each of many jurisdictions, exceptions to that rule have been announced, which include a situation wherein it has appeared that the questioned issue in the subsequent action was neither germane to nor essentially connected with the actual issues that were raised in the former action, even though, with propriety such issues might have been presented therein. 34 C.J. 818, 823. Nor is the rule applicable to rights, claims or demands, although growing out of the same subject matter, but which constitute separate or distinct causes of action, and which were not put in issue in the former action."

[13] Under the rules thus announced and in view of the reservation in the findings and judgment in the earlier case which presented the sole issue of cancellation of the reconveyance, we must conclude that the judgment in that case is not a bar to this action.

[14] Appellants urge that since the amendment to the complaint seeking judgment on the note without foreclosure was filed more than four years after the due date of the note, that cause of action was barred by the statute of limitations. In support of this argument it is urged that the original action was to foreclose the deed of trust and that the amendment stated a new and distinct cause of action for a money judgment without foreclosure. We cannot agree with this contention. An action to foreclose a deed of trust has as its sole purpose the collection of the debt secured thereby. The action on the note had the same purpose. As the security had been lost and had become of no value it was permissible to sue on the note. As the purpose of the original and amended causes of action was the same no new cause of action was stated.

It follows that the portion of the judgment against the Southern California Home Building Company must be affirmed.

We must next consider the question of the judgment against Mr. and Mrs. Coker. The correctness of that portion of the judgment depends upon the sufficiency of the evidence to support the finding that the corporation was their alter ego. We have already summarized the evidence on that question and will not repeat it.

In order to measure the proper legal effect of this evidence we must bear in mind that the note of January 29, 1934, was given in renewal of a pre-existing indebtedness which had its origin in the note of July 10, 1924, payable to at least one of the payees named in the renewal note.

[15] The effect of a renewal note and mortgage was considered in Craig v. Dinwiddie, 77 Cal.App. 681, 247 P. 516, 519, where the court said: "The giving of the second note in this case, as we have stated, did not change the indebtedness. It only postponed the time when action might be had to foreclose the mortgage given to secure its payment, and in this case, so long as the debt remained alive, if necessary to protect the rights of the mortgagee, equity would set aside the release procured in the manner and under the conditions disclosed by the record and award foreclosure." It should be observed that the first mortgage and note involved in the above case was not executed to Amanda E. Dinwiddie, but by assignments passed to Amanda E. Dinwiddie and Nellie Dinwiddie as joint tenants and was satisfied of record after the plaintiff Craig had acquired his interest in the mortgaged property. The second note was given and the mortgage securing it (the renewal ran to Nellie Dinwiddie) was recorded after the satisfaction of the first and after Craig took title to the property. It would follow that because the first note in the instant case was made payable to Hilda A. Stark and the renewal note to Hilda A. and Emil Stark as joint tenants, the fact of its being a renewal of a prior indebtedness would not be changed.

Copp v. Millen, 11 Cal.2d 122, 77 P.2d 1093, 1095, was factually similar to Craig v. Dinwiddie, supra, and involved original secured notes which were renewed by another secured note. In deciding the case the Supreme Court quoted the following rule from Tolman v. Smith, 85 Cal. 280, 24 P. 743, where it was said:

" 'It is well settled that, in the absence of an agreement to that effect, the payment of one note by another is only conditional, and not absolute, payment. It extends the time for payment until the maturity of the new note, or, as it is said, "suspends" the remedy upon the old note, but does not extinguish it.' And, 85 Cal. 280, at page 289, 24 P. 743, 746: 'And so where, as in the case before us, one mortgage is substituted for another, equity will keep the first alive when the interests of justice require it.'

" 'By a doctrine closely akin to that of equitable subrogation, and it seems to us one founded in equal equity and reason, the old mortgage, though released, must be substituted for the new and treated as a continuing lien securing the continuing debt.' American Savings Bank & Trust Co. v. Helgesen, 67 Wash. 572, 122 P. 26, 27, Ann.Cas. 1913A, 390."

Much the same legal situation is found in White v. Stevenson, 144 Cal. 104, 77 P. 828, 831, involving a mortgage given in 1890, and which had been satisfied upon giving a renewal note and mortgage in 1895. The Supreme Court there said: "Upon the facts before the court it should have rendered a decree for the foreclosure of the mortgage of 1890, as prayed by the plaintiff. It was not necessary for him to obtain a decree directing a cancellation of the discharge which he had entered of record in

1895 before commencing an action for its foreclosure (Chester v. Hill, 66 Cal. 480, 6 P. 132); nor was it necessary that a formal direction for canceling the discharge should be entered by the court before rendering the decree of foreclosure."

As the note of January 29, 1934, was a renewal of a prior note or notes and was thus an extension of the due dates of the earlier debts, we must devote our attention principally to the corporate structure, business and management of the corporation between July 10, 1924, and June 1, 1928, the period covered by the original financial transactions between Mrs. Stark and her mother and the corporation. This is because this indebtedness was not extinguished by the renewal note. It should be borne in mind that the loan by Mrs. Stark of $8,000 on July 10, 1924, and by her mother of $4,000 on April 20, 1925, equalled the total of the unpaid indebtedness on January 29, 1934. The question of the corporation being the alter ego of Mr. and Mrs. Coker, to a large extent, must be determined from the facts disclosing their relation to the corporation during the period of the creation of the original indebtedness which was on and prior to June 1, 1928, more than on January 29, 1934, when the renewal note was executed.

[16] The facts that must be established to justify the conclusion that a corporation was the alter ego of one or more of its stockholders are set forth in Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, Inc., 217 Cal. 124, 17 P.2d 709, 711, as follows:

"Whatever may be the rule in other jurisdictions, the rule is well settled in this state that the mere fact one or two individuals or corporations own all of the stock of another corporation is not of itself sufficient to cause the courts to disregard the corporate entity of the last corporation and to treat it as the alter ego of the individual or corporation that owns its stock. In addition it must be shown that there is such a unity of interest and ownership that the individuality of such corporation and the owner or owners of its stock has ceased; and it must further appear that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice. Bad faith in one form or another must be shown before the court may disregard the fiction of separate corporate existence.

"In the leading case of Erkenbrecher v. Grant, 187 Cal. 7, 11, 200 P. 641, 642, the rule is stated as follows:

" 'The finding of the trial court that the company acquired the notes because the then holder of them was pressing plaintiff in his capacity as indorser for payment does not negative the separate entity of the company. In the absence of any dishonest motive or intention to accomplish a wrong, and as we have said, none was proven, we fail to discover any objection whatever to plaintiff directing the company to purchase the notes. If it be assumed that he caused their purchase for the reason that it was not then convenient for him to meet his obligations as indorser, there would still be wanting the elements to which we have referred, and the presence of which we hold is essential to justify treating plaintiff and the company as identical—as a unit. In order to cast aside the legal fiction of distinct corporate existence as distinguished from those who own its capital stock, it is not enough that it is so organized and controlled and its affairs so managed as to make it "merely an instrumentality, conduit or adjunct" of its stockholders, but it must further appear that they are the "business conduits and alter ego of one another," and that to recognize their separate entities would aid the consummation of a wrong. Divested of the essentials which we have enumerated, the mere circumstance that all the capital stock of a corporation is owned or controlled by one or more persons does not, and should not, destroy its separate existence; were it otherwise, few private corporations could preserve their distinct identity, which would mean the complete destruction of the primary object of their organization.'

"In Wood Estate Co. v. Chanslor, 209 Cal. 241, 245, 286 P. 1001, 1002, it is stated: 'The law is well settled that, in order to cast aside the legal fiction of a distinct corporate existence, it must appear that the corporation is the business conduit and alter ego of its stockholders, and that to recognize it as a separate entity would aid in the consummation of a wrong. In other words, not only must it appear that one man or two men own the stock and control the policies, but it must also be shown that there is such a unity of interest and ownership that the individuality of such corporation and such person or persons has ceased; and it must further appear from the facts that the observance of the fiction of separate existence would, under the circumstances, sanc-

tion a fraud or promote injustice.' See, also, D. N. & E. Walter & Co. v. Zuckerman, 214 Cal. 418, 6 P.2d 251, 79 A.L.R. 329; Minifie v. Rowley, 187 Cal. 481, 202 P. 673; Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 155 P. 986; Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 227 P. 723; Ellet v. Los Altos Country Club Properties, 88 Cal.App. 740, 264 P. 270." See, also, Davis v. Perry, 120 Cal.App. 670, 8 P.2d 514; In re Estate of Greenwald, 19 Cal.App. 2d 291, 65 P.2d 70.

[17] When measured by the foregoing rules the evidence is entirely insufficient to support the finding that the corporation was the alter ego of Mr. and Mrs. Coker. The first loan was not negotiated by Mr. Coker. At that time he was a minority stockholder in the corporation and Mrs. Coker was not then a stockholder and never owned more than one share of stock. Mr. Coker did not become a majority stockholder until June 3, 1927, when more than $12,000 had been loaned to the corporation by Mrs. Stark and her mother. All of the money loaned went into the treasury of the corporation and was used by it in its business and not in the business of Mr. and Mrs. Coker. Of course, Mr. Coker was president of the corporation and managed its business but it was the business of the corporation and not the personal business of any of its stockholders.

There is no intimation of fraud, wrong or unfair dealing in any of these original transactions. The only error made at that time was a mistake of judgment common to many investors both corporate and individual in not realizing that second incumbrances could not retain their value in a serious financial depression.

Nor can we see any fraud or wrong in the renewal transaction of January 29, 1934. Mrs. Stark held the secured note of the corporation with the value of the securities greatly depreciated, if they had any substantial value. She was given the note of the corporation which was just what she had held before. This note was secured by a deed of trust on assets of the corporation of questionable and undisclosed value in exchange for the former security which also was of questionable and undisclosed value. The transaction appears to be one of refinancing a bad but secured debt by another equally bad but secured debt which finally proved uncollectible and the security worthless.

Of course, the corporation had suspended its building and financing operations and dealing in securities by 1931. Thereafter it held no stockholders nor directors meetings and its principal place of business was in the residence of Mr. and Mrs. Coker. Its affairs were entirely in the hands of Mr. Coker, but they still remained the affairs of the corporation. Apparently they were confined to salvaging operations and an endeavor to save something from the wreck. That these operations were unsuccessful, that there was no salvage, and that the wreck subsequently became total does not establish fraud or wrong dealings in the prior transactions or even in the giving of the renewal note and deed of trust.

Plaintiff stresses testimony pointing to the bad reputation of Mr. Coker for honesty and integrity. There is evidence to the contrary from other witnesses. He also points to the evidence of one witness that three or four years prior to the trial (June 10, 1940), Coker stated to this witness, in effect, that Mr. and Mrs. Stark were not good business people and that he intended to beat them out of their money. Coker denied making such statement.

If we should assume that Coker was proved to be an unreliable witness and a man without business honesty or integrity still we could not change our conclusion on the question of the corporation being the alter ego of Mr. and Mrs. Coker.

[18] As we have observed, the only evidence even remotely bearing on the question of the alter ego comes from Coker. Of course, plaintiff is not bound by that evidence, but if he chooses to reject it he is faced with an entire lack of any evidence bearing on that question. The burden of proof is on him so he must accept any evidence the record contains on that question in order to make it even debatable.

Because Mr. Coker told a witness in 1936 or 1937 that he was going to beat Mr. and Mrs. Stark out of their money can have little bearing on the question of the corporation being his alter ego on and prior to January 29, 1934. Without other evidence to prove that fact his lack of character and his bad intentions in 1936 cannot establish it.

Plaintiff points to the fact that both Mr. and Mrs. Coker continued to draw salaries from the company after it was insolvent and without Mrs. Coker rendering adequate consideration for the salary she received; that these salaries tended to exhaust the

already depleted assets of the corporation and to deprive plaintiff of the value of his security. If Mr. or Mrs. Coker wrongfully depleted the assets of the corporation, its creditors had their remedy available in a proper action against them. That issue is not presented in this action.

Other questions are argued in the briefs, but from the view we take of the case it is unnecessary to give them detailed consideration as they cannot affect the conclusions we have reached.

The portion of the judgment against Southern California Home Building Company, a corporation, is affirmed.

The portion of the judgment against John B. Coker and Regina W. Coker is reversed.

BARNARD, P. J., and GRIFFIN, J., concurred.



50 Cal.App.2d 129

FOX CHICAGO REALTY CORPORATION, Limited, v. ZUKOR'S DRESSES, Inc.

Civ. 13219.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1942.

1. Appeal and error ⇐102

An order sustaining demurrer to amended complaint without leave to amend is not appealable.

2. Damages ⇐85

Generally a condition or covenant of a contract is invalid if it stipulates payment of a penalty or stipulates damages for breach thereof. Civ.Code, § 1670.

3. Damages ⇐85

A provision of a lease which obligates lessee to pay specified sum upon default in performance of any covenant of lease is void. Civ.Code, §§ 1670, 1671.

4. Damages ⇐150

The fact of the extreme difficulty in fixing the actual damage is an indispensable allegation to collection of liquidated damages. Civ.Code, § 1671.

5. Damages ⇐150

A lessor could not recover liquidated damages for removal of improvements where there were no facts in pleading from which it could be inferred that the amount of damage suffered by virtue of the removal could not be readily proved. Civ.Code, §§ 1670, 1671.

6. Damages ⇐78(2)

A penalty need not be designated as such before it may be so classified so as to preclude recovery when provided for in a contract, since a condition in a contract providing for payment of money not earned is just as much a "penalty" as though it had been stipulated to penalize the promisor should he default in performance of his promise. Civ.Code, § 1670.

See Words and Phrases, Permanent Edition, for all other definitions of "Penalty"

7. Damages ⇐80(3)

Where ten-year lease providing for monthly rental of $4,100 was modified six times with respect to the amount of rental and provided that upon default in payment of any installment or in performance of any other obligation lessee should be required to pay the entire unpaid portion of $4,100 for each month for which lessee had paid a lesser amount, such provision which in effect required lessee to pay $159,000 if he failed to perform some collateral covenant was a "penalty" which was not enforceable. Civ.Code, § 1670.

8. Damages ⇐78(1)

A provision in a contract exacting the payment of moneys for violation of a collateral agreement is opposed to "public policy" and is not bereft of its vice because it may appear in the form of a condition.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

9. Damages ⇐80(3)

Where for six successive periods ten-year lease was modified by unambiguous writings whereby rentals were fixed at precise sums which were paid, lessor could not recover the sum of $159,000 on theory that it was merely a "debt" payable upon happening of a certain event under provision which required lessee to pay the entire unpaid portion of the original rental upon default in

payment of any installment or performance of any other obligation. Civ.Code, § 1670.

See Words and Phrases, Permanent Edition, for all other definitions of "Debt".

10. Damages ⇐80(1)

Any provision by which money or property is to be forfeited without regard to the actual damage suffered calls for a "penalty" and is therefore void. Civ.Code, § 1670.

11. Pleading ⇐310

Where final modification agreement was attached as an exhibit to second amended complaint in lessor's action to recover damages under a lease, and lessor declined to attach such modification agreement as an exhibit to the amendment to the second amended complaint, it was proper for trial court as well as for appellate court to construe the allegations of the pleadings by referring to the exhibit attached to the former pleading.

12. Landlord and tenant ⇐49(2)

A lessor suing for damages under lease could not contend that modification agreement was invalid because it was not supported by consideration where lessor did not plead want of consideration for modification.

13. Contracts ⇐78

Any arrangement mutually agreeable to both parties to a valid contract which has been wholly executed to their mutual satisfaction leaves no question of consideration for adjudication.

14. Landlord and tenant ⇐33

Where modifications of lease were in writing, a good and sufficient consideration was presumed to exist. Code Civ.Proc. § 1963, subd. 39; Civ.Code, §§ 1614, 1615.

15. Pleading ⇐129(2)

Where complaint in lessor's action for damages under lease pleaded a consideration for modification of lease, in absence of a traversal of such declaration, the pleading was final as to question of consideration.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Fox Chicago Realty Corporation, Limited, against Zukor's Dresses, Inc., to recover damages resulting from removal of certain portions of a store and injuries to other portions and for rent due. From an order sustaining a demurrer without leave to amend and from a judgment for defendant, plaintiff appeals.

Appeal from order dismissed and judgment affirmed.

Birger Tinglof and Walter H. Hewicker, both of Los Angeles, for appellant.

Mitchell, Silberberg, Roth & Knupp and Leonard A. Kaufman, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

[1] Plaintiff appeals from an unfavorable judgment entered upon an order sustaining a demurrer to the second amended complaint without leave to amend. It also attempted to appeal from the order sustaining the demurrer but, since such an order is not appealable, that part of the appeal is dismissed.

In 1930 plaintiff executed a ten-year lease in favor of defendant upon certain premises at a monthly rental of $4,166. On May 5, 1932, an unconditional agreement was executed reducing the monthly rental to $4,100. We shall hereafter refer to the latter figure as the agreed rental under the lease. Thereafter the lease suffered six written modifications, by each of which the rent was fixed at a less sum than that at first specified. In each of the six writings by which the lease was successively modified the following language was used:

"4. In the event of default in the payment of any installment of rent, or in the performance of any other obligation to be performed by the Lessee under said original lease or any amendment (including this amendment) under said lease, and such default in payment or performance shall continue for a period of ten days after written notice to the Lessee (time being of the essence) * * * then the Lessee shall be obligated to pay, and the Lessor shall be entitled to collect, the entire unpaid portion of $4100.00 for each and every month for which the Lessee shall hereafter pay, or has heretofore paid, a lesser amount."

The last amendment of the lease occurred June 12, 1937, for the period ending June 14, 1942, and provided for a rental of $3,000 per month with an option granted to defendant to surrender the lease upon a four months' written notice and the payment of an additional $15,000. The lease was terminated pursuant to that provision as of June 14, 1940. The lease provided that the lessee might install certain fixtures which were

to become the property of the lessor upon installation but that the lessee might remove such fixtures so installed provided they be replaced at the lessee's expense upon ten days' written notice.

In the first draft of the complaint demand was made for $15,000 damages for the removal of certain improvements as being a breach of the lease. In the first amended complaint demand was made for $19,166.66 for such damages. The second amended complaint contained two counts: count 1 for damages, in the amount of $18,000, resulting from the removal of certain portions of the store and from injuries to other portions; count 2, for the same damages demanded in the first count and in addition thereto a demand for the sum of $193,906.41, as rentals claimed to be due under the lease payable in the event of a breach of any of its covenants. The demurrer having been overruled as to the first count and sustained as to the second, plaintiff thereupon filed its "Amendment to the Second Amended Complaint" in which it set forth by adoption the allegations and demand for $15,000 for the removal of certain improvements and for divers other injuries to the property and in addition thereto demanded the further sum of $159,450 as the difference between the rentals provided by the lease and the amounts actually paid during the several successive periods designated by the several modifications of the lease.

According to the complaint the $4,100 monthly rental provided by the lease was reduced for the successive periods, defined by the six amendments, to the following sums: for the first period to $2,500; for the second period to $2,000; for the third period to $2,000; for the fourth period to $2,500; for the fifth period to $2,250; for the sixth period to $3,000 "commencing September 15, 1937, and ending midnight September 14, 1942, upon condition and only upon condition that defendant should perform each and every term and provision of the above mentioned lease on its part to be performed throughout the entire period of said lease; that * * * in the event of default in the payment of any installment of rent or in the performance of any other obligation to be performed by the Lessee under said Lease or any amendment thereto, including said agreement, and such default in payment or performance should continue for a period of ten (10) days after written notice to the Lessee, then and in that event the Lessee should be obligated to pay * * * the entire unpaid portion of $4100, the minimum guaranteed rental, as provided for by the terms of said lease for the entire term thereof. * * * That defendant defaulted in the performance of the obligations of the lease * * * in that defendant without the consent of plaintiff * * * removed from the exterior of the premises portions of the store front and removed from the interior of the store room certain portions of the store building * * * that plaintiff served upon defendant written notice advising defendant of its default in the performance of obligations to be performed by defendant * * * in that defendant was removing from the exterior of the demised premises portions of the store front in violation of the terms and conditions of said lease * * *; that defendant did not within ten days after receiving written notice from plaintiff or at all, cure said default or replace any of the portions of the interior * * * within ten days after the service upon defendant of the above mentioned notice of default or at all; that by reason thereof, plaintiff is entitled to receive and collect from defendant the difference between the rentals actually received by plaintiff from defendant from the beginning of defendant's occupancy of the demised premises under said lease to the termination thereof and the amount provided to be paid by defendant to plaintiff as rental by the terms of said lease for said period, or the sum of $159,450."

It is not denied that each of the written modifications of the lease contained the identical provision for the payment of the "entire unpaid portion of $4,100 for each and every month" in the event of default of any obligation; or that the terms of the lease as amended were fulfilled in every respect until the removal of certain fixtures just prior to defendant's removal from the premises. We are to determine whether such provision for the collection of the unpaid portion of monthly rentals is enforcible.

[2, 3] It is the general rule that a condition or covenant of a contract is invalid if it stipulated payment of a penalty or stipulated damages for the breach thereof. Civ.Code, sec. 1670. Likewise is void that provision of a lease which obligates the lessee to pay a specified sum upon the default of the lessee in the performance of any of its covenants. Jack v. Sinsheimer, 125 Cal. 563, 566, 58 P. 130; Green v.

Frahm, 176 Cal. 259, 262, 168 P. 114. The only circumstance under which the provision for the payment of liquidated damages may be enforced is "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." Civ.Code, sec. 1671. Because the covenant for the payment of the differential was void a valid cause of action cannot be predicated thereon.

[4, 5] Moreover, the fact of the extreme difficulty in fixing the actual damage is an indispensable allegation to the collection of liquidated damages. Since this is so, the failure of plaintiff to plead facts that would have brought its case within the scope of section 1671 is fatal to the pleading. Long Beach City School Dist. v. Dodge, 135 Cal. 401, 405, 67 P. 499. There are no facts in the amended pleading from which we could infer that the amount of damage suffered by plaintiff by virtue of the removal of the improvements could not readily be proved. On the contrary, the installation of such fixtures as those described in the pleading are of such frequent occurrence that competent experts can calculate the cost thereof with practical accuracy. Such was in fact conceded by plaintiff when it alleged the facts constituting the damages to the property and thereupon demanded the sum of $15,000 as set forth in the first count.

[6-8] There is nothing in item 4 of the sixth modification of the lease quoted above that might remove it from the category of a penalty. It is not necessary that a penalty be designated as such in specific terms before it may be so classified. A condition in a contract providing for the payment of money not earned is just as much a penalty as though it had been stipulated to penalize the promissor should he default in the performance of his promise. Ebbert v. Mercantile Trust Co., 213 Cal. 496, 498, 2 P.2d 776. If the lease had contained a provision that the breach of any condition thereof should obligate him to pay to the lessor the sum of $159,000, there would be no question of its being properly classified as a penalty. But cloaked in the innocent verbiage of a condition requiring the lessee to pay $159,000 in the event he should fail to perform some covenant which is collateral to the main covenant, it is equally a penalty. Williston on Contracts, sec. 793. A provision in a contract exacting the payment of moneys for the violation of a collateral agreement is opposed to public policy and is not bereft of its vice because it may appear in the form of a condition. Re-statement of Contracts, sec. 302.

[9, 10] Plaintiff argues that the $159,000 is merely a debt payable upon the happening of a certain event. But this cannot be so. There was no debt. For six successive periods the lease was modified by writings of unambiguous terms whereby the rentals were fixed at precise sums and those amounts were in all instances paid. The very language and nature of the modifying contract and the circumstances under which it was executed impress upon item 4 thereof the character of a provision for a penalty. Williston on Contracts, sec. 782. Where the language of a condition thus appears upon a fair construction to be a penalty, the obligation is thereby invalidated. Any provision by which money or property is to be forfeited without regard to the actual damage suffered calls for a penalty and is therefore void. Ebbert v. Mercantile Trust Co., supra.

Plaintiff relies upon Shady v. Mercantile Arcade Realty Co., 206 Cal. 363, 274 P. 340, in support of its contention that the covenant to pay the differential between the rents collected and the rents promised by the lease is not a penalty. The only similarity we find between the two cases is that both involve leases and the parties effected a rent reduction. In the Shady lease the question of a penalty was not involved. No forfeiture was asked. After Shady had procured a reduction of rent from $900 to $700 monthly for eight months and at $1,000 for the succeeding 16 months, he held the premises during a part of the period of reduced rentals, then withdrew and repudiated the lease in toto and sued to cancel the lease. Arcade's demand was for the lease rental payable before the re-spread. No forfeiture was asked. Shady had not performed his modification agreement.

[11] In pleading what it conceives to be the ultimate fact embodied in the fourth item of the final modification agreement, plaintiff made it appear that the obligation sought to be enforced arose out of a conditional promise on the part of plaintiff to relinquish an existing right, to-wit the $4,100 monthly rental, on condition that defendant perform every obligation imposed by the lease and the amendments. It is not necessary for us to determine whether such pleading is sufficient for the reason

that the final modification agreement is attached as an exhibit to the second amended complaint from which we have taken in exact words the fourth paragraph. In declining to attach it as an exhibit to the pleading now before us (Amendment to Second Amended Complaint) plaintiff has not obviated the effect of the exact language of the writing. Under such circumstances it was proper for the trial court, as it is for this court, to construe the allegations of the pleading before us by referring to the exhibit attached to the former pleading. Williamson v. Joyce, 137 Cal. 151, 69 P. 980; Johnson v. Nolan, 105 Cal.App. 293, 288 P. 78; Wennerholm v. Standford University School of Medicine,[1] — Cal.App.2d —, 113 P.2d 736; Ventura, etc., Ry. Co. v. Hartman, 116 Cal. 260, 48 P. 65; Alphonzo E. Bell Corp. v. Bell View Oil Syndicate, 46 Cal.App.2d 684, 116 P.2d 786.

[12, 13] The contention that the modification agreement is invalid because it was not supported by a consideration cannot be maintained. Plaintiff did not plead want of consideration for the modification which fact should be conclusive upon that issue. But if there had been no consideration for the amendments to the lease, then the modification in each instance would have been a nullity and we would then be confronted with plaintiff's acceptance of reduced rentals and a waiver of the excess. Any arrangement mutually agreeable to both parties to a valid contract which has been wholly executed to their mutual satisfaction leaves no question of consideration for adjudication.

[14, 15] But since the modifications were in writing, a good and sufficient consideration is presumed to exist. Code Civ. Proc., sec. 1963 subd. 39; Civ.Code, secs. 1614, 1615; Flint v. Giguiere, 50 Cal.App. 314, 318, 195 P. 85. The complaint having thus pleaded a consideration, we are in no position to assume the contrary; but in the absence of a traversal of such declaration the pleading is final as to that question. Long Beach City School District v. Dodge, supra. But if we could consider the present action upon no basis other than a demand for the unpaid rentals, the presence of the declarations with reference to the modifications would, themselves, serve as a complete defense to the demand. California Safe Deposit & Trust Co. v. Sierra, etc., Co., 158 Cal. 690, 698, 112 P. 274, Ann.Cas.1912A, 729.

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concurred.

1 Hearing in Supreme Court granted.

19 Cal.2d 707

RICHARDSON v. STATE BAR OF CALIFORNIA.

L. A. 18083.

Supreme Court of California.

March 3, 1942.

1. Attorney and client ⇐53(2)

Evidence that attorney prepared and presented to court for approval false accounts in connection with guardianship and estate matters, solicited employment from heirs of deceased person without disclosing attorney's existing and former connection with the estate of decedent, filed a false petition and affidavit to determine heirship in the estate in which he had become beneficially interested, and represented adverse interests in litigation arising out of such guardianship and estate matters, warranted attorney's disbarment.

2. Attorney and client ⇐46

That surety company on administrator's bond, through the company's attorney upon disclosure of the full facts interested itself in disciplinary proceeding against attorney who sued the surety was not fatal to the proceeding where the two proceedings were distinguishable in that attorney's own testimony and admissions with inferences deducible therefrom were sufficient to warrant his discipline, and no witness appearing in disciplinary proceeding was a defendant in pending civil litigation, and persons who appeared in the proceeding were persons who would benefit by attorney's successful prosecution of civil litigation.

In Bank.

Proceeding by F. L. Richardson to review a recommendation of the Board of Governors of the State Bar of California that the petitioner should be disbarred from the practice of law.

Petitioner disbarred.

J. A. Donnelley, of San Diego, for petitioner.

W. Eugene Craven, of Merced, and A. W. Brouillet, of San Francisco, for respondent.

PER CURIAM.

This is a proceeding to review a recommendation of the Board of Governors of the State Bar that petitioner be disbarred from the practice of the law.

Petitioner was admitted to practice in this state in 1913 after having practiced since 1901 in Kansas. On December 23, 1940, a notice, containing four counts, was issued by the respondent State Bar directing petitioner to show cause why he should not be disciplined for certain acts allegedly involving moral turpitude, dishonesty and violation of his oath and duties as an attorney. A local administrative committee conducted several hearings, made findings adverse to petitioner and recommended discipline, leaving the extent thereof for the determination of the Board of Governors. The board thereafter adopted the committee's findings and has recommended that petitioner be disbarred.

The petitioner, as charged, was found to have prepared and presented to a court for approval false and fraudulent accounts in connection with a guardianship and estate matter; to have solicited employment from the heirs of the deceased person without disclosing to them his existing and former connection with the estate of the decedent; to have filed a false petition and affidavit to determine heirship in the estate in which he had become beneficially interested; and to have represented adverse interests in litigation arising out of said guardianship and estate matters.

The evidence discloses that from 1919 to 1922 petitioner acted as attorney of record for one Chandler who was guardian of the estate of Anna Baxter, an incompetent. In the latter year the incompetent died and from then until 1935 petitioner continued to act as the attorney for Chandler who, in the meantime, had been appointed administrator of the estate of the deceased incompetent. In 1935 the administrator died and petitioner had himself appointed administrator of the deceased incompetent's estate and had one Smith appointed administrator of Chandler's estate. Petitioner's conduct as attorney throughout this entire period resulted in the charges here under review.

In the course of the guardianship proceeding petitioner, as attorney, had prepared and filed on behalf of Chandler, the guardian, three accounts, an inventory and a supplemental inventory. Each account was heard in court and approved. In the interim between the second and final accounts certain additional assets consisting of real property appraised at $60,000 and certificates of deposit amounting to $23,122.25 were received by the guardian.

These were scheduled by the guardian in the supplemental inventory. No mention of these certificates of deposit was made in the final account, however, except that about $8,000 received therefrom were accounted for without designating the source. The certificates of deposit thus omitted from the final account of the guardian amounted to approximately $15,000. Petitioner testified in this proceeding that when he prepared and filed the final account in the guardianship proceeding, the incompetent having died in the interim, he knew that these assets were not included but by way of explanation urged that the final account was only intended to cover cash in the estate and not other assets. Aside from the unusualness of such a final account, it must be noted that the order settling the account, also prepared by petitioner, declared that the account contained "a true and correct statement of all funds and property in [the guardian's] hands belonging to said estate. * * *" At about this same time (June, 1922), the petitioner also prepared and had Chandler sign, as administrator of the deceased incompetent's estate, a receipt to himself (Chandler) as former guardian acknowledging receipt of $31,295.25 "in money, property and securities belonging to said estate, the same being all of the property of said estate as shown by the Final Account and Report of said Guardian herein."

In this disciplinary proceeding petitioner testified that the $31,295.25 so acknowledged in the receipt represented "all cash" in Chandler's hands first as guardian, and then as administrator. Yet, when petitioner later in the same month (June, 1922) as attorney for Chandler, prepared and filed an inventory in the deceased incompetent's estate, there was scheduled only $14,672 as cash on hand—some $16,623.25 less than the amount actually on hand. When questioned about this cash discrepancy petitioner admitted that he knew when he prepared the inventory in the estate for Chandler as administrator that there was a cash shortage of between $15,000 and $17,000 but by way of explanation testified that "I could only inventory what he would give me. It didn't make any difference because he had it, the other inventory showed he had it." Petitioner also admitted that he had never called the probate court's attention to the fact that the inventory there filed did not list all the cash he believed should be in the estate. As attempted justification for his silence, he further testified, "I would have been accused of betraying the confidence of my client if I had" disclosed the shortage. Thus, in an admitted effort to conceal the defalcations of Chandler, petitioner saw no vice in deliberately misleading the probate court to the detriment of the heirs.

In 1925, petitioner prepared and filed on behalf of Chandler a final account and petition for distribution of the estate which likewise was deficient in the amount above stated. As to the final account so prepared and filed by him, petitioner testified in this proceeding that "of course I knew it wasn't correct. * * * I knew there was a discrepancy there of about seventeen thousand dollars." He also admitted that he did not call the discrepancy to anyone's attention. Knowing of its falsity, petitioner may not justify the preparation of such an account upon the ground "That is all Chandler would give me. That is all the kind of an account he would make. I didn't have any position in the matter." Such an explanation is indicative of a lack of understanding of his duties and obligations as an attorney and officer of the court. Petitioner thereafter sought and procured a reduction of the administrator's bond from $30,000 to $2,000 upon the representation that all the estate funds had been disbursed except the sum of $1,278.03—knowing at the time that some $17,000 had not been accounted for by Chandler.

Ten years then elapsed with very little activity occurring in the estate. In 1935, however, Chandler, the administrator, died and petitioner had himself appointed administrator in 1937. In July, 1937, after his appointment, petitioner wrote two letters to a Mrs. Marshall, one of the persons entitled to inherit a portion of the Baxter estate of which petitioner was then administrator, in which he informed her that there was an estate in which she might have an interest and that he possibly might get her some money therefrom. He enclosed in the second letter a form of fifty percent contingent fee contract. In these letters petitioner did not disclose the estate involved nor that he had been appointed administrator thereof. By his own admission petitioner at the time knew that Mrs. Marshall had an interest in the Baxter estate. This interest arose by reason of Mrs. Marshall being a legatee of one Thomas Hale, deceased, a brother and heir at law of the decedent Baxter. It was this solicitation of

Mrs. Marshall, testified to by her on deposition and substantially admitted by petitioner here, that constitutes the basis of the second charge against petitioner. While petitioner denies that he "solicited" employment by Mrs. Marshall the facts speak for themselves.

At the time petitioner had so solicited employment from Mrs. Marshall, he already had obtained a fifty percent contingent fee contract with one J. W. Hale, another heir of the Baxter estate, who also was a brother of said decedent. As attorney for J. W. Hale petitioner on September 7, 1937, filed in the Baxter estate a petition to determine heirship. In the petition and supporting affidavit prepared by petitioner it was alleged that Thomas Hale, one of the heirs of Anna Baxter, and through whom Mrs. Marshall claimed as legatee, had died intestate and that his only surviving heir was J. W. Hale, petitioner's client and that said client was therefore entitled to all of the Baxter estate. At the time petitioner so prepared these documents he knew that Thomas Hale had died testate and that one Henning had been appointed administrator of his estate with the will annexed, Mrs. Marshall, as indicated above, being one of his legatees. As a result of this petition being prepared and filed by petitioner, Joseph Hale was decreed to be the sole heir of the decedent Baxter and entitled to her entire estate. At a later date this order or decree was set aside after Attorney Henning had discovered the true state of affairs. It is the preparation and filing of this false petition and supporting affidavit to determine heirship that underlies the third charge here made against petitioner. In the light of his entire conduct in the handling of the Baxter guardianship and estate proceedings and of his earlier preparation and filing of false inventories and accounts therein we cannot accept petitioner's explanation that the petition and affidavit in the heirship proceeding inadvertently employed the word "intestate" rather than "testate." The whole structure points to the knowing and deliberate false use of the word intestate in order to benefit petitioner's client with whom he had a contingent fee contract, to the wrongful exclusion of other heirs.

The fourth charge against petitioner involves a further development of the facts discussed in connection with the first count. As above stated, Chandler the defaulting administrator of the Baxter estate had died in 1935 and petitioner thereafter had himself appointed administrator of that estate and had Smith appointed administrator of Chandler's estate. While serving as administrator of the Baxter estate petitioner also admittedly represented and acted as attorney for Smith as administrator of the Chandler estate. While serving in these dual and clearly adverse capacities petitioner in 1940 prepared a claim for $17,237.08 (representing the shortage in Chandler's account as administrator of the Baxter estate), which claim was presented to and allowed by Smith as administrator of the Chandler estate. Smith was entirely unfamiliar with the estate and did as directed by petitioner. The claim was later allowed against the estate by the probate court and petitioner then brought an action, as administrator of the Baxter estate, against the surety an Chandler's bond to recover the amount of the claim. The whole purpose of petitioner was to collect the shortage from the surety company that had written the administrator's bond for Chandler. While admittedly aware of the Chandler defalcation since 1922 petitioner neither as attorney nor as administrator made any disclosure of or attempt to collect such shortage until 1940 and then only after he had obtained a fifty percent contingent fee contract with one of the heirs of the Baxter estate.

[1, 2] The evidence against petitioner warrants his disbarment. His effort to explain away damaging portions thereof will not stand the test of scrutiny. To accept such explanation would require a disregard of realities. The fact that the bonding company, through its attorney, upon disclosure of the full facts may have interested itself in this disciplinary proceeding is not fatal and the pendency of the action against that company does not bring this proceeding within the holding in Neblett v. State Bar, 17 Cal.2d 77, 109 P.2d 340, as urged by petitioner. The two proceedings are distinguishable. Here, petitioner's own testimony and admissions, with the inferences deducible therefrom, are alone sufficient to warrant his discipline. No witness here appearing is a defendant in the pending civil litigation and the witnesses who did appear in this proceeding are persons who would benefit by petitioner's successful prosecution of the civil litigation. The record discloses a continuous course of misrepresentation and misconduct on the part of petitioner ex-

tending over a period in excess of fifteen years. His repeated and deliberate misrepresentation of facts to the court, his failure to disclose facts to the heirs of the Baxter estate, his misuse of information contrary to their interests and his representation of conflicting and adverse interests adequately warrant the recommended punishment.

It is therefore ordered that petitioner be disbarred from the practice of the law effective thirty days from the filing of this opinion.



19 Cal.2d 807

BERNHARD v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

L. A. 18057.

Supreme Court of California.

March 6, 1942.

Rehearing Denied April 3, 1942.

1. Courts ⇐200½

A probate court had jurisdiction to determine, as an incident to final account of executor, title to bank account claimed by executor in his own right adversely to the estate.

2. Judgment ⇐540, 725(1)

The doctrine of "res judicata" precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction, and under such doctrine any issue necessarily decided in prior litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

3. Judgment ⇐540

The rule of "res judicata" is based upon sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy.

4. Constitutional law ⇐309(1)

The doctrine of "res judicata" must conform to mandate of due process of law that no person be deprived of personal or property rights by a judgment without notice and an opportunity to be heard.

5. Judgment ⇐678(2)

A "privy", within general rule that the plea of "res judicata" is available only when there is privity and mutuality of estoppel, is one who, after rendition of a judgment, has acquired an interest in the subject matter affected by the judgment through one of the parties, as by inheritance, succession, or purchase.

See Words and Phrases, Permanent Edition, for all other definitions of "Privy".

6. Judgment ⇐625

An "estoppel" is "mutual", within general rule that the plea of "res judicata" is available only when there is privity and mutuality of estoppel, if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against it.

See Words and Phrases, Permanent Edition, for all other definitions of "Mutual Estoppel".

7. Judgment ⇐625, 627

Generally, the plea of "res judicata" is available only when there is privity and mutuality of estoppel, but an exception to such rule exists where liability of a defendant asserting plea of res judicata is dependent upon liability of one who was exonerated in an earlier suit brought by same plaintiff upon same facts.

8. Judgment ⇐634

In determining validity of a plea of "res judicata", three questions are pertinent, namely, was the issue decided in the prior adjudication identical with the one presented in the present action, was there a final judgment on the merits, was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

9. Executors and administrators ⇐513(9)

A judgment settling an executor's account, objected to by heirs at law, which determined that decedent had made a gift of bank deposit to executor and discharged the executor, was "res judicata" on issue concerning the gift, in subsequent proceeding brought by one of the heirs at law, as administratrix with the will annexed, against bank's successor to recover amount of the deposit on ground that deposit was wrongfully paid to executor, notwithstanding heirs' for-

mal change of capacity, and that there was no "privity" or "mutuality of estoppel" between executor and bank's successor. Probate Code, § 931.

See Words and Phrases, Permanent Edition, for all other definitions of "Mutuality of Estoppel" and "Privity".

10. Judgment ⇐670

Where a party, though appearing in two suits in different capacities, is in fact litigating the same right, the judgment in one "estops" him in the other.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Helen Bernhard, as administratrix with the will annexed of the estate of Clara Sather, deceased, against the Bank of America National Trust & Savings Association, to recover a bank deposit. From a judgment for defendant, the plaintiff appeals.

Affirmed.

For prior opinion, see, Cal.App., 114 P.2d 661.

Joseph Brenner, of Los Angeles, for appellant.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for respondent.

TRAYNOR, Justice.

In June, 1933, Mrs. Clara Sather, an elderly woman, made her home with Mr. and Mrs. Charles O. Cook in San Dimas, California. Because of her failing health, she authorized Mr. Cook and Dr. Joseph Zeiler to make drafts jointly against her commercial account in the Security First National Bank of Los Angeles. On August 24, 1933, Mr. Cook opened a commercial account at the First National Bank of San Dimas in the name of "Clara Sather by Charles O. Cook." No authorization for this account was ever given to the bank by Mrs. Sather. Thereafter, a number of checks drawn by Cook and Zeiler on Mrs. Sather's commercial account in Los Angeles were deposited in the San Dimas account and checks were drawn upon that account signed "Clara Sather by Charles O. Cook" to meet various expenses of Mrs. Sather.

On October 26, 1933, a teller from the Los Angeles Bank called on Mrs. Sather at her request to assist in transferring her money from the Los Angeles Bank to the San Dimas Bank. In the presence of this teller, the cashier of the San Dimas Bank, Mr. Cook, and her physician, Mrs. Sather signed by mark an authorization directing the Security First National Bank of Los Angeles to transfer the balance of her savings account in the amount of $4,155.68 to the First National Bank of San Dimas. She also signed an order for this amount on the Security First National Bank of San Dimas "for credit to the account of Mrs. Clara Sather." The order was credited by the San Dimas Bank to the account of "Clara Sather by Charles O. Cook." Cook withdrew the entire balance from that account and opened a new account in the same bank in the name of himself and his wife. He subsequently withdrew the funds from this last mentioned account and deposited them in a Los Angeles Bank in the names of himself and his wife.

Mrs. Sather died in November, 1933. Cook qualified as executor of the estate and proceeded with its administration. After a lapse of several years he filed an account at the instance of the probate court accompanied by his resignation. The account made no mention of the money transferred by Mrs. Sather to the San Dimas Bank; and Helen Bernhard, Beaulah Bernhard, Hester Burton, and Iva LeDoux, beneficiaries under Mrs. Sather's will, filed objections to the account for this reason. After a hearing on the objections the court settled the account, and as part of its order declared that the decedent during her lifetime had made a gift to Charles O. Cook of the amount of the deposit in question.

[1] After Cook's discharge, Helen Bernhard was appointed administratrix with the will annexed. She instituted this action against defendant, the Bank of America, successor to the San Dimas Bank, seeking to recover the deposit on the ground that the bank was indebted to the estate for this amount because Mrs. Sather never authorized its withdrawal. In addition to a general denial, defendant pleaded two affirmative defenses: (1) That the money on deposit was paid out to Charles O. Cook with the consent of Mrs. Sather and (2) that this fact is res judicata by virtue of the finding of the probate court

in the proceeding to settle Cook's account that Mrs. Sather made a gift of the money in question to Charles O. Cook and "owned no sums of money whatsoever" at the time of her death. Plaintiff demurred to both these defenses, and objected to the introduction in evidence of the record of the earlier proceeding to support the plea of res judicata. She also contended that the probate court had no jurisdiction to pass upon Cook's ownership of the money because the executor resigned before the filing of the objections. This last contention was answered before judgment was entered, by the decision of this court in Waterland v. Superior Court, 15 Cal.2d 34, 98 P.2d 211, holding that the probate court has jurisdiction in such a situation. The trial court overruled the demurrers and objection to the evidence, and gave judgment for defendant on the ground that Cook's ownership of the money was conclusively established by the finding of the probate court. Plaintiff has appealed, denying that the doctrine of res judicata is applicable to the instant case or that there was a valid gift of the money to Cook by Mrs. Sather.

Plaintiff contends that the doctrine of res judicata does not apply because the defendant who is asserting the plea was not a party to the previous action nor in privity with a party to that action and because there is no mutuality of estoppel.

[2-4] The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action. See cases cited in 2 Freeman, Judgments, 5th Ed., sec. 627; 2 Black, Judgments, 2d Ed., sec. 504; 34 C.J. 742 et seq.; 15 Cal.Jur. 97. The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. See cases cited in 38 Yale L.J. 299; 2 Freeman, Judgments, 5th Ed., sec. 626; 15 Cal.Jur. 98. The doctrine also serves to protect persons from being twice vexed for the same cause. Ibid. It must, however, conform to the mandate of due process of law that no person be deprived of personal or property rights by a judgment without notice and an opportunity to be heard. Coca Cola Co. v. Pepsi-Cola Co., 6 W.W.Harr. 124, 36 Del. 124, 172 A. 260. See cases cited in 24 Am. and Eng.Encyc., 2d ed., 731; 15 Cinn.L.Rev. 349, 351; 82 Pa.L.Rev. 871, 872.

[5,6] Many courts have stated the facile formula that the plea of res judicata is available only when there is privity and mutuality of estoppel. See cases cited in 2 Black, Judgments, 2d Ed., secs. 534, 548, 549; 1 Freeman, Judgments, 5th Ed., secs. 407, 428; 35 Yale L.J. 607, 608; 34 C.J. 973, 988. Under the requirement of privity, only parties to the former judgment or their privies may take advantage of or be bound by it. Ibid. A party in this connection is one who is "directly interested in the subject matter, and had a right to make defense, or to control the proceeding, and to appeal from the judgment." 1 Greenleaf, Evidence, 15th Ed., sec. 523. See cases cited in 2 Black, Judgments, 2d Ed., sec. 534; 15 R.C.L. 1009; 9 Va.L.Reg. (N.S.) 241, 242; 15 Cal.Jur. 190; 34 C.J. 992. A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase. See cases cited in 2 Black, Judgments, 2d Ed., sec. 549; 35 Yale L.J. 607, 608; 34 C.J. 973, 1010, 1012; 15 R.C.L. 1016. The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him. See cases cited in 2 Black, Judgments, 2d Ed., sec. 534, 548; 1 Freeman, Judgments, 5th Ed., sec. 428; 35 Yale L.J. 607, 608; 34 C.J. 988; 15 R.C.L. 956.

[7] The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided. Coca Cola Co. v. Pepsi-Cola Co., supra. See cases cited in 24 Am. & Eng.Encyc., 2d Ed., 731; 15 Cinn.L.Rev. 349, 351; 82 Pa.L.Rev. 871, 872. He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. Ibid. There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.

No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend. See 7 Bentham's Works, Bowring's Ed., 171. Many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of res judicata is asserted. Coca Cola Co. v. Pepsi-Cola Co., supra; Liberty Mutual Insur. Co. v. George Colon & Co., 260 N.Y. 305, 183 N. E. 506; Atkinson v. White, 60 Me. 396; Eagle, etc., Insur. Co. v. Heller, 149 Va. 82, 140 S.E. 314, 57 A.L.R. 490; Jenkins v. Atlantic Coast Line R. Co., 89 S.C. 408, 71 S.E. 1010; United States v. Wexler, D. C., 8 F.2d 880. See Good Health Dairy Products Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758, 112 A.L.R. 401. The commentators are almost unanimously in accord. 35 Yale L.J. 607; 9 Va.L.Reg.(N.S.) 241; 29 Ill.L.Rev. 93; 18 N.Y.U.L.Q.R. 565, 570; 12 Corn.L.Q. 92. The courts of most jurisdictions have in effect accomplished the same result by recognizing a broad exception to the requirements of mutuality and privity, namely, that they are not necessary where the liability of the defendant asserting the plea of res judicata is dependent upon or derived from the liability of one who was exonerated in an earlier suit brought by the same plaintiff upon the same facts. See cases cited in 35 Yale L.J. 607, 610; 9 Va.L.Reg.(N.S.) 241, 245-247; 29 Ill.L.Rev. 93, 94; 18 N.Y. U.L.Q.R. 565, 566, 567; 34 C.J. 988, 989. Typical examples of such derivative liability are master and servant, principal and agent, and indemnitor and indemnitee. Thus, if a plaintiff sues a servant for injuries caused by the servant's alleged negligence within the scope of his employment, a judgment against the plaintiff of the grounds that the servant was not negligent can be pleaded by the master as res judicata if he is subsequently sued by the same plaintiff for the same injuries. Conversely, if the plaintiff first sues the master, a judgment against the plaintiff on the grounds that the servant was not negligent can be pleaded by the servant as res judicata if he is subsequently sued by the plaintiff. In each of these situations the party asserting the plea of res judicata was not a party to the previous action nor in privity with such a party under the accepted definition of a privy set forth above. Likewise, the estoppel is not mutual since the party asserting the plea, not having been a party or in privity with a party to the former action, would not have been bound by it had it been decided the other way. The cases justify this exception on the ground that it would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries.

[8] In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? In re Estate of Smead, 219 Cal. 572, 28 P.2d 348; Silva v. Hawkins, 152 Cal. 138, 92 P. 72, and People v. Rodgers, 118 Cal. 393, 46 P. 740, 50 P. 668, to the extent that they are inconsistent with this opinion, are overruled.

[9, 10] In the present case, therefore, the defendant is not precluded by lack of privity or of mutuality of estoppel from asserting the plea of res judicata against the plaintiff. Since the issue as to the ownership of the money is identical with the issue raised in the probate proceeding, and since the order of the probate court settling the executor's account was a final adjudication of this issue on the merits (Cal.Prob.Code, sec. 931 [formerly Cal.Code Civ.Proc., sec. 1637]; see cases cited in 12 Cal.Jur. 62, 63; 15 Cal.Jur. 117, 120), it remains only to determine whether the plaintiff in the present action was a party or in privity with a party to the earlier proceeding. The plaintiff has brought the present action in the capacity of administratrix of the estate. In this capacity she represents the very same persons and interests that were represented in the earlier hearing on the executor's account. In that proceeding plaintiff and the other legatees who objected to the executor's account represented the estate of the decedent. They were seeking not a personal recovery but, like the plaintiff in the present action, as administratrix, a recovery for the benefit of the legatees and creditors of the estate, all of whom were bound by the order settling the account. Cal.Prob.Code, sec. 931. See cases cited in 12 Cal.Jur. 62, 63. The plea of res judicata is therefore available against plaintiff as a party to the former proceeding,

despite her formal change of capacity. "Where a party though appearing in two suits in different capacities is in fact litigating the same right, the judgment in one estops him in the other." 15 Cal.Jur. 189; Williams v. Southern Pacific Co., 54 Cal.App. 571, 202 P. 356; Stevens v. Superior Court, 155 Cal. 148, 99 P. 512; In re Estate of Bell, 153 Cal. 331, 95 P. 372. See Chicago, R. I. & P. R. R. Co. v. Schendel, 270 U.S. 611, 46 S.Ct. 420, 70 L.Ed. 757, 53 A.L.R. 1265; Sunshine A. Coal Co. v. Adkins, 310 U.S. 381, 401 et seq., 60 S. Ct. 907, 84 L.Ed. 1263; Lee Co. v. Federal Trade Comm., 8 Cir., 113 F.2d 583; and cases cited in 16 N.Y.U.L.Q.R. 158, 159; 38 Yale L.J. 299, 310; 54 Harv.L.Rev. 890.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, HOUSER, and CARTER, JJ., concurred.



19 Cal.2d 748

WEINER v. ROOF et al.

L. A. 17299.

Supreme Court of California.

March 5, 1942.

1. **Principal and agent** ⇐136(4)
Trusts ⇐356(2)

One who has paid money through fraud or mistake to an innocent agent or trustee may recover the amount from the agent or trustee, unless the agent or trustee has paid it to the principal or beneficiary, has spent it on behalf of the principal or beneficiary, or has paid it to a third person on behalf of the principal or beneficiary.

2. **Principal and agent** ⇐136(4)
Trusts ⇐356(2)

The fact that an innocent agent or trustee who has been paid money through fraud or mistake credits the principal or beneficiary with the amount received does not release the agent or trustee from his obligation to make restitution, so long as he continues to hold the money on behalf of the principal or beneficiary, but when the agent or trustee parts with the money in accordance with the agency or trust, he is released from liability.

3. **Trusts** ⇐356(2)

The mere crediting of certain sums by innocent trustee to general trust account and trust improvement account did not release trustee from obligation to withdraw those sums from the accounts and repay them to the one who paid those sums, because of false representations, but having actually expended the money on behalf of the trust, the beneficial owners of which constituted the trustee's principal, trustee was no longer required to make restitution.

4. **Principal and agent** ⇐136(4)
Trusts ⇐356(2)

If an innocent agent or trustee receives money through mistake or fraud and pays it to a third person on behalf of his principal or beneficiary in payment of a debt owed the third person by the principal or beneficiary, the agent or trustee cannot be required to make restitution of the money, and the third person, if he has no notice of the claims of the original owner of the money, is a "bona fide purchaser for value" and may keep the amount as against the original owner, whose only remedy is against the principal or beneficiary on grounds of fraud, mistake, or unjust enrichment. Civ.Code, §§ 1796, 3106.

See Words and Phrases, Permanent Edition, for all other definitions of "Bona Fide Purchaser for Value".

5. **Trusts** ⇐356(2)

Extinguishment by third person of past indebtedness of beneficiary of trust to third person is considered a change of position sufficient to preclude a recovery from the third person by one who has paid the money to trustee for beneficiary through mistake or fraud, even though it would be possible for the third person to give up the money and retain the original claim against the beneficiary.

6. **Principal and agent** ⇐136(4)
Trusts ⇐356(2)

If agent or trustee himself is creditor of his principal or beneficiary, and with the consent of the principal or beneficiary applies money received from third person toward payment of the debt, he is a "bona fide purchaser for value" and may retain the money as against the original owner who has parted with it through mistake or because of fraud of principal or beneficiary.

7. Trusts ⇐356(2)

Where trustee credited to itself as authorized by trust some of the money received from third person in payment of indebtedness owed trustee by beneficiary of trust, trustee was a "bona fide purchaser for value" and was entitled to retain the amount as against the third person, notwithstanding that the money was paid over because of false representations of one other than the trustee.

In Bank.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Theodore Weiner against J. B. Roof, the Citizens National Trust & Savings Bank and others to rescind a land purchase contract and to recover money paid. From a judgment in favor of the Citizens National Trust & Savings Bank, the plaintiff appeals.

Judgment affirmed.

Prior opinion, 115 P.2d 23.

Isador Gralla, Don Marlin, and Henry O. Wackerbarth, all of Los Angeles, for appellant.

Chandler, Wright & Ward, Chandler & Wright, John F. Gilbert, and Oliver S. Northcote, all of Los Angeles, for respondent.

TRAYNOR, Justice.

Joseph P. Connolly owned an 80-acre tract of unimproved land in Los Angeles, which he contracted to sell in 1927 to J. B. Roof, Inc., for $5,500 an acre plus one half the profits to be realized from the subdivision of the property and sale of the lots. To carry out the sale Connolly and J. B. Roof, Inc., set up a subdivision trust with the Farmers and Merchants National Bank of Los Angeles as trustee. Under the terms of the trust, J. B. Roof, Inc., was to subdivide the tract, construct street improvements at its own expense, and sell the lots. The trustee was to execute the contracts of sale, make collections from the purchasers of the lots, pay to Connolly from these funds the amount owed him by J. B. Roof, Inc., for the land, and distribute the remainder to J. B. Roof, Inc. In 1929 the Farmers and Merchants National Bank assigned all its rights as trustee under the trust, including all previous contracts of purchase, to the Citizens National Trust and Savings Bank, and a new trust agreement was entered into between Connolly, J. B. Roof, Inc., and the Citizens Bank. Under the terms of this agreement the Citizens Bank, as trustee, held legal title to the property and made collections from the purchasers of the lots. From funds thus collected the trustee could reimburse itself for advances to the trust. As the funds were received, a portion was allocated to certain accounts for the payment of trust expenses, including fees and commissions of the trustee. Another portion was allocated to an account for payment of improvements. Connolly then received payment on the amount owed him by J. B. Roof, Inc., as purchase price of the land, including half the profits, and the remainder was paid to J. B. Roof, Inc. The trust recited that Connolly was indebted to the Citizens Bank in the sum of $225,000 and authorized the bank to apply Connolly's share of the collections as they were received toward payment of this debt. The payments thus received by the bank were treated as payments to Connolly of his share of the proceeds.

In 1927, the plaintiff, Theodore Weiner, was induced by J. B. Roof, Inc., to contract to purchase a lot for $3,500, and he began making payments to the trustee. Certain representations made by J. B. Roof, Inc., proved false. These representations were not included in the written contract, which contained a clause limiting the responsibility of the seller to representations therein set forth. In 1932 plaintiff gave notice of rescission and brought suit against J. B. Roof, J. B. Roof, Inc., and the Citizens Bank to rescind the contract of purchase because of fraud and to recover the money he had paid on the purchase price of the lot. He recovered a judgment against J. B. Roof and J. B. Roof, Inc., for $3,807.01 and against the bank for $1,890, the latter amount representing payments plaintiff made to the bank after it became trustee. The bank alone appealed from the judgment. On that appeal this court held that under the principle of Speck v. Wylie, 1 Cal.2d 625, 36 P.2d 618, 95 A.L.R. 760, plaintiff could recover payments made to the bank, but only to the extent that the bank was unjustly enriched thereby. The court stated that "appellant, as trustee of the money paid to it by respondent, should be afforded the opportunity of showing, as it asserts it can, that it has paid over to the beneficial owner the money for which

judgment has been taken against it. Such a showing, if made, will disclose that the appellant, an innocent party to the fraud, has not been unjustly enriched and will preclude the entry of a monetary judgment against it under the rule mentioned." The judgment was reversed as to the bank, with the following instructions: "That portion of the judgment awarding plaintiff $1,890 as against the appellant Citizens National Trust & Savings Bank, as trustee, is reversed, with directions to the court below to permit said appellant, if it be so inclined, to offer evidence as to the disposition of the money paid to it by the respondent." Weiner v. Roof, 10 Cal.2d 450, 74 P.2d 736, 738.

The evidence at the second trial was therefore confined to the disposition made by the bank of the money paid to it by plaintiff. The bank, by its accounts and the testimony of one of its officers, showed that in accordance with the terms of the trust it had disbursed the $1,890 received from plaintiff as follows: $1,157.46 was credited to itself toward the payment of Connolly's indebtedness; $346.75 was credited to the general trust account, from which the general expenses of the trust were paid, and $385.79 was credited to the improvement account, from which the cost of street improvements to the tract were paid. The bank showed that at the time of plaintiff's rescission the trust had paid out not only the funds in the various trust accounts but over $7,000 more advanced to it by the bank. On the basis of this evidence, the trial court found that the trustee had paid to the beneficial owners all the money it received from plaintiff, and rendered judgment for the bank.

[1] Plaintiff contends that the bank is liable for the money received by it because the money was never actually paid over to the beneficiaries. The bank, however, in making the collections from the purchasers of the lots in its capacity as trustee acted as agent on behalf of its principals, J. B. Roof, Inc., and Connolly. The same rule governs the liability of the bank in such a situation whether it is designated a trustee or agent. See Rest.Restitution, secs. 143(a), (b), 190(a); Rest. Agency, sec. 13; 1 Cal.Jur. 689, 690; 25 Cal.Jur. 121, 122; Weiner v. Roof, supra. It is well settled that one who has paid money through fraud or mistake to an innocent agent may recover the amount from the agent unless the latter has paid it to the principal, spent it on behalf of the principal, or paid to a third party on behalf of the principal. Rest.Restitution, sec. 143 (b); Rest.Agency, sec. 339(f); Crocker-Woolworth Nat. Bank v. Nevada Bank, 139 Cal. 564, 73 P. 456, 63 L.R.A. 245, 96 Am. St.Rep. 169; Becsey v. California Title Ins. & Trust Co., 192 Cal. 632, 221 P. 356; Craig v. Boone, 146 Cal. 718, 81 P. 22; Weiner v. Roof, supra. See 2 C.J. 821–823; 3 C.J.S., Agency, § 217.

[2, 3] The fact that the agent credits the principal with the amount received does not release the agent from his obligation to make restitution so long as he continues to hold the money on behalf of the principal, Rest.Restitution, sec. 143(b); Rest.Agency, sec. 339(f); see National Bank of Calif. v. Miner, 167 Cal. 532, 140 P. 27; 2 C.J. 823; 3 C.J.S., Agency, § 217; but when the agent parts with the money in accordance with the agency, he is released from liability. In the present case the mere crediting of $346.75 and $385.79 to the general account and the improvement account respectively could not release the bank from the obligation to withdraw these sums from the accounts and repay them to plaintiff, but having actually expended the money on behalf of the trust, the beneficial owners of which constitute its principal, it is no longer required to make restitution.

[4, 5] Most of the money received by the bank from plaintiff, however, was applied on Connolly's indebtedness to it. It therefore still has that amount, not as trustee, but in its private capacity. If an innocent agent receives money through mistake or fraud and pays it to a third party on behalf of his principal in payment of a debt owed the third party by the principal, the agent cannot be required to make restitution of the money. If the third party has no notice of the claims of the original owner, he is a bona fide purchaser for value and may keep the amount as against the original owner, whose only remedy is against the principal on the grounds of fraud, mistake, or unjust enrichment. Rest.Restitution, secs. 13, 172, 173(e); Rest.Trusts, sec. 304(2), (a); Frey v. Clifford, 44 Cal. 335, 342; Davis v. Russell, 52 Cal. 611, 28 Am.Rep. 647; Foorman v. Wallace, 75 Cal. 552, 17 P. 680; Virginia Timber & Lumber Co. v. Glenwood Lumber Co., 5 Cal.App. 256, 90 P. 48; Chapman v. Hughes, 134 Cal. 641, 658, 58 P. 298, 60 P. 974, 66 P. 982. See Cal.Civ.

Code, secs. 1796, 3106. Extinguishment of the past indebtedness by the third party is considered a change of position sufficient to preclude a recovery from him even though it would be possible for him to give up the money and retain his original claim against the debtor. See 21 Cal.L.Rev. 311 et seq.; 45 Harv.L.Rev. 1333 et seq.; 33 Yale L.Rev. 628 et seq.; 2 Williston, Sales, 2d Ed., sec. 620.

[6, 7] If the agent himself is the creditor of his principal, and with the latter's consent applies the money received toward the payment of the debt, he is likewise a bona fide purchaser for value and may retain the money as against the original owner. Rest.Restitution, sec. 143(b); Rest.Agency, sec. 339(f); Bradley Lumber Co. v. Bradley County Bank, 8 Cir., 206 F. 41, 124 C.C.A. 175; White v. Rutherford, Tex.Civ.App., 148 S.W. 598; Winslow v. Anderson, 78 N.H. 478, 102 A. 310, L.R.A.1918C, 173; La Farge v. Kneeland, 7 Cow., N.Y., 456; Mowatt v. McLelan, 1 Wend., N.Y., 173; Langley v. Warner, 3 N.Y. 327; Cullen v. Donahue, 45 R.I. 237, 121 A. 392; Holland v. Russell, 1861, 1 B. & S. 424, affirmed 4 B. & S. 14; Taylor v. Metropolitan Ry., [1906] 2 K.B. 55; Bessler Movable Stairway Co. v. Bank of Leakesville, 140 Miss. 537, 106 So. 445; Hullet v. Cadick Milling Co., 90 Ind.App. 271, 168 N.E. 610. See 21 Cal. L.Rev. 311, 324; 45 Harv.L.Rev. 1333, 1346; 2 C.J. 821-823; 3 C.J.S., Agency, § 217. The fact that the agent is the same person as the creditor and may keep the money himself in payment of the debt does not prejudice his right so long as the payment is authorized by the principal. The legal effect is the same as if the money were delivered by the agent to the principal and then redelivered by the principal to the agent in payment of the debt. Such formalism, however, is unnecessary. In the words of the Restatement of Restitution, section 143, comment b: "Where an agent receives money on account of the principal, the agent may, by agreement with the principal, apply such money upon an indebtedness of the principal to him. In this case the agent becomes a bona fide purchaser of the money and is entitled to keep it although paid to him by mistake. * * * The fact that upon making repayment to the payor, the fiduciary would himself be able to maintain an action against the beneficiary does not prevent the defense of change of position. This is true even though the beneficiary is available and has sufficient assets to respond to a judgment for that amount; the remedy of the payor is against the beneficiary either directly or by subrogation." Thus in the present case the bank credited to itself, as authorized by the trust, some of the money received from plaintiff in payment of the indebtedness owed it by its principal. In its capacity as trustee it has paid out the money. In its private capacity it is a bona fide purchaser for value, entitled to retain the amount as against the plaintiff.

There are decisions that require an innocent agent to make restitution of money received by fraud or mistake when he has applied the money toward the payment of a debt owed him by his principal. Herlihy v. Independence State Bank, 261 N.Y. 309, 185 N.E. 393; Alberta Pac. Grain Co. v. Dominion Bank, 55 Dom.L.R. 735; Nat'l Bank of Calif. v. Miner, supra. These cases reason that the agent has not changed his position but has merely given the principal a credit, and that he may remove the credit upon giving up the money and retain his claim against the principal. The same argument would apply to any bona fide purchaser who has received money or property in payment of a past indebtedness from a debtor who procured it by fraud or mistake. It is established in California, however, that a past indebtedness is sufficient value to justify the bona fide purchaser in retaining the money as against the original owner, and that the bona fide purchaser will not be left to his original claim against the debtor. Frey v. Clifford, supra; Davis v. Russell, supra; Foorman v. Wallace, supra; Virginia Timber & Lumber Co. v. Glenwood Lumber Co., supra; Chapman v. Hughes, supra. The decisions cited above requiring restitution are derived from the rule that an agent is required to restore money paid to him through mistake or fraud when he has credited his principal with the amount but still retains it in his possession. They fail to distinguish between an agent who holds the money on behalf of his principal after crediting it to the principal's account and an agent who has received the money, with the consent of the principal, in payment of a debt owed to him by the principal. In the latter situation the agent is in the position of a bona fide purchaser for value; in the former he is not.

In the present case the bank applied the money received from the plaintiff to the

debt owed it by Connolly in accord with the terms of the trust and with Connolly's consent. It had no knowledge of plaintiff's claim at the time it credited itself with the amount. In its capacity as agent it has therefore paid out plaintiff's money on behalf of its principal, and in its private capacity it is a bona fide purchaser for value, entitled to retain the money.

This action is confined to the disposition made by the bank of the funds received by it from plaintiff. It is therefore irrelevant that the bank as trustee has subsequently received money for the trust from other purchasers of lots. Plaintiff has a judgment against J. B. Roof, Inc., one of the beneficiaries under the trust, and may subject the interest of J. B. Roof, Inc., in the trust to levy and sale under execution.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, HOUSER, and CARTER, JJ., concurred.



19 Cal.2d 774

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. EARP et al.

L.A. 17902.

Supreme Court of California.

March 5, 1942.

1. Contracts ⇐94(1)
Reformation of Instruments ⇐21, 25

A person who has been induced to enter into a contract by fraudulent misrepresentations as to its contents may rescind or reform the contract, and his negligence in failing to read the contract does not bar his right to relief. Civ.Code, § 1689(1).

2. Negligence ⇐100

Contributory negligence is no defense to an intentional wrong.

3. Mortgages ⇐86(3)

In action to foreclose a trust deed, which defendants sought to have declared void, on ground that defendants' signature was obtained by fraudulent misrepresentations as to indebtedness secured, evidence supported finding that terms of trust deed were fraudulently represented to defendants and that defendants were justified in relying on the representation, so as to authorize rescission.

4. Mortgages ⇐78

Where those who signed trust deed, which was represented to them as merely a renewal of old mortgage but which in fact contained an additional provision securing all present and future obligations, were already familiar with the terms of old mortgage, they were justified in assuming that there was no necessity for reading the trust deed.

5. Mortgages ⇐497(1)

In action to foreclose a trust deed with defense of fraudulent representations as to indebtedness secured, trial court in refusing to hold trust deed as security for additional indebtedness in effect rescinded the trust deed to that extent.

6. Mortgages ⇐455

In action to foreclose a trust deed with defense of fraudulent misrepresentations as to indebtedness secured, defendants sufficiently pleaded their right to rescission when they alleged the misrepresentation and requested that the trust deed be declared void.

7. Mortgages ⇐491

In action to foreclose a trust deed with defense of fraudulent misrepresentations as to indebtedness secured, defendants were under no duty to make restitution, where they received nothing from plaintiff under the rescinded provision that they could restore.

In Bank.

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by the Security-First National Bank of Los Angeles against Anna L. Earp and others to foreclose a trust deed. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Thorpe & Bridges and Roane Thorpe, all of Los Angeles, for appellant.

Vance Booker and P. M. Girard, both of Los Angeles, for respondents.

TRAYNOR, Justice.

Defendants, Mr. and Mrs. D. M. Washburn, were indebted to plaintiff, the Security First National Bank of Los Angeles, in the amount of $3,000. The debt was secured by a mortgage on certain real

property owned by defendants. In 1933 defendants, together with certain other persons, executed a joint and several promissory note for $32,750, payable to plaintiff with interest at seven per cent. This note was secured by a deed of trust on other real property. In 1939 this trust deed was foreclosed and the proceeds of the sale were applied to the debt, leaving an unpaid balance of $7,850.70.

In 1935 the $3000 mortgage, outstanding for about 10 years, fell due. In response to a communication from plaintiff, Washburn went to the bank to arrange for a renewal. According to Washburn's testimony he had the following conversation with an employee of the bank: "He wanted to know if I could make any payment at that time on the principal. I told him no, I didn't see how I could, I said, 'Couldn't you extend it, this mortgage for another year?' and he said, 'Well, no, I don't know as we can. Some payment should be made on the principal.' I said, 'Well, I am not able to do that right at this time, but I know another bank, and also a building and loan company, that might, that I would like to see, to see if they would extend or would take this property for $3000 straight loan, or lend $3000 straight loan on it.' And this man I was talking to then said, 'Well, let me see a little bit further.' And he went away from this desk and away from this counter, and I don't know where he went, but he came back in a few minutes —asked me to wait a few minutes—and said that if I and Mrs. Washburn would come in tomorrow, that they would extend this mortgage for another year, which we did, and what I signed the following day." Question: "You came in the next day?" Answer: "Yes. And what I signed the following day with Mrs. Washburn I assumed it was the extension of the mortgage for a year, which in so many words I had been told it was."

Defendants thus signed a renewal note for $3,000 at 7% interest secured by what they believed to be the same mortgage extended for another year. Actually, however, the new encumbrance was a trust deed and contained a provision, not present in the previous mortgage, that it was given to secure the payment of all obligations, present and future, which were then owing or might thereafter become owing from defendants to plaintiff. This clause, couched in legal terminology, was in a printed form in comparatively small print. Defendants, relying upon the representation of plaintiff's employee that they were signing a renewal of the old mortgage, did not read the new encumbrance and were therefore unaware that it was a trust deed containing the foregoing provision.

Defendant defaulted in the payment of the $3,000 promissory note, and plaintiff thereupon brought the present action, asking that the trust deed be foreclosed and the proceeds of the sale applied not only on the $3,000 obligation but also on the $7,850.70 still owed by defendants to plaintiff under the $32,750 note. The trustee under the deed of trust and Anna L. Earp, to whom the Washburns had subsequently conveyed the property, were joined as defendants. Defendants in answer alleged that plaintiff, through one of its agents, induced them to sign the deed of trust by representing it to them as an extension of the mortgage, and that in reliance upon this representation they signed the instrument, unaware that it was a deed of trust or that it purported to secure any indebtedness other than the $3,000 loan. They therefore asked that the deed of trust be declared void.

The trial court found that defendants did not intend to execute a trust deed or to give the property as security for any indebtedness other than the $3,000, and that they signed the instrument without reading it in reliance upon the representation of plaintiff's employee. Judgment was entered foreclosing the deed of trust given to secure the $3,000 note. Plaintiff was awarded a personal judgment against Washburn for $7,850.70 with interest, but the court refused to decree that this indebtedness was secured by the deed of trust. Plaintiff has appealed on the ground that defendants' failure to read the instrument precludes them from setting up any misrepresentation of the contents as a defense.

[1, 2] It is established in California and a majority of other jurisdictions that a person who has been induced to enter into a contract by fraudulent misrepresentations as to its contents may rescind or reform the contract. California Trust Co. v. Cohn, 214 Cal. 619, 7 P.2d 297; Fleury v. Ramacciotti, 8 Cal.2d 660, 67 P.2d 339; Wenzel v. Shulz, 78 Cal. 221, 20 P. 404; Johnson v. Sun Realty Co., 138 Cal.App. 296, 32 P.2d 393; Moore v. Copp, 119 Cal. 429, 51 P. 630. See cases cited in 1 Page, Contracts, 2d Ed. § 229, 230, 233; 9 Wigmore, Evidence 3d.Ed. § 2416. See Glick-

man v. New York Life Insurance Co., 16 Cal.2d 626, 107 P.2d 252, 131 A.L.R. 1292; Seeger v. Odell, 18 Cal.2d 409, 115 P.2d 977, 136 A.L.R. 1291; Cal.Civil Code, § 1689 (1). His negligence in failing to read the contract does not bar his right to relief (California Trust Co. v. Cohn, supra; Fleury v. Ramacciotti, supra; Wenzel v. Shulz, supra; Johnson v. Sun Realty Co., supra; Moore v. Copp, supra. See cases cited 1 Page, Contracts, 2d.Ed., §§ 229, 230, 233; 9 Wigmore, Evidence, 3d.Ed., § 2416) if he was justified in relying upon the representations. See Seeger v. Odell, supra; Restatement of Torts, § 537, and cases cited in 12 Cal.Jur. 750 et seq. Contributory negligence is no defense to an intentional wrong. See Seeger v. Odell, supra; Prosser, Torts, 748, 402, and cases cited in 12 Cal.Jur. 758, 759. In the cases of Kimmell v. Skelly 130 Cal. 555, 62 P. 1067, and Gridley v. Tilson, 202 Cal. 748, 262 P. 322, relied upon by plaintiff, there were no fraudulent representations as to the contents of the contracts in question. In each case the defendant's misconception of the contract was attributable solely to his failure to read it.

[3, 4] In the present case there is sufficient evidence to support the finding of the trial court that the terms of the contract were fraudulently represented to defendants and that they were justified in relying upon the representation. Defendants were not negotiating with plaintiff for the first time; they had in fact dealt with plaintiff for a period of ten years. Since they were already familiar with the terms of the old mortgage, they were justified in assuming that there was no necessity for reading the instrument that was represented to them as a renewal of that mortgage.

[5-7] In refusing to hold the trust deed as security for the indebtedness of $7,850.70 the trial court in effect rescinded the trust deed to that extent. Defendants pleaded their right to rescission sufficiently when they alleged the misrepresentation and requested that the trust deed be declared void. Since defendants received nothing from plaintiff under the rescinded provision that they can restore, they are under no duty to make restitution. See cases cited in 6 Cal.Jur. 387; 4 Cal.Jur.Supp. 135. Plaintiff has already received compensation for the extension of the indebtedness in the form of interest payments that continued until 1939, and plaintiff has a judgment in its favor for the unpaid principal, interest, and expenses, with a decree of foreclosure on the property for this amount.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, HOUSER, and CARTER, JJ. concurred.



19 Cal.2d 778

CAMPBELL v. BIRCH et al.

L. A. 17907.

Supreme Court of California.

March 5, 1942.

Rehearing Denied April 3, 1942.

1. Trusts ⇐262

In action by trustee for damages allegedly suffered by trust estates as result of alleged fraudulent conspiracy by defendants whereby the trustee was induced to settle an indebtedness of one of the defendants for less than the amount due and to reduce rental payable under a lease held by such defendant on certain trust property, evidence sustained trial court's finding that the compromise and modification agreements were entered into as result of certain false and fraudulent representations concerning financial condition of debtor, that the representations were made pursuant to conspiracy, that the trustee relied thereon to damage of trust estates and justified judgment for the trustee.

2. Appeal and error ⇐994(3), 1012(1)

The trial court is the exclusive judge of the weight of the evidence and credibility of witnesses.

3. Appeal and error ⇐996, 1012(1)

It is the province of trial court to give to evidence that weight to which, in its judgment, it is entitled and to draw all reasonable inferences therefrom.

4. Evidence ⇐588

If in judgment of trial court the evidence is entitled to no weight, it may disregard such evidence altogether.

5. Conspiracy ⇐19

A conspiracy to defraud may be proved by circumstantial evidence.

6. Conspiracy ⇐13

Where trustee was induced to settle an indebtedness owed to trust estates for less than amount due thereon and to reduce rental payable under lease held by debtor on trust property by fraudulent representations, concerning debtor's financial condition, made pursuant to a conspiracy, and former creditor knowingly permitted use of her name in the attempt to defraud by creating false impression that substantially all of debtor's assets were pledged to the former creditor as security for debts, which had been extinguished, the former creditor was liable as a joint participant for resulting damage to the trust estates.

7. Conspiracy ⇐18

Where plaintiff, as result of fraudulent conspiracy, was induced to settle an indebtedness for less than amount due thereon and to reduce rental payable under lease, plaintiff, electing to stand on the compromise contract and sue for damages, was not required to prove that the claims which were relinquished as a result of the fraud were in fact collectible, in view of the fact that the claims compromised were not disputed either as to amount or as to their existence.

8. Fraud ⇐31

A defrauded plaintiff may properly elect to sue for damages rather than to rescind.

9. Trusts ⇐265

In trustee's action for damages suffered by trust estates as result of fraudulent conspiracy whereby trustee was induced to settle an indebtedness owed to the trust estates for less than the amount due thereon and to reduce rental payable under a lease upon trust property, judgment which was exactly in the amount the trustee would have been entitled to if no compromise, induced by the fraud, had been negotiated was proper.

10. Fraud ⇐59(1)

Where a claim forming the basis of a compromise, induced by fraud, is fixed and certain and where the defrauded plaintiff under any theory is entitled to keep the amount paid on the compromise, the measure of damages, so far as general damages are concerned, is prima facie the difference between the amount paid on the compromise and the face amount of the claim.

11. Appeal and error ⇐221

In action for damages suffered as result of alleged fraudulent conspiracy inducing compromise settlement, contention that certain alleged rights obtained by the defrauded party in the compromise should have been taken into consideration in determining damages could not be raised for first time on appeal.

12. Trusts ⇐377

In trustee's action for damages suffered by trust estates as result of fraudulent conspiracy whereby trustee was induced to settle judgments for delinquent rent for less than amount due thereon and to reduce rental payable under lease providing that lessee shall pay all reasonable costs, expenses and attorney's fees incurred by lessor in any litigation between the parties "arising out of or in connection with lease", investigation expense and attorney's fees were properly allowed against the lessee.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising out of or in Connection with Lease".

CARTER, SHENK, and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Roy Campbell, trustee, etc., against A. Otis Birch and others for damages sustained as result of alleged fraudulent conspiracy. From an adverse judgment, defendants appeal.

Affirmed.

Prior opinion 109 P.2d 1008.

Rehearing denied; SHENK, CURTIS, and CARTER, JJ., dissenting.

George Acret and Clifford A. Rohe, both of Los Angeles, for appellants Birch.

Clyde F. Murphy, of North Hollywood, for appellant Minter.

Syril S. Tipton, of Los Angeles, for respondent.

PETERS, Justice pro tem.

This action was brought by plaintiff for damages alleged to have been suffered by the trust estates represented by plaintiff as the result of an alleged fraudulent conspiracy by defendants whereby plaintiff was induced to settle an indebtedness of defendant A. Otis Birch owed to the trust estates for less than the amount due thereon, and to reduce the rental payable under a lease held by defendant A. Otis Birch on certain real property owned by the trust estates. The trial court found in detail that the compromise and modifica-

tion agreements were entered into as a result of certain false and fraudulent representations made to Campbell concerning Birch's financial condition; that such representations were made pursuant to a conspiracy by defendants to induce plaintiff to accept the compromise and modification agreements; and that plaintiff relied thereon to his damage. Based on these findings, judgment was entered in favor of plaintiff, from which judgment defendants prosecute this appeal.

[1] The main contention of appellants is that the basic findings of the trial court are not supported by the evidence. After an examination of the record we are convinced that the evidence, together with such inferences as may reasonably be drawn therefrom, amply support the findings and judgment.

On June 6, 1928, plaintiff's predecessors leased to A. D. Van Vracken certain real property in Los Angeles for a period of 99 years. The court found, and the finding is supported, that Van Vracken was acting for Birch, and that on the day the lease was executed it was assigned to Birch. The lease called for the payment of graduated rentals, which, during the years 1934, 1935 and 1936, amounted to $1,000 per month. Birch paid all rentals due under the lease until October of 1934, when all payments ceased. By August of 1935 there was owing to plaintiff an admitted sum of $9,412.59. Plaintiff had secured several judgments against Birch for such delinquent rent totaling $6,395.70. During 1935 plaintiff had several actions pending against Birch. It was under these circumstances that in August of 1935 Birch, and a man by the name of Benson, whose connection with these transactions will be discussed later, induced plaintiff to compromise the total indebtedness of $9,412.59 for $6,000, and to agree to a modification of the lease lowering the monthly rental over a five-year period on a graduated scale, starting with $500 a month. The reduced rental was paid until May of 1936, when the lessee again became delinquent. Respondent contends that he then discovered that he had been defrauded in that he had been induced to enter into the compromise and the lease modification by false representations concerning Birch's financial status. In May of 1937 he brought the present action in fraud and deceit to recover from all three defendants $8,412.59 damages, $3,412.59 alleged to have been sustained by reason of the compromise, and $5,000 through acceptance of reduced rentals. As against A. Otis Birch alone he seeks to recover certain expenses and attorney's fees as provided in the lease. The trial court granted judgment against all three defendants for the larger sum, and against A. Otis Birch alone for $1,253.85 for attorney's and investigation expenses.

The defendants and appellants are A. Otis Birch, his wife Estelle, and his cousin Lula M. Minter. The complaint alleges that defendants falsely and fraudulently represented to plaintiff, and he was thereby led to believe that at the time the compromise and lease modification agreements were entered into Birch was in an unsafe and dangerous condition financially; that it was represented to plaintiff that Birch was indebted to defendant Minter in the sum of $25,000 represented by a note secured by a second deed of trust on certain real property owned by Birch; that it was also represented to plaintiff that Birch was also indebted to defendant Minter in the sum of $130,000 represented by a note secured by a pledge of the entire capital stock of the Birch Holding Company, which, in turn, held all the stock of the Birch Securities Company and of the Birch Ranch and Oil Company, which last two mentioned companies owned practically all of the properties in which the Birches were interested, and that if plaintiff insisted on the payment of the rental provided for in the lease Minter would sell the pledged stock and render Birch insolvent.

The complaint also alleged that defendant Minter conspired with defendants Birch to accomplish the fraud. Plaintiff further alleged that the representations were false; that the $25,000 note and trust deed and the $130,000 indebtedness were fictitious and non-existent; that plaintiff, in belief and reliance on their genuineness, was induced to execute and perform the settlement agreement, to his damage.

The findings of the trial court followed substantially the allegations of the complaint. It is an admitted fact that the evidence supports the findings that Birch and Benson represented that Birch owed Minter a total sum of $155,000; that unless a modification were secured she would sell out the pledge and trust deed, thus stripping the Birches of substantially all of their assets; that the Birches would be

forced into bankruptcy. It is a reasonable inference, and no contention is made to the contrary, that such representations were made for the purpose of inducing plaintiff to act upon them. There also can be no doubt that the evidence supports the findings that plaintiff executed the compromise and modification agreements in reliance on the truthfulness of such representations and would not have executed them otherwise. There can also be no doubt, and this is not disputed, that if the finding that the representation as to the existing indebtedness of Birch to Minter was false is supported, that plaintiff has a good cause of action for such fraud at least as against Birch. On the other hand, plaintiff admitted at the trial, and admits on this appeal, that if that finding is unsupported and the indebtedness to Minter actually existed, he has no cause of action against any of the defendants. So far as the sufficiency of the evidence is concerned, therefore, the only serious question presented for consideration is whether or not the finding that Birch was indebted to Minter is supported by the evidence.

The record shows that Birch commenced borrowing from his cousin, defendant Minter, and her relatives, many years before this controversy arose. The relationship between Birch and Minter was one of great affection and confidence. Birch had been reared by Miss Minter's parents and lived in their home until the time of his marriage. Although they were first cousins, they looked upon each other as brother and sister. He handled nearly all of her financial dealings. Prior to the year 1900 Birch had borrowed several thousand dollars from Miss Minter's mother, and he later borrowed relatively small sums from Miss Minter and her sister, now deceased, until in 1927 he owed them about $17,000. The purpose of these loans, and their continued renewals, was not so much to accommodate Birch as it was to help the Minters find a safe place for the investment of their funds at an attractive rate of interest. After 1927 Miss Minter became possessed of large sums of money by inheritance from her parents and sister. Thereafter, the transactions between the two increased in number and amount.

Many of the transactions involved the transfer from Birch to Minter of Yolo County reclamation district bonds on a ranch owned by the Birches known as the Conaway Ranch. These bonds were part of a $2,000,000 issue, less than one-quarter of which had been sold to the public, the balance being owned by Birch. The bonds had a par value of $1,000, and bore 6% interest. Default on the bonds occurred in 1934. In 1928, and each year following up to 1934, Miss Minter purchased from Birch large numbers of these bonds aggregating $80,000, for which she paid Birch by checks on her account. Birch testified that these bonds were sold by him to Miss Minter subject to his oral promise to repurchase the bonds at par. From time to time he did repurchase some of the bonds when she needed cash. The trial judge, who had the power to pass on the credibility of the witnesses, was not bound by this testimony. He could, and apparently did, disbelieve Birch's story, and concluded from all the testimony that Miss Minter made an outright purchase of these bonds.

By 1932 Birch undoubtedly owed to Miss Minter another sum of $50,000, represented by a note secured by a mortgage.

It should be here mentioned that up to 1930 Birch was a man of considerable wealth and was engaged in many profitable enterprises. From 1926 through 1929 his net worth was over $3,000,000, and his net income over $100,000 a year. After 1930 Birch became financially involved and his assets began to shrink in value, although at no time did his status approach that of insolvency. It is clear that after 1930 the sums borrowed by him from Miss Minter were desired by him to assist him in his financial difficulties.

Giving the evidence the strongest possible interpretation in favor of appellants, and disregarding the possible and reasonable conclusion that the $80,000 did not in fact represent a debt owed by Birch to Minter, it can be assumed, for the purposes of this opinion, that in 1932 he owed Minter $130,000, $80,000 of which was secured by the reclamation bonds, and $50,000 by a mortgage. Commencing in that year occurred a series of transactions upon which respondent relies as supporting the trial court's conclusions that this debt was paid in full, and that thereafter it was fictitiously kept alive for the purpose of defrauding, among others, the plaintiff.

In 1932 and 1933 Birch transferred to Miss Minter stock of five different companies. He transferred to her 90% of the stock of the Birch-Smith Storage Com-

pany. Birch and Minter testified that this stock was valueless, but Smith, an officer of the company and a witness for defendants, testified that its value at the time of transfer was $75,000, less an $8,543.32 loss. In view of this evidence it must be assumed, in support of the judgment, that 90% of this stock transferred by Birch to Minter was then worth about $60,000. In 1935 Birch testified in a supplementary proceeding in which plaintiff was attempting to collect his judgments that Miss Minter "purchased" this stock from him. While testifying in the instant case he stated that what he meant was that "she was entitled to that stock and possibly much more, because of many loans that she had made times when I was badly in need of them. She had loaned me money just before I gave her the stock. She actually paid nothing for it." Admittedly, the only loans made by Miss Minter at this time were part of the $130,000 above-mentioned. What does the testimony above-quoted mean? Is it an admission that the stock was turned over in partial payment of the debts then existing? That is a reasonable interpretation of the testimony.

Also during 1932 and 1933 he transferred to Miss Minter over 600 shares of Lyon Storage Company stock, 400 shares of Pacific Crest Cemetery stock, an unfixed number of shares of Citizen's National Bank stock and 40 shares of Western State Life Insurance Company stock. Birch testified that the value of these shares at the time of the transfer was between $60,000 and $100,000, and that such stock was absolutely clear when transferred. In explanation of these transactions, although he had failed to mention these transfers on former hearings, Birch testified that this stock was transferred in return for a promise of Miss Minter to will her home place to him. He further testified that Miss Minter did make a will devising the home place to him. Plaintiff's witnesses fixed the value of the home place in 1933 at $16,000.

Thus, during this period at a time when he claims to have owed Miss Minter $130,000, he transferred to her assets which, taking their highest values as fixed by the evidence, were worth $160,000 or more. It should also be mentioned that in 1933 Birch prepared a detailed financial statement in which he did not list the $80,000 claimed to be owing to Miss Minter as a liability.

If the trial judge had believed the testimony of Birch and Minter he could have found that these transfers were either gifts from Birch to Minter, or were in return for the promise to will the home place to him. But the court was not bound to so find. The trial court could, and did, disbelieve the testimony of these two witnesses. It is a reasonable inference that if the indebtedness existed it was canceled by these transfers. The trial judge saw the witnesses. He knew of the many contradictions in Birch's testimony. He was in a much better position than this court to pass upon the credibility of the witnesses. He found that no indebtedness in fact existed. He was not bound to believe the explanation proffered by Birch. He knew that these parties had been dealing together for many years with no evidence of large gifts passing between them. He knew that after the 1932-1933 transactions the parties again entered into many transactions. He knew that Birch was heavily involved in 1932 and 1933. He knew of the close relationship existing between the parties. Under such circumstances, the trial court was entitled to infer that Birch in fact was attempting to protect Miss Minter, and, to do so, transferred to her these assets in payment of the existing obligations. This inference is more than a mere suspicion—it is predicated upon the evidence and is based on reasonable probabilities.

After the transactions of 1932-1933, above described, Birch and Miss Minter went through the motions of purporting to keep the indebtedness alive. In October of 1934, the same month he first failed to pay rent on the Campbell lease, Mr. and Mrs. Birch formed three Birch corporations, in one of which they vested their ownership of the reclamation bonds and other securities, and to another they transferred most of their other assets valued at many hundreds of thousands of dollars. The third corporation was a holding company, possessed of the stock of the other two, its stock of 100,000 shares being owned 51% by Mrs. Birch and 49% by Mr. Birch. Birch then purported to have had an accounting with Miss Minter in which he recognized the existence of a $130,000 indebtedness to her. He then had Miss Minter transfer back to one of his companies the reclamation bonds valued at $80,000 and to release the $50,000 mortgage. He and his wife then gave Miss Minter their promissory note for $130,000

secured by a pledge of the 100,000 shares of holding company stock. This stock was worth many times the amount of the note.

In November of 1934 the Birches gave Miss Minter a second deed of trust on certain real property referred to as the Broadway property, as security for a loan of $15,000 and future advancements. On May 1, 1935, Miss Minter advanced another $10,000 under this agreement. It is to be noted that this $25,000, when added to the $130,000 above mentioned, makes a total of $155,000 allegedly then owed to Miss Minter. That is almost the exact value of the stock transferred to Miss Minter by Birch in 1932 and 1933. The trial court found that the $25,000 indebtedness, as well as the $130,000 indebtedness, was fictitious. The basis for these findings has already been discussed. Although the $25,000 undoubtedly passed from Miss Minter to Birch, the trial court could, and did, infer it was merely balancing the transfers of 1932 and 1933. It was this purported indebtedness that was used by Birch as a basis for the representations made to Campbell concerning Birch's uncertain financial status. It was these representations upon which Campbell relied in entering into the compromise and lease modification agreements of August, 1935.

There is one other matter to which reference should be made. During the first part of 1935 Birch and a man by the name of Benson had offices in the same suite. Benson was assisting Birch in attempting to refinance some of his obligations, including the obligations on the lease and judgments owed to Campbell. The plaintiff testified that he first talked directly with Mr. Birch in March or April of 1935 concerning the proposed settlement. In that first conversation Birch, according to Campbell, made most of the representations forming the basis of this action. On at least one occasion Campbell talked with Mrs. Birch, and she told him that they were anxious to settle the dispute. The balance of the negotiations were carried on by Benson. Birch contends that there is no evidence that Benson was his agent, and so testified on this trial. In prior proceedings he had freely admitted that Benson had negotiated the settlement for him. No useful purpose would be served by discussing the evidence on this point in detail. Suffice it to say that it is a reasonable inference from the evidence as a whole that Benson acted in this transaction as the agent of Birch. Benson represented that Miss Minter was angry at Birch and would foreclose him out of the entire Birch Holding Company stock if the Campbell dispute was not settled, and would force Birch into insolvency. Birch likewise represented to Campbell that he was faced with insolvency. These representations were palpably false. The record demonstrates that at all times Miss Minter and Birch were on the friendliest terms, and that she did whatever he told her to in reference to these various transactions. Although Birch was heavily involved, the record demonstrates that at no time did his status even approximate that of insolvency.

The deal between Benson and Birch was consummated on July 16, 1935. By that agreement the Birches transferred to Benson most, but not all, of their valuable assets, including the 100,000 shares of holding company stock. Benson agreed to discharge the liabilities against the properties transferred, and further agreed that when the holding company stock reached a net market value of at least $1,000,000 he would pay the Birches $500,000 cash. Coincidentally, Miss Minter canceled the various notes of the Birches purporting to represent the various debts owed to her by them, and accepted in lieu thereof the note of Benson for $162,574.66, payable ten years after date, to be secured by the holding company stock.

It was under these circumstances that in the middle of August, 1935, the compromise and lease modification agreements were entered into, with Benson handling the details for the Birches. At the request of Benson and with the approval of the Birches, the compromise was not handled in the normal way by entering a satisfaction of the existing judgments, but such judgments were assigned to Benson. The record shows that Benson then used the Campbell judgments to foreclose on the various equities retained by Birch in the few properties not already transferred to him in the July transactions. While the Benson-Birch agreement was still in effect Campbell brought an action against them to set it aside as in fraud of creditors. The record shows that this action was settled by Birch paying Campbell the sum of $12,000, the amount of his claims on the date of the trial. For reasons that

are not entirely clear, the Benson-Birch agreement was terminated in November, 1937, and all the properties turned over to Benson under the agreement were returned to Birch, and, in addition, the properties secured by Benson by executions under the assigned Campbell judgments still retained by Benson, were returned to Birch. The Benson note to Miss Minter was canceled and the Birches executed a $172,000 note in her favor secured by a pledge of a trustee's certificate representing the holding company stock.

From this evidence the trial court could, and apparently did, conclude:

1. That the representations that Birch was facing bankruptcy and would be forced into bankruptcy if the Campbell dispute was not settled, and that Miss Minter was intending to foreclose against Birch were false. It is quite clear that by reason of the confidential relationship existing between Birch and Miss Minter, and their affection for each other, she would never have threatened him with foreclosure, nor would she have proceeded against him. The only reasonable inference from the evidence is that she knowingly permitted her name to be used by Birch to promote his enterprises and to protect his investments.

2. That the reclamation bond transactions were outright sales and not loans, and that $80,000 of the indebtedness did not exist. It must be remembered that Birch failed to list this alleged liability in his financial statement of 1933.

3. That even if this indebtedness did exist, it is a reasonable inference that it, as well as the $50,000 indebtedness, was canceled by the transfers made to Miss Minter by Birch in 1932 and 1933.

4. That such indebtedness was fictitiously kept alive for the purpose of defrauding, among others, the plaintiff.

5. That Miss Minter and Mrs. Birch knew what Mr. Birch was doing, and knowingly permitted their names to be used in the attempt to defraud Campbell by creating the false impression that substantially all the assets of the Birches were pledged to Miss Minter as security for debts which in fact did not exist.

[2-5] Under these circumstances, the findings that the three appellants conspired to defraud, and did defraud Campbell, to his damage are amply supported. It is true that there is no evidence that Miss Minter made any false representations, that there is no direct evidence that she knew what Birch was doing, and that she and Birch testified the alleged debts actually existed. But, of course, the trial court was not required to believe their testimony. The trial court is the exclusive judge of the weight of the evidence and the credibility of the witnesses. It is its province to give to the evidence that weight to which, in its judgment, it is entitled, and to draw all reasonable inferences therefrom, and if, in its judgment, the evidence is entitled to no weight it may disregard such evidence altogether. 24 Cal.Jur. 886, § 135. The cases have frequently taken notice of the fact that it is next to impossible to secure direct evidence of a conspiracy, unless one of the participants has confessed, and that the proof must usually be inferential and circumstantial. Thus, in Johnstone v. Morris, 210 Cal. 580, 590, 292 P. 970, 975, it is stated: "In cases of conspiracy to defraud it is not to be expected that direct evidence of the conspiracy can be secured, because such evidence could usually only be secured in the event one of the conspirators confessed. The jury may infer the conspiracy from all the circumstances, and, if the inference is a reasonable one, it will not be disturbed on appeal. These principles have repeatedly been recognized by this court. In Revert v. Hesse, 184 Cal. 295, at page 301, 193 P. 943, 946, this court quoting from a Georgia case (Woodruff v. Hughes, 2 Ga.App. 361, 58 S.E. 551) said:

"'"The law recognizes the intrinsic difficulty of proving a conspiracy. The allegations with reference to conspiracy are treated as matters of inducement leading up to a more particular description of the acts from which conspiracy may be inferred. * * * The conspiracy may sometimes be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances." * * *'

"On the same page (301 of 184 Cal., 193 P. 943, 946) the court continued as follows: 'In the present action, while plaintiff was unable to prove any formal agreement between defendants Arthur Hesse and Sidney Beach, nevertheless, there was before the court the entire transaction resulting in the consummation of a flagrant fraud upon the plaintiff, in which transaction defendant Sidney Beach participated as an intermediary. * * * These circumstances, coupled with the further fact that defend-

ants Sidney Beach and Arthur Hesse were not strangers, but were on more or less intimate terms, occupying the same office, were sufficient to warrant the inference drawn by the trial court that defendant Sidney Beach was a party to a conspiracy which had for its object the fraudulent conversion complained of by plaintiff.'

"In Beeman v. Richardson, 185 Cal. 280, at page 282, 196 P. 774, 775, the rule is stated as follows:

" 'The point in connection with the finding as to a conspiracy is that the representations were made by the defendant Richardson alone, and that there is no direct evidence that the other defendants agreed that they should be made, or knew at the time that they were being made. But direct evidence of that character could hardly be had in the very nature of things, unless one of the defendants should confess, and the fact must be determined by the inference naturally and properly to be drawn from those matters which can be and are directly proven.' "

[6] If the inference that Birch paid all his obligations to Miss Minter is supported, and we think it is, then obviously Miss Minter knew that fact. With such knowledge, to have entered into the transactions above described makes her liable as a joint participant. The above reasoning likewise applies to Mrs. Birch. On this part of the case we conclude our discussion with the holding that under the evidence the inference of joint fraud was not unreasonable, and for that reason will not be disturbed on appeal.

[7] Appellants next contend that there is no evidence of damage, or, in the alternative, that the trial court applied the wrong measure of damages. These contentions are based on the theory that respondent did not elect to rescind by first returning what he had received, but instead elected to stand on the contract and sue for the damage suffered. If respondent had rescinded, the measure of damages, so far as general damages are concerned, would have been the full amount of the debt owed by Birch to Campbell, and the full amount due on the lease. But, it is urged, when a defrauded plaintiff elects to stand on the contract and sue for damages, the measure of damages is different. It is urged that in such event proof must be made that the claims which were relinquished as a result of the fraud, were in fact collectible, and that, in this case, no such evidence was introduced, and no such finding made.

These contentions are unsound. They are given color only because of language used in certain cases where the factual and legal situation was entirely different from that involved in the instant case.

[8] Running through appellants' argument on this point is the implication, that there is something questionable about a defrauded plaintiff electing to sue for damages, rather than rescinding. There can be no doubt of the propriety of such procedure. In Bozarth v. Birch, 52 Cal.App. 55, 198 P. 222, in a case where the alleged fraud was strikingly similar to the one involved in the instant case, this same appellant urged that the sole remedy under such circumstances was to rescind, and cited Bancroft v. Bancroft, 110 Cal. 374, 42 P. 896, one of the cases relied upon in the present case. The court held that where a contract is secured by undue influence, the proper remedy of the injured party is to rescind, but where the defendant secures an advantageous contract by fraudulent representations, the injured party may elect to affirm the contract and sue for the fraud. The same rule was announced in Westerfeld v. New York Life Ins. Co., 129 Cal. 68, 58 P. 92, 61 P. 667, the main case relied on by appellants. See, also, 12 Cal.Jur. 781, section 49, where the many authorities establishing the rule are collected and commented upon.

In support of their contention that before damages may be recovered in such an action there must be proof and a finding that the compromised or modified claim was in fact collectible, appellants place their main reliance on the Westerfeld case, supra. In that case the insurance company had issued a $10,000 life policy to Westerfeld containing a provision that at the expiration of five years the insured might surrender the policy and receive the then cash value. The complaint filed by the executors of Westerfeld's estate alleged that after four annual premiums had been paid an arrangement was entered into whereby a new policy was issued in place of the old one, and that it was agreed that the cash value of the old policy would be computed and applied to the fifth premium on the first policy, the surplus to be applied to future premiums on the second policy. Westerfeld died with both policies in his possession and, at the time of death, had received no notice of the cash surrender

value of the first policy, which was sufficient to pay the fifth premium on the first policy and the first premium on the second. The executors demanded payment of the second policy. The theory was that the defendant was alleged to have made fraudulent statements to the executors to the effect that the second policy was never in force and that the first policy had become void by failure of Westerfeld to pay the fifth premium, and that, based on these fraudulent representations, the executors had entered into a compromise under which both policies were surrendered upon payment of $2,666.66.

The defendant admitted making the representations but contended that they were true. They urged that it was a fact that the second policy never became effective and that the first one had lapsed. No rescission was had. The trial court instructed the jury that the measure of damages was the difference between the compromise payment and the face of the policy. In reversing the decision the court held that in such event, where the existence of the compromised claim is in dispute, if an action for fraud as distinguished from rescission may be maintained, which was doubted, it is incumbent upon the plaintiff in proving damages, to show that the compromised claim was in fact collectible.

It is obvious that the rule of the Westerfeld case only applies where the compromised claim is disputed, either as to its existence or as to its amount. Not only does the case expressly so hold, but in Taylor v. Hopper, 207 Cal. 102, 276 P. 990, the case was so interpreted. In that case it was stated (207 Cal. page 105, 276 P. page 991):

"The case of Westerfeld v. New York Life Ins. Co., 129 Cal. 68, 58 P. 92, 61 P. 667, relied upon by appellant, is not helpful to her cause, for that case holds that, for the plaintiff to maintain such an action as we are here considering, the compromise sought to be avoided must have been of an undisputed claim. In the decision of the court commissioner, adopted by the court, it was said: 'Cases of that nature (where one who seeks to rescind a compromise agreement on the ground of fraud is not required to restore the money he has received) arise when a party has been led by fraudulent contrivance to accept less money than was due him on an undisputed claim, as in Gilson, etc., Co. v. Gilson, 47 Cal. 597.' The compromise made in the case before us was of a disputed claim, unliquidated in amount, and there is no practicable measure of damages for the action sought to be maintained. The demurrer, therefore, was properly sustained without leave to amend."

[9, 10] In the case at bar the claims compromised were not disputed either as to amount, or as to their existence. Over $6,000 of the compromised amount had been reduced to judgment. The balance was of sums admittedly due under the lease. So far as the modification of the lease is concerned, it was conceded that the obligation was fixed and certain. The amount compromised was definite and undisputed. Obviously, this case is of the type that falls directly within the exception to the rule announced in the Westerfeld case, supra, and quoted in the Taylor case. In effect, the cause of action is one where the damage suffered by the defrauded party is fixed and certain—just as fixed and certain as if the defrauded party had technically rescinded. Obviously, if no compromise had been made, plaintiff would have been entitled to a judgment or judgments for the unpaid rent. The judgment in the present case is exactly in the amount the plaintiff would have been entitled to if no compromise, induced by defendants' fraud, had been negotiated. What other measure of damages would compensate the defrauded party under such circumstances? The only way the defrauded party can be made whole is to return to him the amount to which he admittedly would be entitled had the fraudulent compromise not been secured. To urge that the defrauded party must show that the undisputed liability was in fact collectible in the sense that the defendants were financially responsible is to bring in a false issue. Courts in rendering judgments are not interested in whether the plaintiff can collect the same—they are concerned with the amount of the damage suffered. The collectibility of the compromised judgments and claims, and the collectibility of the present judgment, are matters which are entirely beyond the issues in this case. When the plaintiff proved the claims were fixed, definite and admitted as to their existence and amount he proved they were "collectible" as that term is used in such cases. Where the claim forming the basis of the compromise is fixed and certain, and where the plaintiff under any theory is entitled to keep the amount paid on the compromise, the meas-

ure of damages, so far as general damages are concerned, is prima facie the difference between the amount paid on the compromise and the face amount of the fixed and certain claim.

[11] Appellants also urge that certain alleged rights obtained in the compromise by respondent were not taken into consideration in determining the damages. Thus it is urge that Mrs. Birch guaranteed the reduced rental due under the lease as modified for five years, and it is urged that the trial court should have considered the value of this guarantee in fixing the damages. Appellants also urge that under the modified lease an option to purchase was canceled, and that the value of such cancellation should have been fixed. The obvious answer to these points is that the respondent pleaded and proved his damage in the form required by law. If appellants believed the matters above-discussed had any value, that was a matter of defense which should have been pleaded and proved by them. No issue was made in the trial court on these points and it is too late to raise them for the first time on appeal.

[12] Appellant A. Otis Birch complains of that portion of the judgment which allows respondent as against this appellant $375 for investigation expense and $878.85 by way of attorney's fees. These amounts were allowed against this defendant under a provision of the original lease, which remained unchanged by the modification, and which reads as follows:

"It is hereby agreed between the parties hereto that Lessee shall pay all reasonable costs, expenses and attorney's fees incurred by or against Lessors in any litigation between the parties hereto or persons claiming under them, arising out of or in connection with this lease or the construction or enforcement thereof, in case the Lessors or parties claiming under them shall prove successful in such litigation. * * *"

The judgment against all three defendants is in the total amount of $8,413.59. According to the findings, $5,000 of this amount is for the difference between the reduced rentals and the amount called for in the lease. The balance was for the difference due under the lease and the amount of the compromise. All claims forming the basis of the judgment "arose out of and in connection with the lease" as provided in the lease agreement. It was therefore proper for this allowance to be made.

For the foregoing reasons the judgment appealed from should be, and hereby is, affirmed.

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., concurred.

CARTER, Justice (dissenting).

I dissent.

I am unable to agree with either the conclusion reached in the majority opinion or the reasoning upon which it is based. As the conclusion reached therein is based upon inferences drawn from certain facts, I will first state the facts as disclosed by the record.

It appears that for some time prior to August 1, 1935, defendant A. Otis Birch had been a tenant of certain real property under a 99-year lease dated June 6, 1928, which had been assigned to him immediately following its execution. The rental payable under said lease was $1,000 per month. Said defendant had failed to pay such rental for the period from October, 1934, to April, 1935, and plaintiff had recovered judgments against him therefor in the sum of $6,395.70. Defendant had also failed to pay the rental due under said lease for the months of May, June and July, 1935, and plaintiff had demanded of said defendant the sum of $3,016.89 in payment thereof.

On August 20, 1935, after considerable negotiating between the parties, plaintiff entered into an agreement with defendants A. Otis Birch and M. Estelle C. Birch, his wife, dated August 1, 1935, whereby the indebtedness of said defendant. A. Otis Birch amounting to $9,412.59 was settled for the sum of $6,000, and it was further provided that the rental under said lease be reduced for the ensuing five years on a graduated scale. Commencing August 1, 1935, the rental was reduced from $1,000 to $500 per month. This agreement was performed by defendant and he thereafter paid plaintiff the reduced rental agreed upon for the period commencing August 1, 1935, to May 1, 1936.

Plaintiff thereupon commenced this action alleging that defendants A. Otis Birch and M. Estelle C. Birch, who are husband and wife, induced plaintiff to execute the settlement agreement by means of false and fraudulent representations as to the financial condition of said defendant A. Otis Birch. Lula M. Minter was joined as a de-

fendant on the ground that she participated in the conspiracy to defraud complained of by plaintiff.

The complaint alleges that defendants falsely and fraudulently represented to plaintiff and he was thereby led to believe that at the time said agreement was executed and for some time prior thereto defendant A. Otis Birch was in an unsafe and dangerous condition financially; that he was indebted to defendant Minter in the sum of $25,000 represented by a note secured by a trust deed on certain real property owned by defendant A. Otis Birch; that he was also indebted to defendant Minter in the sum of $130,000 secured by a pledge of 100,000 shares of stock, being the entire capital stock of the Birch Holding Company, which in turn held all of the stock of the Birch Securities Company and Birch Ranch and Oil Company, which two last-mentioned companies owned practically all of the properties in which the Birches were interested, and that if plaintiff insisted on the payment of the rental provided for in said lease, Minter would sell said stock under the pledge and render Birch insolvent. The complaint further alleged that defendant Minter conspired with defendants Birches to accomplish such fraud. Plaintiff also claimed as against defendant A. Otis Birch the sum of $531.90 as expenses incurred in preparing proof for the action, and also attorney's fees by reason of a clause in the lease providing for the same in any action in connection with the lease. Plaintiff further alleged that the representations were false; that the note, trust deed and indebtedness to defendant Minter were fictitious and nonexistent; that plaintiff in belief and reliance on their genuineness was induced to execute and perform the settlement agreement, and that he was damaged thereby in the sum of $3,413.19 by reason of the settlement of the judgment and the sum of $5,000 by reason of the receipt of less rent for the period of ten months under the lease as modified.

During the course of the trial plaintiff's counsel conceded that if the indebtedness from Birch to Minter actually existed, plaintiff could not prevail in this action.

The findings of the trial court followed substantially the allegations of the complaint, and judgment was entered for plaintiff against all of the defendants for $8,413.59, and against defendant A. Otis Birch individually for $375 expenses preparing for trial and $878.85 attorney's fees.

Defendants' main contention in support of their appeal from the judgment rendered against them is the insufficiency of the evidence to support the findings of the trial court upon which the judgment is based.

The evidence produced by plaintiff as to the misrepresentations alleged to have been made by defendants was as follows: Plaintiff testified that in 1933 defendant, A. Otis Birch, furnished him with a financial statement showing various assets and liabilities; that during the period from March to July, 1935, at a time when said defendant was in default under the lease and had not paid the judgments for rent, two supplementary proceedings were conducted by plaintiff in aid of the enforcement of the judgments against said defendant; that during such proceedings and also in conversations between defendant, A. Otis Birch, and plaintiff, the former stated, that "his financial condition was such that he did not have funds available to pay the rent and that he would have to have a modification; that he simply could not go on. That he owed lots of money and he told me the different amounts that he owed"; that he owed defendant Minter $130,000 on a note and that she held the stock (100,000 shares) of the Birch Holding Company "and that he owed her $25,000 on a second mortgage on the Broadway property;" that "he was living by borrowing from his relatives; he was practically broke. The only available funds he had were those borrowed from his relatives;" that unless "he did get relief he would have to go into insolvency, or bankruptcy, *or something.*" That he had "nothing that was tangible, that you could collect anything on, and everything seemed to be mortgaged to the limit." Plaintiff stated that a certain Stanley C. Benson, whom he claimed was Birch's agent (the consummation of the negotiations culminating in the execution of the settlement agreement on August 20, 1935, were carried on between Benson and plaintiff) had stated to him during the same period that he (Benson) personally knew that the Minter obligations existed, and that he could get Minter to "not close out" Birch if the lease could be modified. Plaintiff further testified that defendant, M. Estelle Birch, stated to him that "they (the Birches) were in bad financial condition," and that she gave him the "impression" that they "were practically broke, insolvent"—she did not say it in those words,

but would give you that "impression." With respect to factors upon which plaintiff relied in executing the settlement agreement he testified:

*"I believed * * * that Mr. Birch on August 1st really owed Miss Minter $130,000.00 on the property, which was what I considered the fact * * * and I believed that all I could do would be to attach the stock in order to collect any money, and that Miss Minter would come in with a $130,000.00 mortgage and take it away from me, because I could not pay off that large of a loan, as well as relying upon the fact that Mr. Birch had said unless he did get relief he would have to go into insolvency, or bankruptcy, or something."*

In regard to the basis for this action, plaintiff testified:

"Q. And one of the reasons you filed it (the action) was because you felt she (Minter) *did not have enough money to loan Mr. Birch approximately a hundred twenty-five or a hundred fifty thousand dollars?* A. $155,000.

"Q. You also said, I believe, that when the representation was made to you that Mr. Birch had given his note, secured by stock, to Miss Minter for $130,000.00 and the additional $25.000.00 was loaned, when the representation was made to you you believed it? A. Yes.

"Q. And you relied upon it in making this adjustment? A. Yes.

"Q. And then subsequently you made up your mind that that was untrue? A. That is right.

"Q. Now, if you had ascertained that the $130,000.00 and the $25,000.00 had actually been loaned, then you would not have brought this suit would you? A. Why, no."

It follows therefore that the representations upon which plaintiff must rely to support the judgment are those concerning the indebtedness to Minter and the pledge of stock and trust deed securing it. The evidence establishes that such representations were made and that plaintiff relied thereon and was thereby induced to execute the settlement agreement. It may be inferred from the circumstances that they were made by Birch for the purpose of inducing plaintiff to act upon them.

It is, however, necessary in order for plaintiff to make out a case, to prove that those representations were false. Defendants assert that plaintiff not only failed to prove the falsity of the representations complained of but that the evidence establishing the truth thereof stands uncontradicted. In order to have a clear understanding of the facts relating to the transactions between the Birches and Miss Minter it is necessary to review the history of these transactions. According to the evidence, A. Otis Birch commenced borrowing money from his cousin, defendant Minter, and her relatives many years before this controversy arose. Various transactions were had between them in which sums were borrowed and partly repaid, including the sale by Birch to Minter of bonds in a reclamation district which Birch agreed to repurchase from her at face value. There were periodic settlements between them of their accounts. During that time and up to 1930, Birch had assets amounting to several million dollars in value. In an adjustment between them in about October, 1934, various obligations were aggregated and adjusted, the upshot being that Birch gave Minter his note for $130,000 and pledged to her as security 100,000 shares of stock of the Birch Holding Company, the same being the entire issue of that company. Plaintiff did not controvert the evidence of such balance as being a genuine indebtedness. I will not attempt to discuss the many transactions leading up to that adjustment; however, from an examination of the evidence I am compelled to conclude that not only did plaintiff fail to sustain the burden of proving that the indebtedness did not exist in 1934 when the adjustment was made, but defendants' evidence sufficiently establishes that it did exist. At about that time Birch caused to be organized three corporations, the Birch Ranch and Oil Company, Birch Securities Company, and Birch Holding Company. He transferred the bulk of his property and holdings to the first two corporations the stock of which was taken by the last-mentioned corporation. The stock of the Birch Holding Company was issued to Mr. and Mrs. Birch, 49% and 51% respectively. A note was given by defendants Birch to Miss Minter on November 8, 1934, for $15,000, secured by a second trust deed on certain property known as the Broadway property which was not included in the transfer to Birch Holding Company. The trust deed provided that it was also to stand as security for future advances. (This note and trust deed are the ones claimed to be fictitious and executed for the purpose of defrauding plaintiff.) There was a first trust deed

held by a bank against the property for some $25,000. Defendant A. Otis Birch testified that he received $15,000 upon the execution of the note and trust deed and that an additional $10,000 was advanced by Minter to Birch under the trust deed on or about May 1, 1935. Defendant Birch also testified that in 1932 he transferred to Minter stock in Lyon Storage Company and several other corporations, of the value of from $60,000 to $100,000 in return for her promise to devise to him by will certain real property owned by her; *that in accordance with her promise she devised the property to him;* and that in 1933 he transferred to her 90% of the stock in the Birch-Smith Storage Company. He also stated that he gave or sold the stock to her. The evidence is conflicting as to the value of the stock, Minter and Birch stating that it was practically without value, and Smith, an officer of the company, testifying that its value in 1933 was $75,000 less an $8,543.32 loss. On July 16, 1935, Benson and defendants Birch entered into an agreement wherein it was recited that said defendants had many financial difficulties, and had transferred most of their assets to the three Birch corporations heretofore mentioned, and the corporations assumed some of Birch's liabilities; that Birches were endeavoring to refinance their and the corporations' obligations; that Benson had purchased some of Birches' property at execution sale. It was then agreed that Benson would obtain for Birches a release of all liability to Minter for the $130,000 and $25,000 indebtedness, and assume and agree to pay the same to Minter; that the stock in the Birch Holding Company was to be transferred to Benson, subject to indebtedness owed to Minter and $76,000 to Mrs. Conaway and to future loans from Minter, not exceeding $200,000 and from Conaway not exceeding $150,000; that the directors and officers of the three Birch Companies were to resign and be replaced by persons of Benson's choice; that Benson was to pay all the debts of the Birch Corporations and some specified personal debts of the Birches; that all refinancing necessary to pay such debts must be so done that the Birches would have no personal liability; that the Birches were to receive sufficient for living expenses; that the market value of the stock of the Birch Holding Company is $1,000,000, and that if and when the corporations' liabilities are refinanced, Benson was to pay Birches $500,000; Birch was to manage the corporations' property subject to the direction of the boards of directors. Pursuant to that agreement Minter released Birches from the $130,000 and $25,000 obligations and accepted in lieu thereof Benson's note, to be secured by a pledge of the stock of Birch Holding Company, and with an agreement that such security could be used for $200,000 additional future loans from Minter to Birches; a voting trust agreement was made between Benson and Birches with reference to the Birch Holding Company stock, under which Birches held the stock as trustee with voting authority and with Benson as beneficiary, and providing that the stock was to be deposited with the trustee, the Birches to issue a trustee's receipt to Benson. The receipt was issued but not endorsed to Minter, and it is not clear whether she received it or not. She testified that as the result of the Benson-Birch agreement of July 16, 1935, she received the stock of the Birch Holding Company issued in Benson's name as security for Benson's note. The Benson-Birch arrangement was discarded in 1937. Benson gave Minter his note for approximately $162,000, the same representing the $130,000 and $25,000 obligations and interest thereon. When the Benson-Birch arrangement was discarded the Birches gave their note for about $172,000 to Minter.

It is plaintiff's position that several inferences may arise from the various transactions engaged in by the Birches and the foregoing events which support the judgment. Among others he refers to the Benson-Birch agreement in which it was recited: "You know we had many financial difficulties; that we formed three corporations last October (the Birch Companies)—for reasons with which you are familiar; that we transferred certain assets to these corporations subject to the assumption by them of certain liabilities; that we retained considerable real estate, and we have been making strenuous efforts to refinance all of our obligations. You yesterday purchased at an execution sale three parcels of real estate formerly owned by us." This is followed by provisions to the effect that in the refinancing plan the personal liability of the Birches is not to be incurred. Plaintiff asserts that from that agreement the inference follows that the three Birch Corporations were formed and the stock of the Birch Holding Company pledged to Minter to avoid liability and defraud credi-

tors. In my opinion that inference does not follow. The personal liability referred to was that which might occur while Benson was endeavoring to refinance Birch's liabilities and adjust his financial difficulties. It was personal liability in the future not the past which was referred to in the agreement. One of the main lawful reasons for incorporating a business is to avoid the risk of personal liability. Therefore it cannot be said that the formation of the corporations supports plaintiff's case. That was entirely legitimate. *In any event it must not be lost sight of that the action here is for damages for alleged fraudulent representations,* to wit: that the Birchs were indebted to Minter. *No issue is presented by the pleadings regarding the use of the corporate entities for fraudulent purposes.*

Plaintiff reasons that because there was no endorsement as security for the Benson note to Minter of the trustees' certificate (representing stock in the Birch Holding Company) which arose out of the Benson-Birch agreement of July 16, 1935, and no evidence of its transfer to Minter except her evidence that the stock was delivered to her after July 16, 1935, issued in Benson's name, the court was justified in inferring that there was no pledge of the stock of that company to her in October, 1934, for an indebtedness in the sum of $130,000. No such inference reasonably follows. The matters are not necessarily related to each other. The Benson-Birch agreement of July 16, 1935, provided for the payment of the Birch indebtedness to Minter by Benson, and that the stock was to remain as security therefor. It is clear from what has heretofore been said that from the transactions between Benson and the Birches, Minter was still protected in her security for her obligation originally owed by the Birches to her. There was no change in the essential situation insofar as plaintiff was concerned by reason of the Benson-Birch transaction; there was no such change in Birch's financial position between the time Birch stated to plaintiff that he was indebted to Minter and the time the plaintiff-Birch settlement agreement was executed about August 20, 1935, which would be beneficial to plaintiff. It is true that in that transaction (Benson-Birch) Minter released the Birches on their obligations but the property of the Birches still remained liable therefor under the Benson-Birch agreement.

Plaintiff urges and the majority opinion agrees that from the foregoing transactions it may be inferred that defendants were engaged in a scheme whereby they could reduce their liabilities, reduce their obligations under the lease in which plaintiff was the lessor, and put their property out of the reach of their creditors. From the entire record I cannot agree that such an inference reasonably follows. Rather, the plain purpose seems to have been an honest endeavor on the part of the Birches to alleviate a serious financial involvement to the ultimate benefit of both themselves and their creditors. But even if such an inference may be drawn, it is not sufficient to support the judgment because *this is not an action to set aside conveyances as having been made with the intent to defraud creditors.* As we have seen, it is an action for damages for fraudulent representation; the gist of such representations are that the Birches were indebted to Minter in the total sum of $155,000 and that the same was secured by liens on real property and corporation stock. It does not follow from a general scheme to reduce their liabilities that the indebtedness to Minter was fictitious or false.

With respect to the falsity of the representations concerning the indebtedness to Minter there is evidence heretofore-mentioned with reference to two transactions: First, that in 1933, Birch transferred to her 90% of the stock in the Birch-Smith Storage Company, and indicated that the value of the assets of that company were about $66,456.68. In regard to that transfer Birch testified:

"Q. How did she (Minter) acquire that stock? A. She bought—loaned me some other money and I gave her the stock.

"Q. When did you give her the stock? A. That is to say, *she purchased the stock of us.*

"Q. *When did you receive the money?* A. *Oh, about the time that the company was organized.*" Second, in 1932, Birch transferred to Minter stock in the Lyon Storage Company, Pacific Crest Cemetery, and Citizens National Trust & Savings Bank; that stock had a value of from $60,000 to $100,000. According to Birch's testimony it was made in return for Minter's promise to devise her home place to him by will; she did so devise it. Plaintiff urges, and the majority opinion is based upon the proposition that these transactions constituted a payment by Birch to

Minter of his indebtedness; that from the transfer of that stock an inference arises that such transfer was in payment of the debt and that therefore the debt did not exist. I do not believe that position is tenable. As seen, the evidence is uncontradicted that a portion of the stock was transferred in return for Minter's promise to devise property to Birch. Whether that transaction was particularly advantageous to Minter is of no significance. Birch could have made a gift of the stock and plaintiff would have been in no position to complain. As I have stated before, plaintiff is not seeking to have the transfer set aside as in fraud of creditors. There is no law that prevents a debtor from giving one creditor a preference over others; indeed, the rule is to the contrary. Civil Code, § 3432; 12 Cal.Jur. 1009, et seq.

In regard to the transfer of the securities being made in consideration of Minter's promise to devise her property to Birch, we have the uncontradicted evidence that said transfer was *not made in payment of the debt;* that it was a sale to Minter for which she paid the purchase price. In order to escape the effect of that evidence, the majority decision relies upon two propositions: first, that the trial court could have disbelieved defendants' evidence on the subject; and second, that an inference of payment arose from the transfer of the securities. With the first I agree, but where does that leave us? It must be remembered that the *burden of proof was upon the plaintiff* to establish that the indebtedness which Birch claimed to owe Minter was fictitious. But the majority opinion, in order to support its conclusion, declares that there is an inference of payment of such indebtedness by the transfer of the securities above-mentioned, and that the judgment is thereby supported. That premise must fail because there is no such inference. On the contrary the presumption commonly invoked between creditor and debtor, is that when the debtor retains possession of the instrument representing the obligation, it is concluded that the debt has not been paid. Light v. Stevens, 159 Cal. 288, 113 P. 659; Levey v. Henderson, 177 Cal. 21, 169 P. 673. And where payments are made by the debtor to the creditor, but the latter retains possession of the instrument representing the obligation, it is presumed, in the absence of evidence to the contrary, that the payment was made on some obligation other than the one involved in the action. Light v. Stevens, supra. In the case at bar, the notes representing the indebtedness were in Minter's possession, and furthermore, they called for their payment *in money.* There is no evidence or possible ground for an inference that Minter agreed to accept securities rather than cash in payment of her claim. If it be asserted that there was an inference of her consent to accept payment in a medium different than that called for in her notes, then the result reached by the majority would require the building of an inference upon an inference; that is, first an inference of payment, and then the further and additional inference that a different medium than cash was acceptable to Minter in payment of Birch's obligation to her.

It is also pertinent to observe that even if it be assumed that the debt was paid by the stock transfers prior to 1934, we have the notes themselves which were executed *after* those transfers. Such instruments are presumed to be supported by adequate consideration. Civil Code, § 3105. There is no evidence rebutting that presumption. The transfers of the stock having occurred prior to their execution could not upon any theory be deemed a basis for an inference of payment. Furthermore, the execution of the notes after the transfer gives rise to the inference that the stock transfers were not payment. There is no room for a contrary inference.

In this connection it should be noted that the majority opinion fails to consider plaintiff's own testimony that his position would have been no different even if the stock had been *given* by Birch to Minter. He testified:

"Q. I am going to ask you, Dr. Campbell, whether or not if you knew the fact to be that Miss Minter had taken the Birch Storage stock *as a gift* from Mr. Birch it *would have* also *induced you to make the contract of August 1, 1935?* A. That fact alone?

"Q. Yes. A. No.

"Q. Would that have assisted in inducing you to make the contract of August 1, 1935, if you knew that instead of Mr. Birch putting it up as a security for a loan with Miss Minter that in effect Mr. Birch had given her the stock? A. *Yes, I think it would have been about the same,* it would have been lowering his assets." Thus, even if Birch gave the stock to Minter, plaintiff would have felt he had been de-

frauded when in fact he would not have been.

In addition to the foregoing, it must not be forgotten that in an action for damages for fraud the burden of proof of all of the elements thereof, including the falsity of the representations, rests upon the one asserting the fraud. McEwen v. New York Life Ins. Co., 42 Cal.App. 133, 183 P. 373; Moore v. Giffen, 110 Cal.App. 659, 294 P. 730; 12 Cal.Jur. 816, 818. Plaintiff failed to meet that burden with evidence of any probative force. On the contrary the evidence shows the truth of the existence of the indebtedness to Minter. This is especially true in the light of the firmly established rule that fraud is never presumed, except under certain circumstances where fiduciary relations exist, rather the presumption is in favor of fair dealing. Code of Civil Procedure, § 1963 (19); 12 Cal.Jur. 816, 818.

The undisputed evidence in the record discloses that during the three or four years immediately preceding August 1, 1935, defendant A. Otis Birch became seriously involved financially and his obligations increased to such an extent that he was having great difficulty in meeting them; in fact, plaintiff had recovered two judgments against said defendant for rent which had accrued under the lease in question and plaintiff had been unable to enforce satisfaction of these judgments. Plaintiff does not seriously question the fact that Miss Minter was financially able to make the loans to defendant A. Otis Birch which formed the basis of the representations which plaintiff now asserts were untrue. There was no direct evidence offered to contradict the testimony of defendant A. Otis Birch and Miss Minter that the indebtedness claimed did actually exist, and there is no evidence from which an inference can be drawn that such indebtedness was fictitious or that the representations made by defendant A. Otis Birch to plaintiff in relation thereto were false.

Of course, if the evidence is insufficient to establish the fraud on the part of Mr. Birch, then Minter and Mrs. Birch necessarily are not liable. But assuming it is sufficient, there is a total lack of evidence to charge Minter and Mrs. Birch with Mr. Birch's fraudulent representations. It is conceded in the majority opinion that neither Mrs. Birch nor Minter made any representations to plaintiff, fraudulent or otherwise. In regard to Mrs. Birch, there is no evidence that she had any knowledge that the indebtedness to Minter was fictitious or that any representations were made by her husband in connection therewith. The sole evidence in the record touching upon her connection with the transaction is that she knew nothing about Birch's business transactions; and that she was anxious to have the transaction settled. Surely, that is not sufficient to support a judgment against her.

The basis stated in the majority opinion for holding Minter liable as a conspirator is that she must have known that the indebtedness between her and Birch was fictitious. She made no representations, had no knowledge of any being made, or of the settlement transaction between Birch and plaintiff. *There is no showing of any plan, or scheme, or agreement between Birch, Minter and Mrs. Birch to engage in a conspiracy to defraud plaintiff.* It is essential to establish a conspiracy that a common plan and design for concerted action be proved. There is no evidence of such an agreement.

For the foregoing reasons, I believe that the judgment should be reversed.

SHENK and CURTIS, JJ., concurred.



50 Cal.App.2d 304

ROWE v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13449.

District Court of Appeal, Second District, Division 1, California.

March 3, 1942.

1. Workmen's compensation ⇐1939

A judgment of the Industrial Accident Commission may not be disturbed if the judgment is supported by substantial evidence.

2. Workmen's compensation ⇐1939

An award of the Industrial Accident Commission rating employee's disability at 47½ per cent. was conclusive where there was evidence of a substantial character to

support the findings of the commission, notwithstanding that certain "ratable disabilities factors" were not referred to in detail in the finding, since such fact did not disclose that such factors were not considered by the commission.

Proceeding by Everett F. Rowe, petitioner, to review an order of the Industrial Accident Commission, respondent, awarding compensation under the Workmen's Compensation Act for personal injuries.

Award affirmed.

Ernest P. Morgan, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

DORAN, Justice.

Petitioner seeks a review and annullment of the findings and award of the Industrial Accident Commission. In that connection petitioner contends that "the sole question presented by this proceeding is whether or not there is uncontradicted evidence in the record showing permanent disability factors which have not been considered by the commission in rating petitioner for permanent disability." It is argued in support of this contention that the Industrial Accident Commission acted without and in excess of its powers in its rating of the petitioner for permanent disability. As pointed out by petitioner: "Objection to the award is made primarily because the commission rated petitioner for certain disabilities enumerated in the findings * * * and failed and refused to make any findings upon other and serious ratable disabilities which are shown to exist by uncontradicted evidence." Quoting further, the petition contains the following: "Conceding, therefore, that the findings of permanent disability as above described, do support the award, it is contended that there is undisputed evidence of many other ratable disabilities factors which were not considered by the rating department of the commission, if the only disability factors considered are those enumerated in the report and subsequently embodied in the findings. This certainly must be the case in view of the directions given in the report to the effect that if the permanent disability is described in the language of the report the recommended rating would be 47½%. Further objection is made to the award for the reason the findings of permanent disability as described in the findings and award, are indefinite, ambiguous and uncertain as to those factors which are shown therein, as for example: 'Marked limited motion of thumb and fingers of major hand'; 'Marked loss of grasping power.' Such vague expressions of disability have no support in the medical reports filed as evidence in the case. All of the reports, without exception, show a permanent total disability of the right hand." It is further argued in support of the foregoing that the commission "has failed lamentably in its duty to petitioner in rating an obviously 100% total permanent disability at only 47½%"; and that "the award is unjust and unreasonable and should be annulled, in that the commission abused its discretion and in rating petitioner did not take a fair view of the circumstances of the case."

[1] It is evident from the foregoing that petitioner's contentions may be summed up as a disagreement with the judgment of the Industrial Accident Commission. In that connection, however, it is elementary that the judgment of the commission may not be disturbed if supported by substantial evidence. Manifestly, the judgment of the court cannot be substituted for the judgment of the commission.

[2] The record reveals that the findings are sufficient. From the fact that certain "ratable disabilities factors" are not referred to in detail in the findings, it does not necessarily follow that such factors were not considered by the commission. The record further reveals that there is evidence of a substantial character to support the findings. In the circumstances, there can be no question as to the jurisdiction of the commission in the premises and accordingly the award is affirmed.

YORK, P. J., and WHITE, J., concurred.

50 Cal.App.2d 303

BALLAGH v. WILLIAMS et al.

Civ. 13268.

District Court of Appeal, Second District, Division 1, California.

March 3, 1942.

Rehearing Denied March 28, 1942.

1. Attachment ⇐296

Where third party claim to attached corporate stock was presented to the sheriff on February 2, 1940, but petition of third party claimant was not filed until February 14, 1940, court was without jurisdiction to determine the third party claim since the petition was not filed within 10 days after delivery of the claim to the officer as required by statute. Code Civ.Proc. § 689.

2. Attachment ⇐302

The statute regarding third party claim does not authorize trial of a third party claim where writ of attachment or execution has been levied upon corporate stock. Code Civ.Proc. § 689.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action to recover a money judgment by J. C. Ballagh against W. J. Williams, wherein attachment was levied on certain corporate stock and Baldwin Robertson filed a third party claim to the stock. From judgment dismissing the petition of the third party claimant, the third party claimant appeals.

Affirmed; appeal from order dismissed.

Baldwin Robertson, in pro. per., of Los Angeles, for appellant.

Musick & Burrell, Gwyn S. Redwine, and Clayton Straub, all of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

In this action to recover a money judgment the plaintiff levied an attachment on the interest of the defendant in and to certain corporate stock. After the judgment in favor of the plaintiff, and before levy of execution, a third party claim to the stock was filed. Upon the hearing of the third party claim, plaintiff's objection to any evidence was sustained on the ground that the court had no jurisdiction to determine the merits. From the minute order and judgment of dismissal of the petition of the third party claimant, this appeal is prosecuted.

[1] The claim was presented to the sheriff in accordance with the provisions of section 689, Code of Civil Procedure, on February 2, 1940. The petition was filed February 14, 1940, more than ten days after the delivery of the claim to the officer. The code section provides that the petition must be filed within ten days. Therefore, the court was without jurisdiction to hear the matter.

[2] This appeal must be determined against appellant for another and additional reason. There is no authorization under section 689, Code of Civil Procedure, for the trial of a third party claim where a writ of attachment or execution has been levied upon corporate stock. Bank of America Nat. Trust & Savings Ass'n v. Riggs, 39 Cal.App.2d 679, 104 P.2d 125.

The judgment is affirmed; the appeal from the minute order is dismissed.

YORK, P. J., and DORAN, J., concurred.



50 Cal.App.2d 115

TAYLOR et al. v. ODELL.

Civ. 13218.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1942.

1. Mines and minerals ⇐73

The right of a lessee under an oil and gas lease depends wholly upon the terms of the lease agreement.

2. Mines and minerals ⇐73

Where granting clause of oil and gas lease provided that lessor leased to lessee certain portions of the lands under lease by the lessor and there was no reservation of the surface rights in the lessor, lessee's rights were not limited to mere production and lessee had power to make contract regarding use of surface by another.

3. Mines and minerals ⇐105(2)

Where corporate owner of oil and gas lease was owned by two persons, one of

whom managed the corporation, a contract made by manager concerning part of surface of land covered by oil and gas lease which contract was ratified by co-owner was valid.

4. Mines and minerals ⇐74

Where neither oil and gas lease nor assignment of it reserved any surface rights and assignee had taken possession of land involved, which was owned by several persons, one of such persons was without power to grant original lessee any surface rights.

5. Evidence ⇐441(4)

Any prior oral agreement could not vary the terms of a written oil and gas lease. Code Civ.Proc. § 1856.

6. Landlord and tenant ⇐76(1)

A restriction against assignment is a "personal covenant" made for the benefit of the landlord and does not "run with the land".

See Words and Phrases, Permanent Edition, for all other definitions of "Covenant Running with the Land" and "Personal Covenant".

7. Landlord and tenant ⇐76(3)

In the event of an assignment of rights under a lease contrary to a covenant forbidding such assignment, such assignment is valid, but the landlord alone has the option to forfeit the lease for the breach of covenant; and if the landlord ignores the breach the lease is valid as to all other parties.

8. Mines and minerals ⇐74

Where assignor of oil and gas lease containing inhibition against subletting any portion of premises without assignor's written consent knowingly permitted sublessee to occupy part of land, it "waived" requirement of written consent.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

9. Mines and minerals ⇐60, 79(1)
Tenancy in common ⇐3

An owner of 20 per cent. of the production of an oil company was a "tenant in common" with such company and was "estopped" to challenge the title of another oil company which as lessee in possession of property sublet a portion of it to such owner's cotenant.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop" and "Tenant in Common".

10. Mines and minerals ⇐74

Where lessee of oil and gas lease sublet a portion of surface of land involved for a royalty interest in net sales of sublessee and later assigned the lease alone, the assignor did not part from its title to the royalty.

11. Frauds, statute of ⇐63(2)

That assignment of royalty interest in net sales of oil company was not made in writing was immaterial in action for accounting.

12. Mines and minerals ⇐79(7)

Where all parties concerned were satisfied and were plaintiffs and judgment creditors, the fact that owner of royalty interest in net sales of sublessee oil company had given interest to his wife was no defense to action for accounting of the royalties.

13. Limitation of actions ⇐39(9)
Mines and minerals ⇐74

Where lessee in possession under oil and gas lease sublet by parol agreement portion of surface for royalty interest in net sales of oil company during productive life of well, sublessor became "owner" of such percentage upon occupancy by sublessee, which was "ratified" by passing of each day sublessee remained in peaceable possession and such royalty was an "incorporeal interest in real property" and person holding the royalties for sublessor was a "trustee", and action to collect royalties was an "action to recover rents and royalties earned by realty" which was not governed by limitation relating to "contract not in writing" but by limitation relating to "action not hereinbefore provided for". Code Civ.Proc. §§ 339, 343.

See Words and Phrases, Permanent Edition, for all other definitions of "Action Not Hereinbefore Provided for", "Action to Recover Rents and Royalties Earned by Realty", "Contract Not in Writing", "Incorporeal Interest in Real Property", "Owner", "Ratify", and "Trustee".

14. Limitation of actions ⇐103(1)

An action against a trustee holding money for beneficiary arose on trustee's repudiation of his trust, and action brought less than four years thereafter was timely. Code Civ. Proc. § 343.

15. Frauds, statute of ⇐144

When a tenant comes into possession of land under a lease, he is "estopped" to aver its invalidity under the statute of frauds.

Code Civ.Proc. § 1962, subd. 3; Civ.Code, § 1624.

16. Estoppel ⇐83(1)

When a party has by his own declaration, act, or omission intentionally led another to believe a particular thing is true and to act upon such belief, he cannot in any litigation arising out of such declaration, act, or omission be permitted to falsify it. Code Civ.Proc. § 1962, subd. 3; Civ.Code, § 1624.

17. Frauds, statute of ⇐144

Where one interested with oil company in another property procured sublease to company which went into possession and parties acted upon lease for several months and later royalties due to sublessor were collected by such person, in action by sublessor to collect such royalties, such person was "estopped" to set up statute of frauds on ground that promise to pay royalties was not in writing. Code Civ.Proc. § 1962, subd. 3; Civ.Code, § 1624.

18. Frauds, statute of ⇐155

Where answer pleaded statute of frauds, a replication thereto was not required. Civ. Code, § 1624.

19. Trial ⇐395(5)

Where ultimate facts found by court were such as to create an "estoppel" to assert the statute of frauds, they constituted a sufficient finding on the issue whether agreement was barred by the statute. Civ. Code, § 1624.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

20. Appeal and error ⇐1071(3)

That evidence was insufficient to support finding that oil well produced continuously after November 4, 1933, was immaterial where accounting made by trustee and accepted by plaintiff beneficiary and entered into the judgment showed that production ceased in November, 1938.

21. Mines and minerals ⇐74

An agreement by one interested in oil lease to convey royalty interest in company's net sales for sublease of surface to certain land to company which was given possession after agreement by sublessor's manager was supported by a "consideration".

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

22. Appeal and error ⇐1071(3)

That finding that defendant received proceeds of royalty subsequent to April 20, 1935, was unsupported by the evidence was immaterial where, under accounting stipulated to, defendant accounted for the moneys earned by the royalty after such date.

23. Judgment ⇐256(5)

That findings that one plaintiff was entitled to income from royalty were inconsistent with judgment for all three plaintiffs was immaterial.

24. Licenses ⇐18½

The corporate securities act was enacted to protect the investor and not the seller, who could not take advantage of his own failure to secure permit before selling royalty. Civ.Code, § 3517; St.1917, p. 673.

25. Appeal and error ⇐1050(1)

Where oil company originally owning interest in net sales of another oil company was party to litigation to collect royalty which before defendant's repudiation of agreement had been paid to one owner of company and his wife and both owners of company had consented to gift of royalty to such wife, and husband and wife were parties to the action, admission of parol evidence to prove assignment of royalty from oil company to one co-owner was harmless.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Walter Desmond, Judge.

Action by Wallace Taylor and others against A. J. Odell involving an agreement by defendant to assign a royalty in an oil well. From a judgment for plaintiffs, the defendant appeals.

Judgment affirmed.

Louis N. Whealton, of Long Beach, for appellant.

Joseph A. Ball, of Long Beach, for respondents.

MOORE, Presiding Justice.

This action arose out of an agreement by defendant to assign to plaintiffs a royalty in an oil well for a consideration which was rendered. Defendant appeals.

On July 30, 1933, defendant procured a lease from one Seeger upon a small lot in the Huntington Beach oil field. He assigned the lease to the Two-and-One Oil Company,

reserving unto himself the 20 per cent interest in the net production. In August, 1933, Two-and-One commenced drilling and on the 4th of November placed its well on production. Adjacent to and east of the Seeger lease lies the Colter lease at first acquired by defendant on the 10th day of April, 1933. Twenty-two days later defendant assigned the Colter lease to the Odell Petroleum Corporation and in the following July it was assigned to the American Petroleum Company, which "was owned by plaintiff Wallace Taylor and one F. E. Fairfield" and was managed by Taylor.

Prior to the 4th day of November, 1933, defendant agreed with Wallace Taylor and his corporation as follows: That the American Petroleum Company and Wallace Taylor will allow the Two-and-One Oil Company to use a portion of the surface of the Colter property for the purpose of erecting thereon a pipe rack and slush pit to be jointly used in drilling the Two-and-One well and the well on the Colter lease until such time as the Two-and-One well shall be drilled to completion. As a consideration for the use of such premises, Odell agreed to convey to plaintiffs one-half of one per cent of the net sales of petroleum products from the Two-and-One well and to cause such revenues to be paid to plaintiffs.

After the Two-and-One well had been placed on production, plaintiffs consented that Two-and-One might construct on the Colter lease a pumping unit to be used to pump the Two-and-One well. Pursuant to the agreement made with Taylor, defendant caused the income from the promised royalty to be paid to plaintiffs less the deduction of its pro rata share of the maintenance and operation expense. These payments continued from the first sales on November 4, 1933, to and including April 20, 1935. After the latter date defendant refused to pay any part of the revenues earned by the royalty. Neither would he account to the plaintiffs therefor notwithstanding such revenues were at all times received by defendant until the well became a dry hole in August, 1938.

Upon finding the foregoing facts, the court ordered, by interlocutory decree that defendant make an accounting of the full amount due plaintiffs. Upon the accounting rendered under stipulation of the parties the court entered its final judgment. The question determined by the trial court was whether defendant was obligated to pay to plaintiffs the net revenues earned by the ½ of one per cent royalty in the Two-and-One well after April 22, 1935. We have to decide only whether in entering judgment for plaintiffs the trial court committed prejudicial error.

[1-3] (1) Appellant argues that under the lease held by plaintiffs the lessee acquired no general estate in the land or any proprietary rights over it except to produce oil; that, therefore, the lease to the Two-and-One Oil Company of the surface of the Colter lot was ultra vires. Also, he insists that plaintiff corporation and not Wallace Taylor was the holder of the lease. But the granting clause of the lease held by the American Petroleum Company reads as follows: "that the lessor * * * leases to the * * * lessee" certain portions of the lands under lease by the lessor. Nowhere in the lease is there any reservation of the surface rights in the lessor. The right of a lessee under a lease depends wholly upon the terms of the lease agreement. 20 Cal.Jur., sec. 7, p. 363; Kline v. Guaranty Oil Co., 167 Cal. 476, 140 P. 1; Smith v. United Crude Oil Co., 179 Cal. 570, 178 P. 141; Lineberger v. Delaney Petroleum Corp., 8 Cal.App.2d 153, 47 P.2d 326. Many oil leases are granted in which the activities of the lessee are restricted to that of exploring for and producing oil. But such is not the case in a lease granted by Colter and his associates. As to Taylor's agency for the American in granting the privilege of occupying his company's lot we need only to mention that Taylor's action was approved by Fairfield, his co-owner.

[4, 5] Appellant also contends that he had permission from Colter to use the surface of the latter's lot. This contention must fail for two reasons: (1) Colter was only one of the several owners of the property held under lease by the American Petroleum Company. If such permission had been of any value, it would have required the signatures of the McAdoos, the Wootens, Mr. Sadler and Mrs. Colter. If Colter had been the sole owner, any agreement made by him with his lessee prior to to the execution of the written lease could not vary the terms of the lease. Code Civ.Proc. § 1856. (2) The testimony of Colter was that in his conversation with defendant with reference to the reservation of any surface rights, he said to defendant: "I care nothing about that; go down and get me a well, you can use it all." The at-

titude of Colter at the time of the execution of the lease to defendant explains the absence of any reservations to surface rights in the Colter lease. Neither did defendant in his assignment of the lease to the Odell Petroleum Corporation reserve any surface rights. Likewise the assignment by the last named corporation to the American Petroleum Company contained no reservation. The only entity possessed of power to grant the surface rights to the Colter property was the American Petroleum Company which at that time was the lessee in possession. The lessor was out of possession with no rights reserved.

[6, 7] Appellant argues that the assignment of the Colter lease by the Odell Petroleum Corporation to the American Petroleum Company inhibited the sub-letting of any portion of the premises without the written consent of the assignor. But a restriction against assignment is a personal covenant made for the benefit of the lessor and does not run with the land. Laird v. McPhee, 90 Cal.App. 136, 265 P. 501. In the event of an assignment of rights under a lease contrary to a covenant forbidding such assignment or sub-letting, such assignment is valid but the lessor alone has the option to forfeit the lease for the breach of covenant. Chapman v. Great Western Gypsum Co., 216 Cal. 420, 14 P.2d 758, 85 A.L.R. 917; Buchanan v. Banta, 204 Cal. 73, 266 P. 547; Ruppe v. Utter, 76 Cal.App. 19, 243 P. 715. If the lessor ignores the breach the lease is valid and subsisting as to all other parties. Ibid.

[8] Even though the inhibition against assignment or subletting contained in the assignment from the Odell Petroleum Corporation to the American Petroleum Company were binding upon the latter company, it was waived by the assignor. Since the Odell Petroleum Corporation with full knowledge of all the facts, permitted the occupancy of the Colter property by the Two-and-One Company in operating its pipe rack and slush pit on the Colter lease, it waived the requirement of a written consent to the tenancy of the Two-and-One Company. Delijian v. Rosenburg, 134 Cal. App. 264, 25 P.2d 228.

[9] But defendant is estopped to challenge the title of the American Petroleum Company. The latter company as lessee in possession was the only power capable of preventing the occupancy of the Colter premises by the Two-and-One Company. The latter company made use of the premises as long as it had need of them. Having held quiet and peaceable possession for the term, the tenant is without authority to question the title under which he has occupied the premises. Odell, as the owner of 20 per cent of the production of the Two-and-One Company, was a tenant in common with the company and in the production of oil with the corporation. La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132, 114 P.2d 351, 135 A.L.R. 546. It was for his immediate advantage to obtain the use of the surface rights on the Colter lease for the maintenance of the slush pit and pipe rack. Having made the agreement for the tenancy of his corporation the latter entered into and remained in undisturbed possession as tenant of the American Petroleum Company. The Two-and-One Company having continued its possession under the protection of its lessor, there is no theory upon which it can escape its contractual obligation to the American Petroleum Company. Under such circumstances the status of the lessor's interest is of no concern to the lessee. Ghiradelli v. Greene, 56 Cal. 629. The only occasion whereby the lessee might escape from its obligation to pay the rental promised at the beginning of the tenancy is for the lessor to repudiate his obligation as such lessor. The tenant is estopped from challenging the title of the lessor.

[10] (2) The contention that plaintiffs are not the real parties in interest is based upon the facts: (1) that plaintiff corporation assigned the Colter lease to the Petrol Corporation February, 1936, 2½ years before the well went dry; (2) that by no writing did plaintiffs reserve any rental; (3) that the claim which forms the basis of plaintiffs' complaint was for the use and occupation of the Colter lot; (4) that the agreement was for the benefit of the Colter lease as well as for the Two-and-One well and that it was a covenant running with the land. Because of the recited facts, defendant insists that the assignment of the lease without reserving any part of the rentals was a transfer of those rentals. But it is not suggested that the American Petroleum Company sold the royalty in the Two-and-One well to the Petrol Corporation. That royalty was a separate item of property owned by plaintiff corporation and was not dependent upon its continued operation of the Colter lease. It could alienate the royalty or the lease at its pleasure. If it sold the lease and kept the royalty such

sale did not becloud the title to the royalty. The Petrol Corporation has not asserted title to the royalty and justly so for it was not mentioned in connection with the sale of the Colter lease.

[11, 12] It is argued that there was no competent writing in evidence to prove the assignment to Taylor of the royalty which, it is claimed, would be necessary in view of the fact that the royalty was an interest in real property. This is immaterial. The gift of the income from the royalty to Mrs. Taylor was an intra-family matter. It presents no difficulty here because all parties concerned are satisfied and are plaintiffs and judgment creditors.

[13, 14] (3) The action is not barred by section 339 of the Code of Civil Procedure. Although the agreement was in parol and was made prior to November 4, 1933, and was repudiated in April, 1935, three years and two months before this action was filed, these facts are collateral to the main event, towit, the assignment of a percentage of the production of the oil well. Plaintiff corporation became owner of that percentage immediately upon defendant's occupancy of the Colter lot. Such ownership was ratified by the passing of each day with the Two-and-One in peaceable possession. The percentage of production was to be payable during the productive life of the well,—an indefinite period. For that reason, it was an action to recover rents and royalties earned by realty (Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962, 103 A.L.R. 822; Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871) and could not therefore be governed by section 339. The money payable under such an assignment of royalties is not the fruitage of the contract to assign. Defendant did not promise the money. Neither did he promise to pay for the use of the Colter lot. He agreed to assign the royalty interest in the well's production. He merely delivered the instrument by means of which plaintiffs became entitled to draw upon the bounty of the Two-and-One well. Such royalty was an incorporeal interest in real property "subject to the same requirements and protected by the same safeguards." La Laguna Ranch Co. v. Dodge, supra [18 Cal.2d 132, 114 P.2d 355, 135 A.L.R. 546]. The moneys paid plaintiffs from the sales of the well's production was received as an incident to ownership, the same as rent from any real property. The assignment of the royalty interest in the well of the Two-and-One Oil Company vested in plaintiffs an interest in the oil produced by that company. When the money for production was received by Two-and-One, it was held in trust for plaintiffs if the company had knowledge of defendant's assignment. La Laguna Ranch Co., v. Dodge, supra; Dougherty v. California Kettleman Oil Royalties, 9 Cal.2d 58, 69 P. 2d 155; Schiffman v. Richfield Oil Co., 8 Cal.2d 211, 223, 64 P.2d 1081. But it is admitted that the entirety of the revenues earned by the 20 per cent interest reserved to defendant upon his assignment of the Seeger lease to the Two-and-One Company was paid to him until the well became exhausted. Upon his receipt of the moneys he held ½ of one per cent of the total net sales for the use and benefit of plaintiffs for the reason that they owned ½ of 1 per cent interest in the realty which produced the oil sold.

As long as he held those moneys he was trustee for plaintiffs and was under obligation to account to plaintiffs for the moneys in his custody. Plaintiffs' action for an accounting and to enforce payment thereof is governed by section 343, Code of Civil Procedure; Hannah v. Canty, 175 Cal. 763, 768, 167 P. 373. The period of limitation began on the date of defendant's repudiation of his trust, April, 1935, less than four years prior to the filing of the action.

[15-18] (4) Defendant contends that the action is barred by the statute of frauds (sec. 1624 of the Civil Code) because the agreement to convey the fractional interest in the well was verbal. He argues that it was an "agreement to convey an interest in real property"; that defendant did nothing to take it out of the statute of frauds; that defendant's sole interest was his percentage in the production of the well; that Walt Hughes was sole owner of the Two-and-One Company, the assignee of defendant; that while Two-and-One constructed the pipe rack and pit on the Colter premises, appellant did nothing; that plaintiff expended no money and suffered no detriment. But defendant is blind to the significance of his own engagement. Plaintiffs performed all that was to be done for defendant in return for the royalty to be assigned to them by defendant. Upon his promise of the royalty they granted the use of their property to defendant's assignee and tenant which erected its pipe rack and slush pit thereon. Both of these were continuously used by Two-and-One as long as the well produced. Defendant

acknowledged and verified the agreement with plaintiffs and admitted the fulfillment by plaintiffs of their obligation. Also, commencing with the first month of the well's production, defendant transmitted to plaintiffs monthly ½ of 1 per cent of the total net proceeds of the sales of the production and forwarded with each remittance a statement of the monthly earnings of the well. Such compliance of defendant with his agreement were acknowledgments by him that he held the ½ of 1 per cent of the net sales of the well's production in trust for plaintiffs. Such transmission of plaintiffs' share was not "part payment" of the price for the use by its tenant of the Colter lot. Defendant paid absolutely nothing after he exchanged his percentage of interest in the well for the use of the premises. His function thereafter was merely that of trustee and messenger to convey to plaintiffs their own moneys which were revenues from their own royalty interest. Under such circumstances, to allow defendant to escape his obligation by invoking the statute of frauds would be to defeat the just claim of a litigant by the perpetration of a fraud upon him. When a tenant comes into possession of land under a lease, he is estopped to aver its invalidity under the statute of frauds. Otherwise the courts would promote injustice by approving a fraud inhering in the consequence of thus setting up the statute. Dutton v. Interstate Investment Corp., 19 Cal.2d 65, 119 P.2d 138; Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154; Heffernan v. Davis, 24 Cal.App. 295, 140 P. 716. Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission be permitted to falsify it. Code Civ.Proc., sec. 1962, subd. 3. Defendant made his agreement with plaintiffs for the benefit of his own tenant, Two-and-One Oil Company. That tenant took possession of plaintiffs' premises and enjoyed peaceable possession as long as it had a need for the premises. By protecting the tenant in its occupancy of the Colter lot plaintiffs completed performance of their part of the contract. For more than seventeen months defendant faithfully fulfilled his obligation under the agreement. Such conduct removed the contract from the bar of the statute of frauds. Under such circumstances performance by plaintiffs of their part of the agreement was clearly induced by defendant's promise to assign the royalty and to pay its revenues. This fact taken with defendant's own subsequent behavior in fulfilling his part of the obligation bars the statute as a defense. Dougherty v. California Kettleman Royalties, Inc., supra. There is no merit in its contention that plaintiffs failed to plead an estoppel. The answer pleads the statute of frauds and a replication thereto was not required under our practice.

[19] (5) Since the ultimate facts found by the court are such as to create an estoppel to assert the statute of frauds, they constitute a sufficient finding on the issue as to whether the agreement was barred by the statute. After finding that the agreement was made, the court found that plaintiffs fully met all their obligations under the contract; that the Two-and-One Oil Company used plaintiff's land, erected a pipe rack and slush pit; that these were actually used until the well was completed (as provided by the agreement); and that defendant actually paid the earnings of the royalty in accordance with the terms of the agreement for more than 17 months.

[20, 21] (6) It is contended that the evidence was insufficient to support the finding that the well produced continuously after November 4, 1933. That is immaterial for the reason that the accounting made by defendant and accepted by plaintiffs and entered into the judgment shows that production ceased in October, 1938. It is suggested that the agreement for the assignment of the royalty is not supported by a consideration. This is cured by the other findings, supported by the evidence, that the consideration for the royalty was the occupancy of the Colter lot held under lease by plaintiff corporation which consented to the occupancy by the Two-and-One Company. While Taylor negotiated with defendant the plaintiff corporation provided the consideration. As half owner and manager of the American, Wallace Taylor's agreements on behalf of his company were binding, particularly so after it had accepted the benefits of his transaction. This disposes of the criticism of the finding that defendant promised to pay plaintiffs the royalty although Taylor made the agreement.

[22, 23] It is suggested that the finding that defendant received the proceeds of

the royalty subsequent to April 20, 1935, is unsupported by the evidence. But under the accounting stipulated to, defendant accounted for the moneys earned by the royalty after April 20, 1935. The attack upon the findings that Taylor was entitled to the income from the royalty by reason of the assignment from plaintiff corporation as inconsistent with the judgment for all three plaintiffs is without merit for the reason that the judgment runs in favor of all three plaintiffs.

All other criticisms of the findings have been answered by the discussions of other assignments.

[24] (7) Defendant argues that the agreement to assign the royalty to plaintiffs was void because no permit had been issued by the Division of Corporations for its transfer by defendant. The Corporate Securities Act, St.1917, p. 673, was enacted to protect the investor, not the seller. While a sale or agreement to issue may be void, if violative of the act, at the behest of the purchaser, not in pari delicto, it was not the purpose of the legislature to confer an advantage upon the seller of a security. If it was wrong for defendant to sell the royalty, he cannot take advantage of his own wrongful act to avoid his obligation after deciding that he preferred to repudiate it. Civ.Code § 3517; Western Oil & Ref. Co. v. Venago Oil Co., 218 Cal. 733, 24 P.2d 971, 88 A.L.R. 1271.

[25] Contention is made that it was error to admit parol testimony to prove the assignment of the royalty by plaintiff corporation to Wallace Taylor. Whatever of merit may inhere in such assignment is dispelled by the facts: (1) that the Taylors had received the income from the royalty prior to defendant's repudiation of his agreement, and (2) that the American Petroleum Corporation, owned by Taylor and Fairfield, is also one of the plaintiffs and both of its owners consented to the gift of the income from the royalty to Mrs. Taylor. If there had been no proof of an assignment of the royalty to Mrs. Taylor, the evidence abundantly establishes that the management and owners of American Petroleum Corporation made her a gift of its revenues.

All other assignments are disposed of by the foregoing discussion.

Judgment is affirmed.

W. J. WOOD, J., concurred.

McCOMB, Justice (dissenting).

I dissent.

From a judgment in favor of plaintiffs after trial before the court without a jury in an action to recover sums alleged to be due for breach of a contract to pay certain percentages of royalties received by defendant, the latter appeals.

Viewing the evidence in the light most favorable to plaintiffs (respondents), so far as material here the essential facts are:

Defendant obtained two separate oil leases, one on property owned by a Mr. Colter and others, hereinafter referred to as the Colter lease, and the other upon property owned by Mr. Seeger and others, hereinafter referred to as the Seeger lease. The two properties are adjacent. Defendant assigned the Colter lease to Odell Petroleum Corporation, which in turn assigned it to the American Petroleum Company, reserving unto himself a 30% royalty interest. He assigned the Seeger lease to the Two-and-One Oil Company, reserving unto himself a 20% royalty. The Seeger property was too small to permit the erection of an oil derrick and the necessary appurtenances, and defendant obtained permission from the American Petroleum Company for the assignees of the Seeger lease to use a portion of the surface of the property covered by the Colter lease. Defendant agreed to pay Mr. Wallace Taylor, one of the plaintiffs, one-half of one per cent of the production from the Seeger lease for such permission. The American Petroleum Company and the Two-and-One Oil Company erected on the Colter property certain oil well operating facilities, which were used by both companies. Defendant paid Mr. Taylor one-half of one per cent of the production from the Seeger lease from November, 1933, until April, 1935. He then refused to make further payments. Thereafter plaintiffs sued to recover such percentage. Among other defenses defendant by his answer pleaded the Statute of Frauds, and evidence was introduced tending to prove that the alleged agreement for the payment of royalty was an oral one and for the transfer of an interest in real property. The trial court failed to make a finding upon the issue raised by this defense.

This is the sole question necessary for us to determine:

Where there is substantial evidence, if believed by the trial judge, to sustain de-

fendant's plea that the Statute of Frauds bars a recovery by plaintiffs, is it prejudicial error for the trial court to fail to make a finding on this issue?

This question must be answered in the affirmative. The law is settled in California that it is reversible error for the trial court to fail to make a finding upon a material issue properly raised by the pleadings if, as in the instant case, there is any evidence which would support a finding in favor of such defense. Due v. Swartz, 22 Cal.App.2d 217, 218, 70 P.2d 716; Lyden v. Spohn-Patrick Co., 155 Cal. 177, 182, 100 P. 236; Knoch v. Haizlip, 163 Cal. 146, 153, 124 P. 998.

There is no merit in plaintiffs' assertion that defendant is estopped from invoking the defense of the Statute of Frauds, for the reason that estoppel as to any defense which would otherwise be available to the defendant (appellant) under the facts stated in a complaint may not be relied upon by the plaintiff (respondent) unless the estoppel is pleaded. Cohen v. Metropolitan Life Ins. Co., 32 Cal.App.2d 337, 347, 89 P.2d 732. Therefore, since in the instant case estoppel was not pleaded in plaintiffs' complaint as amended, the plaintiffs may not rely thereon to defeat defendant's defense of the Statute of Frauds.

For the foregoing reasons in my opinion the judgment should be reversed.



50 Cal.App.2d 201

THORMAN v. DOME PRODUCING & DEVELOPING CO., Limited (COOPER, Intervener).

Civ. 12909.

District Court of Appeal, Second District, Division 3, California.

Feb. 26, 1942.

1. Corporations ⇐202

In action by president of corporation which was controlled by president and his father, against corporation to recover on corporation's note payable to president, and executed by president and president's father as secretary of the corporation, stockholder alleging in complaint in intervention that corporation was not indebted to president on the note, and that corporation had other good defenses to action on note, but that corporation's board of directors was controlled by president and secretary, and that board would not, in good faith, defend the action, but would commit the corporation to a judgment, was entitled to intervene and make a defense on behalf of the corporation.

2. Appeal and error ⇐913

Where plaintiff and defendant filed both general and special demurrers to application for leave to intervene, and demurrers were overruled, but several days later, court made an order denying application for leave to intervene, District Court of Appeal on intervener's appeal was required to assume that although complaint in intervention had not actually been filed, it was treated as having been filed for the purposes of the demurrers.

3. Parties ⇐44

In judging the sufficiency of a complaint in intervention, rigid tests should not be applied.

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Action on a note by M. J. Thorman against the Dome Producing & Developing Company, Limited, wherein Guy E. Cooper, a stockholder of defendant, sought to intervene to defend the action. From an order refusing to permit Guy E. Cooper to intervene, he appeals

Order reversed.

Dudley Robinson, of Los Angeles, for appellant.

Loughman & Loughman, of Ventura, for plaintiff-respondent.

Charles F. Gerard, of Ventura, for defendant-respondent.

SHINN, Justice.

This appeal from an order refusing a stockholder the right to intervene to defend an action against a corporation, has been submitted under a stipulation waiving oral argument and the filing of a brief by respondent. A sufficient statement of the sole question involved is found in appellant's brief, reading as follows: "Should a stockholder be permitted to intervene as party defendant in an action against a corporation upon a promissory note payable to plaintiff, executed by plaintiff as presi-

dent, and her father as secretary, of the corporation which they control, where the complaint in intervention denies that the corporation is indebted to plaintiff upon said note, and alleges that said corporation has other good and legal defenses thereto, but that its board of directors is controlled by plaintiff and her father, that it will not, in good faith, defend said action, but will commit the corporation to a judgment therein, and that it is necessary for said stockholder to intervene and make a defense on behalf of said corporation, which he desires to do?" The answer is in the affirmative.

The action against the corporation is upon a promissory note executed by the corporation in favor of plaintiff. The proposed complaint in intervention alleged that intervenor was a stockholder of the defendant corporation; that the note in question had been signed for the corporation by plaintiff as president and by her father as secretary, who, with a brother of plaintiff, constituted the entire board of directors and the owners of all of the authorized capital stock of the corporation; that shortly after the note was given, intervenor made a purchase of stock of the corporation, was elected and continued to be a director and president, the other directors being plaintiff's father and brother. It was alleged that the note was given without consideration and in pursuance of a scheme to sell privately owned stock to the corporation, for resale and for the purpose of financing the corporation, in evasion and violation of the Corporate Securities Act, St.1917, p. 673, and in violation of law, in that the scheme contemplated the illegal purchase by the corporation of portions of its own stock; that the transaction in which the note was given was never submitted to or ratified by the stockholders of the corporation and that the corporation was not indebted to plaintiff upon any account; that intervenor purchased his stock without knowledge of the existence of the note and without knowledge of the facts which led to its execution. It was further alleged that the corporation had valid defenses to the action; that plaintiff held the note for the use and benefit of her father, who dominated and controlled the action of a majority of the board, namely, himself and his son; that intervenor had demanded of the directors that they defend the action upon the note but they refused to and would not make any bona fide defense thereto and intended to and would suffer judgment to be given against the corporation; that the property of the corporation was under attachment in the suit on the note and that it had no funds on hand or available for the payment of any judgment that might be rendered; and that intervenor, if allowed to do so, would present bona fide defenses to the action.

[1, 2] An order to show cause was issued why leave should not be granted to file a complaint in intervention. Service of the order to show cause was made and proof of service, together with a copy of the proposed complaint in intervention, was filed. When the application for leave to intervene came on for hearing plaintiff and defendant filed both general and special demurrers thereto. These demurrers were overruled, but several days later, before the trial of the case, the court made an order denying the application for leave to intervene. We must assume that although the complaint in intervention had not actually been filed, it was treated as having been filed for the purposes of the demurrers. The case was one in which a stockholder should have been allowed to intervene for the purpose of defending the action. Shively v. Eureka, etc., Mining Co., 1900, 129 Cal. 293, 61 P. 939; Eggers v. National Radio Co., 1929, 208 Cal. 308, 281 P. 58.

[3] We should not apply rigid tests to the complaint in intervention in judging of its sufficiency. The essentials of a case for intervention were alleged and the court so ruled. Had the ruling been otherwise, appellant no doubt would have been given an opportunity to amend in order to meet the objections. We must therefore treat the pleading as sufficient as a complaint in intervention.

The order is reversed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

50 Cal.App.2d 356

GOODMAN v. MEYERS.

Civ. 12859.

District Court of Appeal, Second District, Division 2, California.

March 6, 1942.

Rehearing Denied March 30, 1942.

Hearing Denied May 4, 1942.

1. Appeal and error ⇐994(3)

Any inconsistency between testimony of a witness at the time of trial and prior statements in a deposition presents a "question of fact" for the determination of the trial court, with which an appellate court will not ordinarily interfere.

See Words and Phrases, Permanent Edition, for all other defintions of "Question of Fact".

2. Account, action on ⇐7

In action to recover balance allegedly due for the transfer by plaintiff to defendant of contracts for the conditional sale of automobiles, conflicting evidence sustained findings that defendant became indebted to plaintiff upon an open and current account and on account of goods and choses in action sold and delivered to defendant at his request.

3. Appeal and error ⇐1008(1)

Where transferee agreed to pay cash for assignments of contracts for the conditional sale of automobiles, if contract price did not exceed the value of the automobiles sold, but such assignments were actually made for a portion of the contract price in cash and delivery of duebills for the balance, which transferor testified were payable immediately, whether the parties by their conduct modified their agreement with respect to unconditional cash payments was a "question of fact" for the determination of the trial court in an action by transferor to recover amount unpaid, evidenced by such duebills, as upon an open and current account and on account of goods and choses in action sold and delivered to transferee at his request.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

4. Appeal and error ⇐994(3)

The credibility of witnesses is a question for the trial court to determine, and only where testimony is so improbable as to be impossible of belief will an appellate court interfere.

5. Sales ⇐475

In action to recover upon duebills, which were executed and delivered by assignee in connection with assignment of contracts for the conditional sale of automobiles, and which reflected the portion of agreed price for such assignments not paid in cash, evidence was sufficient to establish which of the duebills sued on were payable immediately and which represented the excess of contract price over the value of the automobile sold under such contract, which became payable only when contract price was paid in full.

6. Appeal and error ⇐1008(1)

In action to recover upon duebills, which were issued in connection with the assignment of contracts for the conditional sale of automobiles and which reflected the unpaid portion of the agreed upon price for such assignments, whether, in case of a series of repossessions and resales of the same automobile, each succeeding duebill issued by assignee of contracts, canceled the preceding duebill, so as to preclude recovery thereon, was a question for the determination of the trial court.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Sam Goodman against L. J. Meyers to recover money allegedly due plaintiff on account of the purchase by defendant of contracts for the conditional sale of automobiles, wherein defendant filed a cross-complaint seeking the recovery of money allegedly owing him. From a judgment in favor of plaintiff, defendant appeals.

Judgment affirmed.

Mark L. Herron and Samuel H. Robinson, both of Los Angeles, for appellant.

Orloff & Katz, of Los Angeles, for respondent.

W. J. WOOD, Justice.

In this action plaintiff sought to recover a judgment for money due from defendant as the purchaser of various contracts for the conditional sales of automobiles. The court found in plaintiff's favor on three causes of action, an open book account, assumpsit for goods sold and delivered and for an accounting. Defendant filed a cross-complaint seeking the recovery of money alleged to be owing from plaintiff

to defendant. The trial court found that defendant was indebted to plaintiff in the amount of $31,149.55 and that plaintiff was indebted to defendant in the sum of $15,603.72. Judgment was accordingly entered in plaintiff's favor for the sum of $15,545.83, from which judgment defendant has appealed.

Conceding that, in general, the findings of fact are supported by the "uncorroborated" testimony of plaintiff, defendant directs our attention to certain contradictions and inconsistencies in the testimony and seeks to have this court declare that plaintiff's testimony is so inherently improbable that it is insufficient to sustain the findings.

From plaintiff's testimony it appears that for many years prior to the commencement of this action plaintiff had been engaged in the used car business and defendant had been in the automobile financing business. Since 1930 defendant has purchased from plaintiff, at a discount, many conditional sales contracts on automobiles sold by plaintiff. At the commencement of their business relationship it was agreed that defendant would purchase contracts from plaintiff at a discount and would pay the purchase price in cash; however, in those instances where the contract price exceeded the value of the car, defendant agreed to pay cash to plaintiff in an amount equal to the value of the car and to issue plaintiff a due bill for the excess which was to become payable only when the conditional vendee had been paid the contract price in full. It was further agreed that when the contract price exceeded the value of the car plaintiff would transfer title to the contract by an assignment in writing in the nature of a written guarantee. In all other cases, title to the contracts was to be transferred merely by delivery. Most of the conditional sales contracts purchased by defendant were transferred merely by delivery but a few were transferred by written assignment. Despite the agreement to pay cash for the contracts it was defendant's custom upon delivery of a contract to pay the major portion of the purchase price in cash and within two or three days thereafter to deliver to plaintiff a memorandum of the transaction (referred to by the parties and hereinafter as a due bill) which usually indicated that an additional sum was due plaintiff. The due bills contained entries showing the balance of the contract price, the amount of cash which defendant had paid plaintiff and the amount of his discount. Where the cash amount paid plaintiff plus defendant's discount was less than the balance of the contract price, the difference was reflected on the due bill as an amount owing to plaintiff. Some of the due bills were issued in connection with the resale by plaintiff of automobiles which had been repossessed by defendant, or by plaintiff on defendant's behalf. Plaintiff's bookkeeper kept a record of all due bills received. Numerous demands were made on defendant for payment of the due bills and each time defendant did not deny that the bills were then due and payable, but stated that he would have to look at his records to see how much was due plaintiff. Upon defendant's failure to pay, plaintiff commenced the present action to recover the total amount of all unpaid due bills. At the trial a number of the due bills were introduced in evidence as plaintiff's "Exhibit 1." "Exhibit 2" was a list, compiled from plaintiff's business records, of the amounts of all due bills, totaling $31,411.75, including the total of the due bills in "Exhibit 1." "Exhibit 3" consisted of contracts which had been transferred by written assignment. Plaintiff failed to prove that any of the due bills issued in connection with the contracts in "Exhibit 3" were payable and was therefore not permitted to recover upon them.

[1-4] The trial court's findings to the effect that defendant became indebted to plaintiff upon an open and current account and on account of goods and choses in action sold and delivered to defendant at his request are attacked as being unsupported by the evidence. It is argued that there is no substantial evidence to prove that the due bills upon which recovery was allowed were unconditionally due and payable. Defendant concedes that plaintiff's testimony supports such findings but contends that the testimony is uncorroborated and inconsistent with other testimony of plaintiff in his deposition. Any inconsistency between testimony of a witness at the time of trial and his prior statements in a deposition presents a question of fact for determination of the trial court with which an appellate court will not ordinarily interfere. Miller v. Schimming, 129 Cal.App. 171, 18 P.2d 357; Smarda v. Fruit Growers' Supply Co., 1 Cal.App.2d 265, 36 P.2d 701. Although the testimony was conflicting, there is substantial evidence to sustain the

questioned findings. Both parties gave testimony to the effect that defendant agreed to pay cash for the contracts which were transferred by delivery only. Plaintiff testified that the due bills which defendant gave him for contracts which were transferred by delivery and not by written assignment were to be paid at once. There was no necessity for corroboration of plaintiff's testimony. Whether the parties by their conduct modified their original agreement with respect to unconditional cash payments was a question of fact for the determination of the trial court under all of the circumstances. The credibility of any witness is a question for the trial court to determine and it is only where his testimony is so improbable as to be impossible of belief that an appellate court will interfere with findings of fact based upon such testimony. We cannot say that plaintiff's testimony was inherently improbable.

[5] It is contended that the evidence is insufficient to prove which of the due bills sued on were issued in connection with contracts transferred by delivery only (and therefore immediately payable) and those which were issued in connection with the transfer of contracts by written assignment, but the record contains sufficient evidence to establish this distinction. Both parties testified that with very few exceptions all contracts were transferred by delivery only. A number of contracts which contained written assignments from plaintiff to defendant were introduced in evidence as plaintiff's "Exhibit 3." These contracts were identified by plaintiff as the contracts which he had transferred by assignment in writing.

[6] Defendant also contends that many of the due bills were shown by the evidence to have been cancelled by the issuance of later due bills in connection with the resale of an automobile which had been repossessed. The entire argument is based upon defendant's testimony to the effect that in a series of repossessions and resales of the same car, each succeeding due bill issued to plaintiff cancelled the preceding one. This testimony falls far short of proving an agreement to cancel any due bills and, at most, merely created a conflict in the evidence for the determination of the trial court. Plaintiff testified that the due bills listed in plaintiff's "Exhibit 2," which included due bills which defendant claims were cancelled, were immediately due and payable. None of the due bills issued in connection with the resale of an automobile following repossession in any way indicated that they were intended to cancel any preceding due bill, all of which were permitted to remain in plaintiff's possession. Defendant directs our attention to four series of repossession and resale transactions and endeavors to demonstrate that if all of the due bills issued in each series of sales were paid defendant would be required to pay out more money than he received from the conditional vendees. On the contrary, the evidence shows that with few exceptions, each conditional vendee in a series of resale transactions paid a large proportion of the balance due upon his contract before defaulting. In many instances defendant actually received much more than a given car was worth and much more than the balance due upon the original contract of sale as a result of successive sales following repossessions. With reference to two of the series of resales, defendant gave testimony inconsistent with his present contention, stating that he considered both the original and subsequent due bills to be owing to plaintiff. In three of the four transactions of which defendant complains the last due bill issued to plaintiff shows that nothing was due, although the preceding due bills had been for amounts as high as $85. Since the evidence shows that plaintiff spent considerable time and money in reconditioning cars which had been delivered to him for resale, it would be unreasonable to assume that he would accept a due bill showing no balance due in cancellation of a due bill for a substantial amount. This court is powerless to interfere with the trial court's findings upon such conflicting evidence.

Upon the assumption that his contentions above considered would be upheld, defendant has devoted a large portion of his briefs to mathematical computations in an attempt to show that the judgment must be reduced. However, since we have been unable to sustain defendant's contentions, it is only necessary to state that there is substantial evidence to support the judgment in the amount found by the trial court to be due plaintiff.

The judgment is affirmed.

MOORE, P. J., concurred.

McCOMB, J., took no part in the consideration or decision of the foregoing case.

50 Cal.App.2d 289

PEOPLE v. STEIN.

Cr. 3509.

District Court of Appeal, Second District, Division 2, California.

March 2, 1942.

1. Robbery ⇐26

In robbery prosecution, alleged discrepancies in witnesses' description of the two bandits and the clothing they wore was for consideration of triers of fact, whose duty it was to pass upon the strength or weakness of the identifications.

2. Criminal law ⇐444

In robbery prosecution, permitting witness to testify that photograph shown to her was photograph of the second man taking part in robbery was not error, notwithstanding that second man had not been apprehended up to time of trial.

3. Criminal law ⇐719(1)

In robbery prosecution, prosecutor's argument that victim first identified bandit from photographs shown to victim by officers investigating case, rather than at trial, did not constitute "misconduct" on ground that record was silent as to any identification of bandit by any pictures, where there was testimony from which it could properly be argued that bandit had been identified by a photograph prior to the trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Morris Stein was convicted of robbery, burglary and assault with a deadly weapon, and he appeals.

Affirmed.

Nathan O. Freedman, of Hollywood, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

W. J. WOOD, Justice.

At a jury trial defendant was found guilty of robbery, burglary and assault with a deadly weapon. He has appealed from the judgments and from the order denying his motion for a new trial.

Defendant makes three assignments of error: That the evidence is insufficient to support the convictions; that the trial court erred in admitting in evidence a photograph of a man not on trial; and that the prosecutor was guilty of misconduct in addressing the jury.

[1] At about midnight on the night of March 13, 1940, Mr. and Mrs. Fred Berrens returned to an apartment on Shoreham Drive in Los Angeles. They unlocked and opened the door of the apartment, switched on the light and were confronted by two bandits armed with revolvers. Mrs. Berrens was robbed of jewelry of the approximate value of $6,500. At the trial both Mr. and Mrs. Berrens identified defendant as one of the two bandits who had robbed them. This testimony is sufficient to sustain the verdicts. Defendant's criticism of the identifications, directed mainly to alleged discrepancies in the description of the two bandits and the clothing they wore, was for the consideration of the triers of fact, whose duty it was to pass upon the strength or weakness of the identifications. We find nothing in the attack on the identifications which would justify a reversal by a reviewing court.

[2] During the course of her testimony Mrs. Berrens described the appearance of both bandits. On being shown a photograph of one Alfred Weisenberger she stated that the photograph was that of the other man taking part in the robbery. This second bandit had not been apprehended up to the time of the trial. The court did not err in permitting the witness to testify concerning the photograph. Undoubtedly a description of the appearance of the second bandit was proper, and if he had been present in the courtroom her testimony pointing him out as the second bandit would have been proper. The use of the photograph was a proper method for describing the second bandit. People v. Smith, 215 Cal. 749, 761, 12 P.2d 945.

[3] During his argument to the jury the prosecutor stated: "After the crime has been reported, the officers assigned to the particular case make an investigation, and photographs are shown to the victim and the victim says, yes, that is the man. That is the time the identification was made of the defendant, and not now, as Mr. Freedman would have you believe." Defendant now asserts that "the record is silent as to any identification of appellant by any pic-

tures whatsoever," and argues that the prosecutor was guilty of misconduct in making the statement to the jury. The reporter's transcript discloses that when the witness Fred Berrens was describing the appearance of the bandits who had robbed the apartment he gave this testimony:

"Q. Have you seen any pictures of Mr. Stein? A. Yes.

"Q. How many? A. I believe two. Full face and profile.

"Q. Have you ever seen him in person other than today since then? A. No." From this testimony it could properly be argued that defendant had been identified by a photograph prior to the trial. The prosecutor had the right to present to the jury his views of the proper deductions or inferences to be drawn from the evidence.

The other assignments of misconduct on the part of the prosecutor during his argument to the jury are not of sufficient importance to justify an extended discussion. The prosecutor did not in any instance exceed the bounds of legitimate argument.

The judgments and the order denying a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concurred.



50 Cal.App.2d 264

BECK v. AZCARATE et al.

Civ. 13184.

District Court of Appeal, Second District, Division 3, California.

Feb. 28, 1942.

Hearing Denied April 27, 1942.

1. Automobiles ⇐173(5)

Under statute providing that every motor truck having an unladen weight of 4000 pounds or more, and every truck tractor irrespective of weight when operated upon any highway outside the corporate limits of any city shall be equipped with at least two flares or two red lanterns, the term "motor truck" does not include the term truck tractor, and truck tractor and semitrailer having an unladen weight of 4000 pounds or more need not carry flares when operated inside corporate limits of a city. Vehicle Code, § 590, as amended by St.1937, p. 620, and § 618, St.1935, p. 201.

See Words and Phrases, Permanent Edition, for all other definitions of "Motor Truck".

2. Automobiles ⇐173(5)

Statute providing "every motor truck having an unladen weight four thousand pounds or more, and every truck tractor irrespective of weight when operated upon any highway outside the corporate limits of any city" shall be equipped with at least two flares or two red lanterns is to be construed as though a comma appeared between the words "weight" and "when" so as to express the intention of the Legislature that both types of designated vehicles should be required to carry flares only when operated outside a city. Vehicle Code, § 590, as amended by St.1937, p. 620, and § 618, St. 1935, p. 201; Vehicle Code, § 33, St.1935, p. 95, and § 32.5, St.1937, p. 412.

3. Statutes ⇐181(1), 200

Punctuation should be considered in interpreting a statute, but it is not a controlling factor and is subject to the basic proposition that the legislative intent as expressed in the language of the statute governs.

4. Statutes ⇐181(2), 184, 200, 217

In determining the legislative intent it is proper to consider the history, object and reasonableness of the statute, and if such factors reveal an intent that is not in harmony with the punctuation, the latter must give way to the former.

5. Automobiles ⇐173(5)

Where 1935 statute providing that every truck or commercial vehicle operated on any highway outside corporate limits of any city shall be equipped with and at all times carry at least two flares applied to every truck and commercial vehicle irrespective of weight, but only when operated outside corporate limits of city, 1937 amendment replacing the words "every truck" by the words "every motor truck having unladen weight of four thousand pounds or more" and the words "commercial vehicle" by the words "every truck tractor irrespective of weight," the object of the 1937 amendment was to exclude light trucks and small commercial vehicles from the requirement when operated outside a city. Vehicle Code, § 590, as amended by St.1937, p. 620, and § 618, St. 1935, p. 201.

6. Statutes ⇐181(2)

The language of a statute must be given a reasonable interpretation. Civ.Code, § 3542.

7. Automobiles ⇐12

Where first sentence of statute required certain vehicles to be equipped with flares when operated on a highway outside corporate limits of city, and second sentence specified that the flares were to be used when the vehicles were disabled upon highway during certain time, the word "highway" as used in the second sentence means a highway upon which the designated vehicles are required to be equipped with flares when operated, that is, highway outside corporate limits of a city. Vehicle Code, §§ 81, 590, as amended by St.1937, pp. 617, 620.

See Words and Phrases, Permanent Edition, for all other definitions of "Highway".

8. Appeal and error ⇐1064(1)
Automobiles ⇐246(13)

Where tire of truck tractor and semitrailer blew out and driver parked at night on highway within corporate limits of a city and was struck by automobile while changing tire, in truck driver's action for personal injuries, instruction that truck driver was guilty of negligence if he failed to place warning flares in front or in rear of his truck tractor and semitrailer when it was disabled and parked at night on highway within corporate limits of city, was erroneous and required reversal of judgment for defendant. Vehicle Code, § 590, as amended by St.1937, p. 620, and § 618, St.1935, p. 201.

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Personal injury action by George E. Beck against Tony R. Azcarate and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Goble, Twitchell & Stephan, of Santa Maria, for appellant.

Smith & Smith, of Santa Maria, for respondents.

PARKER WOOD, Justice.

This action is to recover damages for personal injuries to plaintiff as the result of being struck by an automobile operated by defendant Cyphert and owned by defendant Azcarate. Plaintiff appeals from a judgment upon a verdict in favor of both defendants.

Plaintiff contends that the court erred in two respects: First, in giving an instruction that plaintiff was guilty of negligence if he failed to place warning flares in front of or to the rear of his truck tractor and semitrailer when it was disabled and parked at night upon the highway within the corporate limits of a city; and second, in refusing to instruct the jury upon the doctrine of the last clear chance. The first contention must be sustained.

About 11 o'clock p. m., on May 25, 1940, plaintiff was driving a truck tractor and semitrailer, 53 feet in length, in a southerly direction on U. S. Highway 101, and as he was entering the corporate limits of the city of Santa Maria one of the tires blew out. He ascertained that the blown tire was one of the dual set of tires on the right rear of the tractor. He then drove forward about 200 yards to a place where there was more light, and parked on the highway about 4 feet from the right-hand curb in order to allow sufficient space in which to remove the blown tire. There were two street lights near the place where he parked and a large neon sign and several small lights at an auto court across the highway. He then proceeded to remove a tire from a dolly wheel on the left side of the truck tractor to replace the blown tire, and while he was so engaged he was struck by an automobile which was driven by defendant Cyphert in a southerly direction. Defendant Azcarate was riding in the automobile.

It was uncontradicted that at the time of the accident plaintiff's truck tractor and semitrailer was disabled and parked upon the highway within the corporate limits of the city of Santa Maria and that warning flares or other signals had not been placed in the front of or in the rear of the truck tractor although there had been a reasonable time to place them. It was agreed that the unladen weight of the truck tractor, without the semitrailer attached, was over 4000 pounds.

The court gave the following instruction: "You are instructed that section 590 of the California Vehicle Code, a part of the law of the State of California in force at the time of the happening of the accident here in question, provided in part as follows: 'Every *motor truck* (emphasis added) having an unladen weight of 4,000 lbs. or more * * * shall be equipped with and at all times carry at least two flares

or two red lanterns, or two warning lights or reflectors, which reflectors shall be of a type approved by the Department. When any vehicle above mentioned or any trailer or semi-trailer is disabled on the highway at any time from a half hour after sunset to a half hour before sunrise, a warning signal of the character indicated above shall be immediately placed at a distance of approximately 100 ft. in advance of, and 100 ft. to the rear of such disabled vehicle. The warning signals herein mentioned shall be displayed continuously during the times mentioned * * * while such vehicle remains disabled upon the highway.'

"Therefore, in this case, if you find that plaintiff's parked vehicle at the time of the accident was a *truck tractor and semitrailer* (emphasis added) and had an unladen weight of over 4,000 lbs. and that said vehicle was disabled and that plaintiff was making repairs on said vehicle and that plaintiff, after parking said vehicle and prior to commencing said repairs, did not place on the highway 100 ft. in front of or 100 ft. to the rear of said parked vehicle any flare, lantern, warning light or reflector, then, in that case, you must find that the plaintiff was himself guilty of negligence in his failure so to do and if you find that his negligence proximately contributed in any degree or manner to the happening of the accident, then your verdict must be for the defendants."

It will be noted that the instruction refers, in the first paragraph, to "Every *motor truck* (emphasis added) having an unladen weight of 4000 pounds" and then states that such motor trucks are required to carry flares and when disabled on the highway at night shall place flares at the front or rear of the vehicle. It will be noted further that the instruction then states, in the second paragraph, that "Therefore, in this case, if you find that plaintiff's parked vehicle at the time of the accident was a *truck tractor and semitrailer* (emphasis added) and had an unladen weight of 4000 pounds * * * and that plaintiff * * * did not place * * * any flares * * * you must find that plaintiff was himself guilty of negligence * * *."

Appellant contends that the giving of this instruction was error for the reason that section 590 of the Vehicle Code does not require that warning flares be placed when a *truck tractor* is disabled at night within the corporate limits of a city.

Section 590 of the Vehicle Code, St.1937, p. 620, upon which the instruction was based is as follows: "Every motor truck having an unladen weight of four thousand pounds or more, and *every truck tractor irrespective of weight when operated upon any highway outside the corporate limits of any city or town* [emphasis added] shall be equipped with and at all times carry at least two flares or two red lanterns, or two warning lights or reflectors, which reflectors shall be of a type approved by the department. When any vehicle above mentioned or any trailer or semitrailer is disabled on the highway at any time mentioned in section 618, a warning signal of the character indicated above shall be immediately placed at a distance of approximately one hundred feet in advance of, and one hundred feet to the rear of such disabled vehicle. The warning signals herein mentioned shall be displayed continuously during the times mentioned in section 618 while such vehicle remains disabled upon the highway."

The time mentioned in section 618, St. 1935, p. 201, above referred to is "* * * from a half hour after sunset to a half hour before sunrise * * *."

It is clear from a literal reading of section 590 that *truck tractors* are required to carry flares *only* when operated outside the corporate limits of a city. In other words that a *truck tractor* operated within the corporate limits of a city is not required to carry flares. The case now before the court involves a truck tractor within the corporate limits of a city.

[1] A comparison, however, of the instruction and the section indicates that the trial judge did not follow the literal reading of section 590 as it applies to *truck tractors,* but apparently construed the section in the manner now urged by the respondent, namely, that the term *"motor truck"* is a broad term which includes the term *"truck tractor,"* and that section 590 requires that a motor truck having an unladen weight of 4000 pounds or more must carry flares whether operated outside or inside the corporate limits of a city, and that a *truck tractor and semitrailer having an unladen weight of 4000 pounds or more* must carry flares whether operated outside or inside the corporate limits of a city. This construction cannot be upheld.

According to the Vehicle Code, sections 33, St.1935, p. 95, and 32.5, St.1937, p. 412,

these vehicles are defined as follows: "A 'motor truck' is a motor vehicle designed, used or maintained primarily for the transportation of property," and, "A 'truck tractor' is a motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn." Inasmuch as both such vehicles are self-propelled and are used for property transportation, it may be considered in referring to such vehicles generally that a truck tractor and semitrailer attached constitute a vehicle which is for general intents and purposes and in appearance a motor truck. Section 590, however, refers to motor trucks and truck tractors separately and makes specific and different provisions as to each with respect to weight as a basis for determining when each should carry flares. Therefore, for the purposes of the section, that is, when flares should be carried by such vehicles, it cannot be held that the term motor truck includes the term truck tractor.

If, however, that were a proper construction to place upon those terms as used in that section, it would not mean that such a truck tractor and semitrailer must carry flares when operated within a city.

Respondents' contention that a truck tractor and semitrailer having an unladen weight of 4000 pounds or more must carry flares within a city, is based upon the construction, above stated, that a motor truck of such weight is required to carry flares when operated within a city, and that a truck tractor is a motor truck, and therefore, a truck tractor and semitrailer of such weight must carry flares within a city.

[2] Apparently, the construction that a motor truck of such weight must carry flares whether operated outside or inside the corporate limits of a city, is based upon the fact that there is no comma in the first sentence of the section 590 between the words "weight" and "when." Since the comma is not there, it is contended that the phrase "when operated upon any highway outside the corporate limits of any city" does not apply to motor trucks of such weight. If a comma were at that place the sentence would read: "Every motor truck having an unladen weight of 4000 pounds or more, and every truck tractor irrespective of weight, when operated upon any highway outside the corporate limits of any city * * * shall be equipped with * * * flares * * *." If the section were thus punctuated it would clearly express the undoubted intention of the legislature that both types of the designated vehicles should be required to carry flares *only* when operated outside a city. It is only the absence of a comma at that place which presents a question as to whether a motor truck is required to carry flares when operated within a city. It is conceded by respondent that there would not be such a requirement if there were a comma between the words "weight" and "when" in the first sentence.

[3, 4] While it is true that punctuation should be considered in interpreting a statute, it is not a controlling factor and is subject to the basic proposition that the legislative intent as expressed in the language of the statute governs. In re Sekuguchi, 1932, 123 Cal.App. 537, 11 P.2d 655. In determining the legislative intent it is proper to consider the history, object and reasonableness of the statute, and if these factors reveal an intent that is not in harmony with the punctuation, then the latter must give way to the former.

[5] The hisory of section 590 is that it first appeared in the Vehicle Code in 1935 and at that time it read as follows: "Every truck or commercial vehicle, operated on any highway outside the corporate limits of any city or town, shall be equipped with and at all times carry at least two flares * * *." It is clear that the section as originally enacted applied to every truck and commercial vehicle irrespective of weight, and *only* when *operated outside the corporate limits of a city.* It will be noted that in the 1937 amendment to section 590 (which is the section under consideration) that the words "every truck" in the 1935 section were replaced by the words "every motor truck having an unladen weight of four thousand pounds or more," and the words "commercial vehicle" were replaced by the words "every truck tractor irrespective of weight," and that the words "operated upon any highway outside the corporate limits of any city or town" were not changed but remain in the 1937 amendment. It will be noted further that there was a "comma" in the 1935 section immediately following the designation of the vehicles involved and preceding the words "operated on any highway outside the corporate limits of any city or town * * *."

The evident object to be accomplished by the 1937 amendment was to exclude light trucks and small commercial vehicles from

the requirement that they carry flares when operated outside a city, and to require large heavy trucks and truck tractors to carry flares when operated outside a city. In order to accomplish this a weight limit was set as to trucks, and no limit was set as to truck tractors, and the identical words relative to operating outside the corporate limits of a city were retained in the amendment. The legislature undoubtedly intended that the requirement that flares be carried should apply not only to truck tractors *only when operated outside a city*, but should apply also to motor trucks having an unladen weight of 4000 pounds or more *only when operated outside a city*. Both parties concede that the 1935 section required flares *only* when the vehicles there designated were operated outside a city. There is nothing in the 1937 amendment to indicate that it was intended to change that feature of the 1935 section, except the omission of the comma.

[6] The language of a statute must be given a reasonable interpretation. Sec. 3542, Civ.Code; In re Estate of Todd, 1941, 17 Cal.2d 270, 109 P.2d 913. As previously shown, it is clear from the plain language of section 590, now under consideration, that truck tractors are required to carry flares *only* when operated outside a city. There appears to be no particular reason or any reason for a distinction between a motor truck and a truck tractor in so far as a requirement to carry flares in or out of a city is concerned. The reasonable interpretation to place upon the statute is that motor trucks likewise are required to carry flares only when operated outside a city. Therefore, if the truck tractor and semitrailer operated by plaintiff be regarded as a truck tractor within the meaning of section 590, plaintiff was required by the plain language of the statute to carry flares only when outside a city, and if such vehicle be regarded as a motor truck according to the interpretation of the trial court (which is not upheld), the plaintiff was required to carry flares only when outside a city.

The first sentence of section 590 requires certain vehicles to be *equipped* with flares. The second sentence specifies *when* the flares, with which the designated vehicles are required to be equipped, must be *used*. The second sentence states: "When any vehicle above mentioned or any trailer or semitrailer is disabled on the *highway* [emphasis added] at any time mentioned in section 618, a warning signal of the character indicated above shall be immediately placed * * *."

[7] Respondent refers to the definition of the word "highway" in section 81 of the Vehicle Code, St.1937, § 617, as follows: "'Street' or 'highway' is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." He contends that since the term "highway" is not defined as a street outside the corporate limits of a city that it must be presumed that the word "highway" in the second sentence of the section 590 means a street or highway either in or out of a city. Since it is clear according to the literal reading of the first sentence that the legislature required that truck tractors be equipped with flares only when operating upon a "highway" outside the corporate limits of a city, it is unreasonable to conclude that the legislature intended, by the use of the word "highway" in the second sentence, that a truck tractor which was not required to be equipped with flares when operating within a city should *use* flares when the truck tractor is disabled on a "highway" in a city. The only reasonable interpretation that can be given to the word "highway" as it is used in the second sentence is that it is the highway upon which the designated vehicles are required to be equipped with flares when operated, that is, the "highway" outside the corporate limits of a city. It would be unreasonable to expect that flares be used upon a highway where it is not required that flares be carried.

A consideration of the history, object and reasonableness of the section 590 reveals a legislative intent that is not in harmony with the punctuation of the first sentence and therefore the omission of the comma between the words "weight" and "when" in that sentence should be disregarded and the section construed as if the comma were there.

The second contention of appellant is that the court erred in refusing to instruct the jury upon the doctrine of the last clear chance. By reason of the disposition that is made of this appeal upon the first contention of appellant there is to be another trial of the action, and inasmuch as the applicability of the doctrine of the last clear chance will depend upon the evidence as presented upon the re-trial, it is unnecessary to determine the second contention upon this record.

[8] For the reason that the court erred in instructing the jury that the plaintiff was guilty of negligence if he failed to place warning flares in front of or in the rear of his truck tractor and semitrailer when it was disabled and parked at night on the highway within the corporate limits of a city, the judgment is reversed.

SCHAUER, P. J., and SHINN, J., concurred.



50 Cal.App.2d 235

FINLEY et al. v. SUPERIOR COURT OF SAN MATEO COUNTY et al.

Civ. 12071.

District Court of Appeal, First District, Division 2, California.

Feb. 27, 1942.

Hearing Denied April 27, 1942.

1. Appeal and error ⇐608(1)

The statute in requiring as prerequisite to perfection of an appeal a transcript of the "acts or statements of the court" has reference to such acts or statements which amount to rulings upon questions submitted to the court and does not contemplate remarks made by court or counsel in nature of a running colloquy preceding rulings by the court. Code Civ.Proc. § 953a.

See Words and Phrases, Permanent Edition, for all other definitions of "Acts or Statements of the Court".

2. Appeal and error ⇐608(1)

Since court reporter is an officer of the court and under its control, neither party should be denied the right of appeal because reporter has not entered in transcript matter which the law does not require. Code Civ.Proc. § 953a.

3. Appeal and error ⇐612(1)

The superior court was not authorized to refuse to certify the reporter's transcript for an appeal on the ground that it did not comply with the statute, in that certain side remarks of defendant's attorney which prompted some of the rulings should have been included in the transcript in order to explain the court's language in making such rulings where the transcript did, in compliance with the statute, contain all the acts or statements of the court, objections or exceptions of counsel, and all matters to which they related. Code Civ.Proc. § 953a; Supreme Court and District Courts of Appeal Rules, rule II, § 7.

Proceeding in mandamus by James B. Finley, a minor, etc., and others, to compel the Superior Court of San Mateo County and the judge thereof to certify the reporter's transcript on appeal.

Writ issued.

Hearing denied; CARTER, J., dissenting.

Hoge, Pelton & Gunther and A. Dal Thomson, all of San Francisco, for petitioners.

J. A. Branson, Francis N. Foley, and Hugh F. Mullin, Jr., all of San Mateo, for respondents.

NOURSE, Presiding Justice.

In an action tried to a jury the plaintiff had a verdict and judgment from which the defendant gave notice of appeal under the provisions of section 953a of the Code of Civil Procedure. Concurrently with the filing of said notice the defendant gave due notice to the clerk to prepare a transcript, and arranged with the court reporter for his compensation for transcribing his notes and preparing a reporter's transcript. In due time the clerk certified and filed a clerk's transcript, and the reporter certified and filed the reporter's transcript. After due notice these were both presented to the respondent court for certification. After several hearings the respondent refused to certify the reporter's transcript upon the ground that it did not fully comply with the conditions of the code section.

In presenting the petition for a writ of mandate the petitioner has pleaded and proved that he has done everything which the law demands to perfect his appeal from the judgment. All the steps taken by him were in strict accordance with the procedure prescribed. The court reporter testified at the hearing before respondent court in reference to the transcript presented for approval: "Everything is in there that I took down." No evidence was taken disproving the correctness of the transcript or the certification of the reporter. But respondent expressed the opinion that something else was said by counsel or by the court which did not appear in the

transcript. It seems to be the position of respondent that a passage between court and counsel occurred during the closing argument of the attorney for the plaintiff, and that interruptions were made by the attorney for the defendant. There is no suggestion that the reporter's transcript does not contain all the "acts or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate." The position of respondent is that certain side remarks of the attorney for the defendant which prompted some of the rulings should have been included in the transcript in order to explain some of the language used by the court in making these rulings. Specifically it appears that, while counsel for the plaintiff was making his closing argument to the jury, objections or exceptions were made by counsel for the defendant. These objections, with the court's rulings thereon, were entered in the transcript, but the reporter did not make note of remarks made by either the court or counsel in the nature of a running colloquy preceding the rulings.

[1] The code section under which the appeal is taken does not require the court reporter to transcribe the oral argument of counsel or the remarks or argument upon an objection or exception, or all the explanations or "remarks" of the court in reference thereto. In requiring a transcript of the "acts or statements of the court" the section has reference to such acts or statements which amount to rulings upon questions submitted to the court. This has been the accepted practice and has been made certain in criminal cases by rule II, section 7 of the Supreme Court and District Courts of Appeal which provides that the notes of the reporter shall be transcribed "* * * excluding therefrom all statements and opinions of the court not constituting rulings, and all arguments of counsel, unless such statements, opinions or arguments were objected to or assigned as error or misconduct at the time they were made."

[2, 3] The plain answer to the position here assumed by the respondent is that, if in any case either the trial court, or counsel, desires the reporter to make note of anything of this character it would be a simple matter to request him to do so, but since the reporter is an officer of the court, and under its control, neither party should be denied their right of appeal because the reporter has not entered in the transcript matter which the law does not require.

Let a writ issue as prayed.

STURTEVANT and SPENCE, JJ., concurred.



50 Cal.App.2d 352

PLUMMER v. EHLERS.

Civ. 2951.

District Court of Appeal, Fourth District, California.

March 5, 1942.

1. Waters and water courses ⇐231

Where offer of sale of land acquired for taxes by an irrigation district was conditionally made and required an acceptance approved by district's trustees before a binding contract of sale and purchase could be created, and plaintiff's application to purchase land was rejected by trustees, no "contract" was created and plaintiff acquired neither a legal nor equitable interest in land.

See Words and Phrases, Permannet Edition, for all other definitions of "Contract".

2. Waters and water courses ⇐231

Where offer by an irrigation district to sell land to which district had acquired tax title because of delinquent district assessments was made to the former owner or his assigns, and rehabilitation plan under which land was offered for sale defined "former owner" as meaning owner of land when it was deeded to district, and plaintiff obtained a quitclaim deed from predecessor of one who owned land when it was conveyed to district, plaintiff was not an "assignee of the former owner" within meaning of plan and could not purchase land. St.1933, p. 1961.

See Words and Phrases, Permanent Edition, for all other definitions of "Assignee of the Former Owner".

Appeal from Superior Court, Riverside County; Harry C. Westover, Judge Assigned.

Action by W. M. Plummer against E. O. Ehlers to quiet title to land and for ejectment. From a judgment for defendant, plaintiff appeals.

Affirmed.

R. J. Welch, Jr., and H. M. Dougherty, both of Riverside, for appellant.

Sarau & Thompson and Roy W. Colegate, all of Riverside, for respondent.

MARKS, Justice.

Plaintiff brought this action to quiet his title to land in the Palo Verde Irrigation District in Riverside County, California, and for ejectment. Defendant had judgment and this appeal followed.

No question is seriously argued under the cause of action for ejectment so we will confine ourselves to the questions presented in the action to quiet title against E. O. Ehlers. As the action was dismissed as to all other defendants, we will refer to E. O. Ehlers as the defendant. The pleading is in the usual form and alleges "that the plaintiff now is and for five (5) years last past, together with his immediate predecessors in interest, has been the owner in fee and entitled to the possession of that certain lot and parcel of land. * * *"

Alfred Solano was the owner of the property in 1921. After five years' default in the payment of taxes, it was deeded to the state on August 16, 1927. On May 27, 1926, Solano conveyed the property to Charles L. Marble. On June 15, 1927, Charles L. Marble executed a quitclaim deed to the property to Solano. Solano, by quitclaim deed dated July 18, 1929, and recorded July 23, 1929, conveyed the property to Edward Galle. In 1931, the property was conveyed by deed to the Palo Verde Irrigation District after non-payment of assessments. By deed dated December 3, 1934, recorded on December 6, 1934, Solano quitclaimed the property to W. M. Plummer, the plaintiff in this action. On July 24, 1936, the State of California conveyed the property, which had been deeded to it because of delinquent taxes as distinguished from delinquent district assessments, to the Palo Verde Irrigation District.

On December 17, 1934, Solano commenced an action to quiet his title against Edward Galle and Myrta Blandford, also known as Myrta Blanford. The decree quieting his title was rendered and entered on May 13, 1935. This information is gained from an inspection of the original records in that action which were admitted in evidence by reference but were not copied into the record.

This completes the chain of title as shown by the record. The following facts are gathered from various documents offered in evidence but which were excluded on objections made by defendant.

The irrigation district assessments on more than ninety-eight per cent of the property in the district had become delinquent and a large proportion of the property had been deeded to the district. Taxes were also delinquent and much of the property had been deeded to the state. Default had been made on some of the bonds of the district and there had been a total default on all of the bonds since 1931. On August 18, 1932, the district entered into a certain contract of lease and option with Florence Clark, representing the owners of more than eighty-five per cent in amount of bonds outstanding, looking to some reorganization of the district. (Apparently Florence Clark subleased some considerable portions of the property.) On March 1, 1934, the Reconstruction Finance Corporation granted the district a loan of $1,039,423 with which to refund its bonded indebtedness.

In order to service this loan it became necessary to get the property in the district back into private ownership and on the assessment rolls. This the trustees of the district proposed to do under the provisions of an act approved June 5, 1933. Stats.1933, page 1961.

In 1934 the trustees caused a plan for the rehabilitation of the district to be prepared. This plan provided for the sale at a fraction of the delinquent assessments and taxes of the various parcels "to the former owner or his assigns, when acquired by the District, the State and District tax title to all land which has been deeded to State and District for taxes now delinquent. The term 'former owner' means the owner at the time the land was deeded to the District and prima facie to the person to whom the land was assessed for district purposes at that time. The district may, on evidence of title submitted by an applicant to whom the land was not so assessed, determine that such applicant is the former owner or his assignee." Definite provisions were made for the protection of the right to purchase by the sub-lessees of Florence Clark, the

lease and option to her being cancelled and the district agreeing to assume her obligations under her contracts. It was particularly provided that "as between a sublessee of Florence Clark who shall be found to have complied with the terms of his sublease and the former owner or his assigns, the District Board shall conclusively determine which shall be entitled to purchase, lease or option, as their respective interests may appear, after hearing as hereinbefore provided." This plan also contained the following: "If conflicting applications are made for the same land, the District Board shall, upon such notice and hearing, as it shall prescribe, determine which applicant is entitled to deed, contract, lease or option, and such determination, except in case of actual fraud, shall be conclusive on all applicants."

The rehabilitation plan was approved by the board of trustees of the district and was submitted to the Board of Supervisors of Riverside County. It was approved with certain amendments. We are not advised as to the details of these amendments. The amended plan was then approved by the board of trustees of the district, the Board of Supervisors of Imperial County and apparently by the necessary state officers.

On October 9, 1934, the board of trustees of the district ordered published in the Palo Verde Weekly Times, "an offer to sell the tax title to certain lands within said District," including a copy of the rehabilitation plan. This notice was first published on November 1, 1934, and provided that applications to purchase must be made within sixty days from that date.

On December 19, 1934, plaintiff made a formal application to acquire the property here involved "under the provisions of the Rehabilitation Plan." On January 17, 1935, plaintiff made a deposit of the amount necessary to complete his application and received a receipt which contained the following: "This receipt is given subject to final acceptance of repurchase application by Board of Trustees."

On February 15, 1935, plaintiff was informed that his application had been rejected and his deposit was returned to him. Under date of March 11, 1935, plaintiff wrote the district asking for a rehearing on his application. He gave as his grounds that he had been informed that Solano had instituted suit to establish his title to the property and stating that "A determination of the Solano suit favorable to him would establish him as the former owner of the property within the purview of the repurchase plan, and me, therefore, as his assignee."

We are informed by counsel that a rehearing was had and that plaintiff's application was again rejected.

It is plaintiff's theory that the district made an offer of sale of the property to a class of which he was a member; that he unconditionally accepted the offer; that this acceptance created a binding contract of sale and purchase, giving him an equitable interest in the property which he could establish in this action.

In support of this argument he cites numerous decisions which support the rule for which he contends. We have no quarrel with the rule or the decisions supporting it. The facts before us do not bring the case within the rule and the reasoning of the decisions.

[1] The offer of sale was not unconditionally made to a class including the plaintiff. It was conditionally made and required an acceptance which must be approved by the trustees before a binding contract of sale and purchase could be created. As there was no approval, but a rejection, there was no contract created and plaintiff acquired neither a legal nor an equitable interest in the property. Toms v. Hellman, 115 Cal.App. 74, 1 P.2d 31; Dexter v. Ankiewicz, 26 Cal.App.2d 326, 79 P.2d 400.

[2] Plaintiff was not one of the class to which the offer was made. The offer was made to the former owner or his assigns. Under the definition of "former owner," contained in the Rehabilitation Plan from which we have quoted, Galle and not Solano was the "former owner" in 1931, when the district acquired the tax title because of delinquent district assessments. Therefore, plaintiff was not the assignee of the "former owner," as defined in the Rehabilitation Plan, and had no right to purchase the property under the terms of the plan.

Because of the view we take of the case, it is unnecessary to consider the other questions argued by counsel.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

DEEVY et al. v. TASSI et al.

Civ. 11792.

District Court of Appeal, First District, Division 2, California.

March 3, 1942.

Hearing Granted May 1, 1942.

1. Chattel mortgages ⇐162

Where mortgage on cattle provided that if mortgagors defaulted in payments on mortgage note, mortgagee could, with or without process of law, take possession of cattle, the mortgagee was justified in taking possession of cattle without process of law upon default by mortgagors only if possession could be secured peaceably.

2. Appeal and error ⇐1002

The jury's implied findings on conflicting evidence could not be disturbed.

3. Assault and battery ⇐24(1)

In action for injuries received in an assault, plaintiffs could prove as an item of damage the aggravation of one plaintiff's heart condition as result of assault without alleging the condition and aggravation thereof as special damage.

4. Appeal and error ⇐901

The District Court of Appeal is not bound to endeavor to locate conflicts, if any, in instructions.

5. Assault and battery ⇐35

Evidence authorized verdicts for plaintiffs in action for injuries sustained in assault occurring while defendant mortgagee was attempting to repossess mortgaged cattle from plaintiffs.

6. Master and servant ⇐331

Defendant, being liable for acts of his manager which were within scope of manager's employment, was liable for compensatory damages for injuries sustained by plaintiffs in assault occurring while manager was attempting to repossess mortgaged cattle from plaintiffs for defendant as mortgagee, but defendant was not liable for exemplary damages claimed by plaintiffs as result of manager's acts where there was no showing that defendant specifically advised acts of manager, or that defendant ratified such acts.

7. Assault and battery ⇐40

$500 to each plaintiff as exemplary damages in connection with an assault occurring while defendants, as mortgagee, were attempting to repossess mortgaged cattle from plaintiffs was not excessive.

8. Assault and battery ⇐40

$2,500 as compensatory damages to each plaintiff in action for injuries sustained in an assault was excessive and would be reduced to $500 for one plaintiff and to $300 for each remaining plaintiff. Civ.Code, § 3359.

9. Appeal and error ⇐1004(1)

The amount of award of exemplary damages in action for injuries sustained in unlawful assault was not before District Court of Appeal on defendants' appeal, since such award stood or fell on statutory grounds. Civ.Code, § 3294.

10. Assault and battery ⇐37

The compensatory damages to which each plaintiff was entitled for injuries sustained in an unlawful assault rested on injuries suffered by each plaintiff.

11. Appeal and error ⇐1066

In action for injuries sustained in an assault, an instruction purporting to apply statutory rule respecting award of damages for injuries certain to result in future was prejudicial and should not have been given where there was no medical testimony respecting whether plaintiffs would suffer future injury as result of assault, but giving of instruction was not reversible error under uncontradicted evidence showing that each plaintiff had suffered some injuries for which he was entitled to recover. Civ.Code, § 3283.

12. Appeal and error ⇐1060(1)

In personal injury action, argument to jury by plaintiffs' counsel wherein epithets were used and defendants were referred to as "gunmen" and "racketeers," while not free from criticism, was not such prejudicial "misconduct" as to require reversal of judgment for plaintiffs.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

13. Assault and battery ⇐13

Defendants could not claim self-defense in action for injuries sustained in an assault, where defendants had invited the trouble which resulted in assault.

14. Assault and battery ⇐9

One charged with assault may not rely on the fact that he first took advice of counsel.

15. Assault and battery ⊂34

That defendants before assault had consulted an attorney regarding their rights was admissible in evidence to aid jury in estimating exemplary damages in action for injuries sustained in assault.

Appeal from Superior Court, Marin County; Benjamin C. Jones, Judge Assigned.

Action by Dan Deevy and others against J. A. Tassi and others to recover damages for injuries suffered in an assault. From a judgment for plaintiffs defendants appeal.

Judgment modified and affirmed.

George T. Davis, of San Francisco, for appellants.

Vincent W. Hallinan and James A. Himmel, both of San Francisco, for respondents.

STURTEVANT, Justice.

The plaintiffs sued the defendants to recover damages for injuries suffered in an alleged unlawful assault. The defendants answered and the action was tried before the court sitting with a jury. The jury returned a verdict in favor of each plaintiff in the sum of $2500 as compensatory and $500 as exemplary damages. The defendants made a motion for a new trial. The motion was based on all of the statutory grounds. The motion was denied. The defendants appealed and have brought up typewritten transcripts.

As will hereinafter appear, it will be necessary to discuss the rights of individuals. But it is appropriate at this time to state the following facts. Dan Deevy, Jr., and Julia, his sister, are the owners of a dairy ranch located near Olema in Marin County. Some of the cows are owned by Dan Deevy, Jr. The defendant J. A. Tassi under the fictitious name of San Jose Cow Market is engaged in the business of buying and selling livestock. His principal place of business is at San Jose. On December 29, 1937, Dan Deevy, Sr., and Nellie Deevy, his wife, bought from San Jose Cow Market a herd of cows and in payment the two purchasers, and John Gomez and Loeda M. Gomez as endorsers, executed to the vendor a promissory note. The note was secured by a chattel mortgage. That mortgage contained a clause as follows: "It is also hereby agreed that if the mortgagor should fail to make any of the payments as in said promissory note provided, either of principal or of interest, or if there should be any default in the same or in the performance of any of the agreements or obligations herein contained, or in the payment of any liability or liabilities secured by this mortgage, or in event of an unreasonable depreciation in value of the mortgaged property or the mortgaged property from any other cause reasonably shall be deemed, by the mortgagee or his assigns, inadequate security for the indebtedness hereby secured, then and in either of the aforesaid events all of said note, both principal and interest, and all other amounts payable hereunder or secured hereby shall at the option of the mortgagee or his assigns become immediately due and payable, and the mortgagee or his assigns thereupon or at any time during such default shall have the right to take possession of any and/or all of the mortgaged property wherever the same may be, and for that purpose may enter into and upon any premises whatever or wherever the mortgaged property or any part thereof may be or may be supposed to be, either with or without process of law and using all necessary force so to do, and if found shall have the right to take possession of and/or remove the same." On March 30, 1940, E. A. Tassi, the manager of the mortgagee, claiming the mortgagors were in default, consulted his attorney Jerome A. Duffy as to his rights in the premises. The latter advised him that he could retake the livestock under the provisions of the mortgage provided he could do so without committing a breach of the peace. On the date last mentioned E. A. Tassi, accompanied by Jack Bones, a deputy sheriff, went to the Deevy ranch, and the former asked for a return of the mortgaged livestock. The mortgagors refused to make a delivery. E. A. Tassi thereupon left the premises and went to Olema. He hired R. J. Kynock and two horses. He also hired Sam Howe. They returned to the Deevy ranch and started to herd and drive said livestock from the premises. They were immediately resisted. An affray ensued. Tassi and Howe attempted to herd and drive the cows away. Dan Deevy, Sr., Nellie Deevy, Julia Deevy, Dan Deevy, Jr., and one hired man opposed them. For injuries suffered in said affray the plaintiffs in this action sought to recover. Other facts will hereinafter be recited as it becomes necessary to present the particular point under discussion.

[1, 2] The defendants were justified in taking possession of the above-mentioned cattle without process of law *only where such possession could be secured peaceably.* Silverstin v. Kohler & Chase, 181 Cal. 51, 183 P. 451, 9 A.L.R. 1177. In Kirby v. Foster, 17 R.I. 437, 22 A. 1111, at page 1112, 14 L.R.A. 317, the Supreme Court of Rhode Island said: "In the most favorable view of the case for the defendants, the plaintiff, having obtained the money by no crime, misrepresentation, or violence, nor against the will of its owner, retained it wrongfully. In such cases the rule is clearly stated in Bliss v. Johnson, 73 N.Y. 529: 'The general rule is that a right of property merely, not joined with the possession, will not justify the owner in committing an assault and battery upon the person in possession, for the purpose of regaining possession, although the possession is wrongfully withheld.' See, also, Harris v. Marco, 16 S.C. 575; Barnes v. Martin, 15 Wis. 240 [82 Am. Dec. 670]; Andre v. Johnson, 6 Blackf. [Ind.] 375. * * * But, it is said, the plaintiff was about to carry away the money against the will of the owner. Undoubtedly this was so; but this is true in every case of wrongful conversion of property. If it be not taken against the will of the owner, it cannot be retaken by force, but only by the usual civil remedy." However, they contend that E. A. Tassi attempted only a peaceful repossession, that defendants' actions were lawful and reasonable, and that plaintiffs were responsible for the resulting controversy. Each of those contentions was submitted to the jury and it returned a verdict against the defendants. On the issues so submitted the evidence was distinctly conflicting and the implied findings of the jury may not be disturbed on appeal.

[3] In their complaint the plaintiffs did not allege that Dan Deevy, Sr., was afflicted with chronic miocarditis and that the affray aggravated said affliction. However, in making the opening statement, the plaintiffs' attorney stated to the jury that the plaintiffs would prove as an item of damage the aggravation of the heart condition of Dan Deevy, Sr. The defendants objected and now contend that such statements by plaintiffs' attorney constituted misconduct. Over the objection and exception of the defendants the plaintiffs introduced evidence on the subject last mentioned. The defendants earnestly contend that the ruling admitting such evidence was also prejudicial and erroneous. We think they are mistaken. Their contentions rest on the assumption that the condition of the heart and aggravation of that condition were matters of special damage which should have been alleged. The error in their position is the assumption that the plaintiffs should have alleged said matters as special damage. They were not bound to do so. Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 P. 624.

[4] The defendants contend that the instructions of the trial court were conflicting, contradictory, and confusing. They quote several folios of instructions. They then make the claim that the instructions are irreconcilable. They do not show in what respect. It is no part of the duty of this court to endeavor to locate conflicts, if any. For that reason the point may not be sustained.

[5] The defendants also contend that the evidence was insufficient to sustain the judgments and verdicts. It will suffice to state that the evidence contained conflicts; but, that there was evidence from which the jury was entitled to bring in verdicts in favor of the plaintiffs, is beyond controversy.

[6] The defendants also contend that the verdict against J. A. Tassi is contrary to law. As an objection to an award for compensatory damages the contention may not be sustained. As E. A. Tassi was the manager of J. A. Tassi the latter was liable for the acts of the former which were within the scope of the former's employment. In so far as the contention is addressed to exemplary damages it must be sustained. Lightner Mining Co. v. Lane, 161 Cal. 689, 705, 120 P. 771, Ann.Cas.1913C, 1093. There is nothing in the record showing that J. A. Tassi specifically advised the acts of E. A. Tassi, that he knew anything whatever of his acts until after the incident had happened, or that he ratified such acts. Therefore he was not liable for exemplary damages. Loeb v. Kimmerle, 215 Cal. 143, 9 P. 2d 199.

[7] It is also claimed that the damages awarded are excessive. As to the defendant J. A. Tassi we have just shown that he was not liable for any part of the exemplary damages. As to the defendant E. A. Tassi, it may not be said that the sum of $500 awarded by the jury as exemplary damages in favor of each plaintiff was excessive. From what has been said hereinabove we think it is apparent that there

were facts which, if the jury believed them, would give reasonable support to the verdict returned. However, as to compensatory damages the case presents a very different problem. The affray above mentioned occurred on Saturday, March 30, 1940. The next day, acting on the advice of counsel, all three plaintiffs consulted their family physician, Dr. C. C. Everman. Each one of the plaintiffs was examined regarding each and every injury he complained of. On the trial the doctor was produced as a witness on behalf of the plaintiffs. As summarized by the plaintiffs in their brief Dr. Everman testified: "All of the three people were complaining of injuries, and after refreshing his recollection from his office record, he testified that as to Julia Deevy she showed soreness and tenderness in the left cheekbone region with limitation of voluntary up and down motion of the jaw; in other words, she could not open it as easily as she would like to, because as she states, at the time the bone at the joint of the jaw with the skull on that side—the sidewise motion of the jaw was perfectly all right but it hurt her to do it. She could move it completely, but it hurt her in this place (indicating.) Her teeth came together accurately, tending to show there was no break in the jawbone itself; there was no sign of fracture or dislocation of the jaw. My impression at the time was traumatic sprain. In other words sprain due to forcible injury of the left—of the junction of the left part of the jaw with the skull; the joint there. The muscles of her right forearm and arm from her shoulder to her hand were sore and aching. Her right middle finger—she had a skinning on the back of the knuckle, of the first knuckle above the hand, with moderate swelling of the whole finger. The back surface of her left hand was slightly swollen and tender. Sore to the touch at the base of the index and middle finger. The witness testified as to Dan Deevy, Sr., he complained of soreness over the cheekbone, and tenderness on pressure over his cheekbone, and he was nervous and upset and his heart was a little more rapid than usual, probably due to excitement. The witness further testified as to examination of Mrs. Deevy. She complained of soreness in the muscles of her upper arms, up near the shoulders on both sides; in the muscles in the left side of her neck, and of soreness and tenderness to pressure over the mastoid prominence, the bony part behind her left ear, and down the side and back of both thighs, from the hips down to the knees. She had an abrasion, a skinning just below her left knee. She also had a skinning with soreness also behind the left knee. She also had a very slight skinned place in the front surface of the right knee. With regard to bruising, I will state from my experience a bruise will appear two or three days after a traumatic injury to the place which is bruised. In the first place a bruise is a fact of pathology. It is not an external evidence. A bruise may occur but there might not be any visible signs of it until several days later. But the visible signs occurring several days later could not have occurred."

[8-10] The jury awarded to each, as compensatory damages, $2,500. In that behalf the verdict was so plainly and outrageously excessive as to suggest at first blush passion or prejudice in fixing the amount. The passion and prejudice of the jury were, as shown by the record, appealed to on many occasions and in many ways. The chattel mortgage, not unlawful on its face, was, by plaintiffs' counsel, attacked as being unconscionable. That fact was stressed by the plaintiffs at all times. Because the defendants sought to enforce the terms of said mortgage they were by plaintiffs' counsel called "desperadoes," "gun-men," "racketeers," etc. In short, the jury was, in effect, asked to, and apparently did, penalize defendants for writing and enforcing harsh contracts. Whereas the issue on trial was the amount of damages for personal injuries suffered by the plaintiffs. The compensatory damages must therefore be reduced. The award of exemplary damages is not before us. That stands or falls on statutory grounds. Civ. Code, sec. 3294. The compensatory damages to which each plaintiff was entitled must rest on the injuries suffered by each. Assuming that the injuries suffered by Julia Deevy were not because of a fall but because of the acts of the defendants, the case stands thus. If she had sued alone, had introduced the same evidence, and a jury had returned a verdict for $500, we submit neither party would be entitled, as a matter of law, to challenge the amount. Such sum, under all of the facts, would have been reasonable and in all cases damages, if allowed at all, must be reasonable. Civ.Code, sec. 3359. Including every element of detriment shown by the evidence, such verdict would obviously have been reasonable. By a parity of reasoning $300 in favor of Nellie Deevy

and $300 in favor of Dan Deevy would also be reasonable. It follows that all in excess of said sum awarded as compensatory damages was excessive and should not be allowed. Seelye v. Harvey, 46 Cal.App. 448, 450, 189 P. 311; Loeb v. Kimmerle, 215 Cal. 143, 164, 165, 9 P.2d 199; Bellman v. San Francisco H. S. Dist., 11 Cal.2d 576, 586, 81 P.2d 894.

[11] The defendants complain because the trial court gave an instruction purporting to apply to the instant case the rule defined in section 3283 of the Civil Code. As to whether any one of the plaintiffs would suffer any detriment resulting after the commencement of the action was distinctly a medical problem. Cordiner v. Los Angeles Traction Co., 5 Cal.App. 400, 404, 91 P. 436; Bauman v. City and County of San Francisco, 42 Cal.App. 2d 144, 163, 164, 108 P.2d 989. There was not a particle of evidence given by a medical practitioner on that subject with reference to any injury suffered by any one of the plaintiffs. As applicable to the instant case the instruction was clearly prejudicial. The defendants contend it was improperly worded. We think it was. However, assuming that it was properly worded, in the absence of any evidence as to future detriment, it should not have been given. Bellman v. San Francisco H. S. Dist., 11 Cal.2d 576, 588, 81 P.2d 894. But, under the facts contained in this record, we think the giving of said instruction was not reversible error. The erroneous part of the instruction was addressed solely to future detriment. That factor can be treated without reversing the judgment. The uncontradicted evidence is to the effect that each plaintiff suffered some injuries for which he was entitled to recover. The amounts herein approved were not computed by taking into consideration future detriment and there is no reason that a new trial should be ordered.

[12] Defendants earnestly contend that the plaintiffs' attorney was guilty of prejudicial misconduct. Except as hereinabove specified such misconduct consisted of epithets used by him in his argument. They were not free from criticism. We have hereinabove given the attack such consideration as we think it should have when we discussed the claim that the verdicts were excessive and were the result of passion and prejudice.

[13] At about half past one in the afternoon, on March 30, 1940 E. A. Tassi appeared at the Deevy ranch and demanded that he be allowed to take the herd of cows described in the above-mentioned mortgage. The demand was at once refused. Tassi left the premises and later returned with more help and proceeded to take possession. Almost at once the affray commenced. As to who struck first the evidence is conflicting. The defendants complain because they were not, in their argument, allowed to claim self-defense. We see no error in the ruling. The defendants had invited the trouble. 4 Am. Jur. 149 "Assault and Battery," sec. 45.

[14, 15] The defendants stress the fact that E. A. Tassi was acting on advice of counsel. They claim that fact was a complete defense against any award for exemplary damages. They do not cite any authority to that effect. It is clearly the law that one charged with assault may not rely on the fact that he first took the advice of counsel. 6 C.J.S., Assault and Battery, § 88, p. 941. That the defendants consulted an attorney regarding their rights was a pertinent fact to introduce in evidence to guide the jury in estimating exemplary damages. 5 C.J. 685 "Assault and Battery," sec. 128; Walker v. Chanslor, 153 Cal. 118, 124, 94 P. 606, 17 L.R.A.,N.S., 455, 126 Am.St.Rep. 61. But the evidence was admitted and no contention is made to the contrary.

The judgment herein is modified by reducing the award of the jury for compensatory damages from $2,500 in favor of each plaintiff to $300 in favor of plaintiff Dan Deevy, to $300 in favor of plaintiff Nellie Deevy, and to $500 in favor of plaintiff Julia Deevy, and by striking out the award of the jury for exemplary damages in the sum of $500 in favor of each plaintiff against the defendant J. A. Tassi. As so modified said judgment is affirmed as to each of the two defendants, and each party will pay his own costs on appeal.

NOURSE, P. J., and SPENCE, J., concurred.

50 Cal.App.2d 238

LYON v. MASTER HOLDING CORPORATION et al.

Civ. 13431.

District Court of Appeal, Second District, Division 2, California.

Feb. 27, 1942.

Hearing Denied April 27, 1942.

1. Venue ⇐70

Trial court's denial of a motion for change of place of trial on the ground of convenience of witnesses is not an abuse of discretion, where affidavit of adverse party shows that his witnesses will be inconvenienced by the change.

2. Venue ⇐52(1)

A mere preponderance in number of witnesses expected to be produced by one party will not necessarily determine the order to be made on motion for change of place of trial for convenience of witnesses.

3. Appeal and error ⇐965

Trial court's determination of motion for change of place of trial for convenience of witnesses will not be interfered with by appellate court except for abuse of discretion.

4. Venue ⇐70

Trial court's denial of defendant's motion for change of place of trial for "convenience of witnesses" was not an abuse of discretion, where plaintiff's affidavit and opposition showed that procurement of certain documentary evidence before court to which defendant sought to have case changed, would be impossible by reason of jurisdiction theretofore gained over the evidence by federal authorities, and that a change would inconvenience plaintiff's witnesses.

See Words and Phrases, Permanent Edition, for all other definitions of "Convenience of Witnesses".

5. Pleading ⇐11, 48

It is neither necessary nor proper to allege evidentiary details in complaint, but rather rules of pleading require only a clear statement of ultimate facts requisite to the cause of action.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Suit by Phoebe Eleanor Lyon against Master Holding Corporation, Turlock Guarantee Building-Loan Association, and others. From an order denying its motion to change the place of trial, the defendant Turlock Guarantee Building-Loan Association appeals.

Affirmed.

Wm. N. Graybiel, of Turlock, for appellant.

F. W. Sawyer, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendant Turlock Guarantee Building-Loan Association appeals from an order denying its motion to change the place of trial from Los Angeles to Stanislaus County.

On February 17, 1937, plaintiff filed her action in the Superior Court of Los Angeles County against the predecessors in interest of defendant for damages in the sum of $8,000, suffered by reason of fraudulent representations made to plaintiff in the sale of shares of the capital stock of the Master Holding Corporation, one of such predecessors in interest. The answer of El Portal Building Loan Association, one of such predecessors, was filed January 28, 1938, and amendments thereto were filed December 7, 1939.

On the 18th day of September, 1941, defendant Turlock Guarantee Building-Loan Association served and filed this motion for a change of place of trial from Los Angeles County to Stanislaus County on the ground of convenience of witnesses. In the notice of motion it is set forth that defendant has its principal place of business in Stanislaus County and that all of its witnesses reside therein, as do also the plaintiff and her witnesses, and that it will be in the interest of justice for both parties to have the case tried in the last-named county. In support of the motion defendant filed its affidavit of merits setting forth that the El Portal Building Loan Association had its place of business in Stanislaus County and that it had merged all of its interests with the Turlock Guarantee Building-Loan Association April 17, 1939; and that such corporation forfeited its franchise to do business on the 16th day of March, 1933, by reason of its failure to pay its franchise tax; that it has not existed as a corporation since March 16, 1933; that the default of the Master Holding Corporation

was entered February 16, 1938; that the action was dismissed as to all other defendants; that on the 22d day of June, 1938, the deposition of plaintiff was taken in Stanislaus County at which time plaintiff named her son and daughter and son-in-law as her three witnesses, all of whom reside in Stanislaus County. The affidavit further averred that the sale of the stock of the Master Holding Corporation took place in Stanislaus County; that at that time it was allied with El Portal Building Loan Association and they had an interlocking board of directors; that for the purpose of defeating such allegation defendant expects to use seven witnesses who are residents of Stanislaus County and that these witnesses will testify that there was no interlocking board of directors; that Atceson, the alleged agent of El Portal Building Loan Association, was never employed by it and that the Master Holding Corporation never owned any stock in the El Portal.

In opposition to the foregoing affidavit, plaintiff filed the affidavit of her lawyer in which it is said "one of the material issues to be tried and decided by the court in the trial of this action is the fact of the secret escrow of the exchange of corporation stock, as alleged in the complaint on file herein, without proof of which plaintiff cannot recover, which exchange was in violation of the conditions of the permit issued by the Commissioner of Corporations for the issuance and sale of the stock of the Master Holding Corporation for cash and not for exchange." Affiant then states the names of four witnesses, all of whom reside in Los Angeles County who cannot conveniently attend the trial in the county of Stanislaus. Moreover it is averred that the books, records and corporate files of the Master Holding Corporation are necessary evidence in support of plaintiff's cause; that all of said records are in the custody of the County Clerk of Los Angeles County who is under subpoena to produce them before the United States authority investigating the affairs of said Master Holding Corporation and its alleged allied concerns, "which books, records and files cannot be conveniently produced to the courts of Stanislaus County as the United States authorities refuse to consent to the withdrawal of the same for that purpose."

The case was set for trial December 27, 1939, and was dropped from the calendar because of the motion of defendant to amend its answer. By its affidavit presented on behalf of the motion for a change of place of trial, defendant named as witnesses E. R. Hawke, G. M. Brut and T. B. Scott, stating that they were all directors of El Portal and would give certain testimony in support of the defense. In her reply affidavit, plaintiff offered to stipulate that each of the witnesses proposed by the defendant was a director of El Portal during the times mentioned in the complaint and that all such witnesses would testify as set forth in defendant's affidavit of merits and that such affidavit might be considered in all respects the same as though their testimony were given under oath at the trial. Upon the affidavits presented, the court denied the motion.

[1, 2] It is no abuse of the trial court's discretion to deny a motion for change of place of trial made on the ground of convenience of witnesses if the affidavit of the adverse party shows that his witnesses will be inconvenienced if the change be ordered and a mere preponderance in the number of witnesses named by the moving party will not determine the order to be made. Scott v. Stuart, 190 Cal. 526, 213 P. 947.

[3] The question as to whether a change of the place of trial on the ground of convenience of witnesses should be ordered is a matter addressed to the sound discretion of the trial court and unless it appears that such discretion has been abused, the appellate court will not interfere with the exercise of such discretion. McNeill & Co. v. Doe, 163 Cal. 338, 341, 125 P. 345; Brown v. San Francisco Savings Union, 122 Cal. 648, 55 P. 598.

[4, 5] From the facts recited it was definitely established to the satisfaction of the trial court that the procurement of such documentary evidence before the court of Stanislaus County would be impossible by reason of the jurisdiction heretofore gained over it by the federal authorities. Moreover the convenience of the witnesses to be called by the plaintiff was in itself sufficient to warrant the order denying the motion. The contention of defendant is that because there is no allegation in the complaint concerning a secret escrow, for that reason the affidavit should be disregarded. It is also claimed that the testimony of the witnesses with reference to such secret escrow is material to no issue raised by the complaint. It is neither necessary nor proper to allege evidentiary details. The rules of pleading require only a

clear statement of the ultimate facts requisite to the cause of action. We may safely assume that the proof of the alleged secret escrow is a necessary part in the chain of plaintiff's proof of the alleged fraud.

The order is affirmed.

W. J. WOOD and McCOMB, JJ., concurred.



50 Cal.App.2d 232

SPENCER v. DI GHILINI.

Civ. 11999.

District Court of Appeal, First District, Division 2, California.

Feb. 27, 1942.

1. Sales ⟸52(5)

Evidence established existence of an oral contract for sale of an antique silver covered Spanish throne on which to base action for rescission of the contract.

2. Sales ⟸52(7)

Evidence sustained judgment for rescission of oral contract for sale of antique silver covered Spanish throne, on ground that the sale was induced by misrepresentations made concerning buyer's title and possession of certain antiques allegedly forming part of consideration for the sale.

3. Evidence ⟸434(4)

Where evidence sustained finding that seller executed bill of sale to antique silver covered Spanish throne because of false representations of buyer, seller was not precluded from maintaining suit to rescind the sale on ground that he was bound by the written bill of sale as full receipt of all consideration agreed to by the parties, and that the writing was presumed to contain all the terms of the prior oral negotiations. Code Civ.Proc. § 1856; Civ.Code, § 1625.

4. Evidence ⟸434(11)

In actions for rescission of sale on ground of fraud the statutory provisions that when terms of agreement are reduced to writing, the writing is considered as containing all of the terms, and that execution of contract supersedes all prior negotiations or stipulations do not control. Code Civ. Proc. § 1856; Civ.Code, § 1625.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Frank S. Spencer against U. L. di Ghilini to rescind an oral contract for sale of an antique silver covered Spanish throne. From an adverse judgment, defendant appeals.

Affirmed.

Morton E. Feiler, of Los Angeles, for appellant.

Henry M. Lee and Harold A. Fendler, both of Los Angeles, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to rescind an oral contract for the sale of an antique silver covered Spanish throne. He had a judgment from which defendant appeals.

The evidence covering the terms of the oral contract is in strong conflict. In brief the plaintiff's contention is that on June 22, 1940, he sold and delivered the throne to defendant in consideration of the latter's promise to pay therefor the sum of $200 in cash, several paintings, including an original "Corot," and other specific personal property shown to plaintiff's agent in the attic of Mrs. Thomas, for whom the defendant was acting as business manager. It is the defendant's contention that the entire consideration for the sale of the throne was the sum of $200 and the delivery of fourteen paintings.

On June 22, 1940, plaintiff delivered the throne to defendant and took delivery of some paintings, and received the cash payment. On July 2, the plaintiff signed an unconditional bill of sale of the throne, and, on July 17, gave notice of rescission of the contract. The plaintiff testified that he signed the bill of sale upon the fraudulent representation that defendant needed and would use it only for publicity purposes and that the remaining articles would soon be delivered.

The plaintiff commenced an action in the Municipal Court for the return of the throne, and tendered the cash and the paintings which he had received. The defendant demurred and moved to transfer the cause to the Superior Court upon the

ground that the throne was worth $30,000. The demurrer was sustained, and this action was refiled in the Superior Court based upon the theory of fraudulent representations and failure of consideration. In support of his claim of failure of consideration, the plaintiff pleaded that the parties agreed that no definite intrinsic value would be put upon the throne, but that defendant would deliver in payment therefor, in addition to the sum of $200, a group or collection of paintings and certain other antiques of unknown value consisting of twelve swords, two Paisley shawls, two Cashmere shawls, one Chinese bronze, two box springs and mattresses, two paintings, one settee, one chair, and two auto robes; that the defendant thereupon falsely, and with the fraudulent intention of inducing plaintiff to make the agreement, represented to plaintiff that he had title and possession of the last enumerated personal property; that plaintiff relied fully upon these representations and was thereby induced to deliver the antique throne. The defendant denied these allegations and pleaded the written bill of sale dated July 2 and other facts indicating that when the defendant had the throne appraised and learned that it might have belonged to Queen Isabella of Spain he was led to twit the plaintiff on his poor judgment of values, and the plaintiff thereupon became alarmed and started these proceedings to free himself from a poor bargain. Defendant then points to certain inconsistencies between the allegations of the complaint herein and those found in the complaint filed in the Municipal Court, and lists four grounds for a reversal of the judgment, which we will take in the order stated.

[1] The alleged failure to prove the oral contract. The argument is based upon the often criticized practice of taking unconnected portions of the testimony of the witnesses as indicating an inconsistency in the full story. The negotiations for the sale were made in part by the respondent, in part by Osiel, his agent, and they were conducted in part with the appellant and in part with Mrs. Thomas for whom he was acting as business manager. The evidence as a whole disclosed that the consideration for the sale of the throne, in addition to the cash payment, was the transfer of certain paintings and other personal belongings of Mrs. Thomas, which were pointed out and identified as stored in the attic of her house. The evidence was sufficient to support the finding covering the terms and conditions of the oral contract, as alleged in the complaint. On the other hand the testimony of the appellant was impeached on so many material matters that the trial court was fully justified in dismissing it entirely and in making the finding that the allegations of the answer were untrue.

[2] Secondly, it is argued that there was no proof of any misrepresentations made to respondent inducing the sale. Under the former heading appellant recites evidence of the representations relating to the goods stored in the attic and objects that the evidence did not clearly identify the several articles. There is no denial however that such representations were made, that they were an inducement to the sale, or that they were made without the intention of delivering the goods as a part of the sale.

Next it is argued that the judgment must be reversed because it rests upon undisclosed statements made to respondent by his own agent. This contention rests upon the failure to take into consideration the evidence that the negotiations were conducted in part by the principals and in part by their agents. This evidence discloses that all the material parts of the numerous oral negotiations were communicated to the parties in interest, and that the agreement was made as found by the trial court.

[3, 4] Finally it is argued that respondent should be bound by the written bill of sale as a full receipt of all consideration agreed to by the parties; that this writing must be presumed to contain all the terms of the prior oral negotiations. The trial court found that the respondent executed the bill of sale upon the false representations of appellant, and the evidence fully supports this finding. The rule of law applicable is found in Mooney v. Cyriacks, 185 Cal. 70, 81, 195 P. 922, 927, where it was said: "It follows that in actions for rescission on the ground of fraud the statutory provisions that when the terms of an agreement have been reduced to writing it is to be considered as containing all of the terms (section 1856, Code Civ.Proc.), and that the execution of a contract supersedes all prior negotiations or stipulations (section 1625, Civ.Code), do not control."

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.

50 Cal.App.2d 299

CALOU v. JONES.

Civ. 11832.

District Court of Appeal, First District, Division 2, California.

March 3, 1942.

Hearing Denied April 30, 1942.

1. Trusts ⇐10

Where husband during wife's lifetime agreed to carry out terms of wife's will, but wife left no funds to pay legacies and husband received nothing under will, there was nothing in husband's hands to which a "trust" could attach in favor of a particular legatee.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

2. Trusts ⇐17(2)

A trust in personalty can be created by the oral declarations of the settlor.

3. Appeal and error ⇐1008(1)

Where husband after wife's death withdrew $5,500 from account standing in his own and deceased wife's names as joint tenants, whether husband's oral declarations that the money belonged to wife's children and that he was holding it for them until he could pay it were sufficient to establish a trust for children's benefit was for the trial judge.

4. Evidence ⇐16

It is common knowledge that every day people use such expressions as "the money is yours" and "I will hold it for you" without any intention of creating a trust but only as an emphatic way of saying "you will be paid".

Appeals from Superior Court, Santa Clara County; William F. James, Judge.

Action by Effie La Veque Calou against John J. Jones as executor, etc., to establish a trust. From a judgment for defendant, plaintiff appeals.

Affirmed.

Harry A. Houser and Owen D. Richardson, both of San Jose, of appellant.

John J. Jones in pro. per. for respondent.

DOOLING, Justice pro tem.

Plaintiff appeals from a judgment for defendant in an action based upon an alleged trust. Plaintiff is the daughter of Nellie Patton, deceased, and step-daughter of George E. Patton, deceased. Nellie Patton died on February 10, 1940, leaving a will by which she bequeathed to appellant the sum of $2,500. She, however, died without estate other than a piece of real property which was specifically devised for life to a son and daughter-in-law with remainder to a grandson.

After Nellie Patton's death her husband George E. Patton withdrew from an account which stood in his own and his deceased wife's names as joint tenants the sum of $5,500. At the time he expressed the intention to pay his wife's funeral and other expenses and to pay her children the amounts left to them by their mother's will. He said: "It is your money, your mother and I had this agreement and I want you to have it." They went to the office of his attorney and Mr. Patton again expressed the intention of paying the children. The attorney said: "You do not have to pay them this money for six months according to law." They then left the office and Patton said: "Now, I don't want you children to worry about this, this is your money. I am holding it for you until I can pay it."

Mr. Patton died about ten days later, without paying the money and after drawing a will by which he left nothing to appellant.

The court made the following findings:

"That during the lifetime of said Nellie Patton, said George E. Patton did agree to carry out the terms of the last will of said Nellie Patton, but that said Nellie Patton left no funds to pay the legacies provided in said last will."

"That it is true that said George E. Patton withdrew * * * Fifty-Five Hundred Dollars ($5,500.00), subsequent to the death of said Nellie Patton, but that it is not true that he agreed with plaintiffs herein that he was holding said sum, or any part thereof, in trust for plaintiffs, to be paid to them at a later date."

"That it is not true that said George E. Patton, deceased, held said money at the time of his death in trust for the said plaintiffs. * * *"

Appellant cites and relies on Curdy v. Berton, 79 Cal. 420, 21 P. 858, 12 Am.St. Rep. 157, 5 L.R.A. 189; Miller v. Forster, 131 Cal.App. 509, 21 P.2d 678; Estate of Everts, 163 Cal. 449, 125 P. 1058; Garner

v. Purcell, 173 Cal. 495, 160 P. 682; O'Donnell v. Murphy, 17 Cal.App. 625, 120 P. 1076; Crinkley v. Rogers, 100 Neb. 647, 160 N.W. 974 and the note in 66 A.L.R. 156.

The citations are not in point. They may all be summarized by the following quotation from 66 A.L.R. 157:

"Where a person, knowing that a testator, in giving him a devise or bequest, intends it to be applied for the benefit of another, either expressly promises, or by his action at the time implies, that he will carry the testator's intention into effect, and the property is left to him in the faith on the part of the testator that such promise will be kept, the promisor will be held as a trustee ex maleficio."

[1] In this case George E. Patton received nothing from his wife's estate to which a trust could attach. The promise to his wife was not to pay her children from property received by him under her will, and he received nothing under her will. It was quite the converse, to pay bequests made by her will which she left no money or property to satisfy.

[2, 3] Since these are the only authorities cited by appellant we might close our opinion here. However, in view of the established rule that a trust in personal property can be created by the oral declarations of the trustor, we deem it well to consider whether the decedent's statements after his wife's death were such as to compel a finding by the trial court that a trust was thereby created. It was evidently the view of the trial judge that decedent's statements amounted only to promises to pay in the future, and were not intended by him to create a present beneficial interest in appellant. It was for the trial judge to construe the effect of Patton's language as testified to, bearing in mind the ease with which oral declarations may be unwittingly changed in repetition and the rule announced in Noble v. Learned, 153 Cal. 245, 251, 94 P. 1047, 1050, that "in every such case, it is for the trial court to determine, as a question of fact, whether the words and acts of the alleged trustor indicated with reasonable certainty an intention to create a trust." Cf. Lefrooth v. Prentice, 202 Cal. 215, 227, 259 P. 947; In re Kellogg, 41 Cal.App.2d 833, 841, 107 P.2d 964; Estate of Alberts, 38 Cal.App.2d 42, 46 et seq., 100 P.2d 538.

[4] It is common knowledge that people use every day such expressions as "the money is yours" and "I will hold it for you" without any intention of creating a trust, but only as an emphatic way of saying "you will be paid." While the evidence undoubtedly would have supported the finding of the creation of an oral trust we cannot hold that the trial court committed error in finding otherwise.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.



50 Cal.App.2d 311

CLARK et al. v. HUDDLESTON et al.

Civ. 2664.

District Court of Appeal, Fourth District, California.

March 3, 1942.

Rehearing Denied April 1, 1942.

Hearing Denied April 30, 1942.

1. Negligence ⇐136(23, 26)

In action against department store for injuries to customer who when leaning over into freight elevator to indicate to saleslady who was in elevator the plant customer desired to purchase, when customer was struck by upper section of elevator door which was being lowered by assistant manager in the elevator in order to raise the lower section of the door to the floor level of the elevator, so that there should be no opening left between floor of elevator and floor of the store, assistant manager's negligence and customer's contributory negligence were for jury.

2. Damages ⇐131(4)

$25,000 to 34-year-old housewife for head injury which caused her to become "foggy" and dizzy for several days, who could not remember as well as before accident, but who assisted her husband in his business, was excessive under evidence which was insufficient to show that her condition at time of trial some eight months after accident would be permanent or to what, if any, extent such condition or part thereof might be reasonably certain to continue.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by Anna Clark and another against Robert W. Huddleston and others, to recover for injuries sustained by named plaintiff in defendants' department store. From a judgment for plaintiffs, defendants appeal.

Reversed and remanded for new trial with directions.

Hearing denied; CARTER, J., dissenting.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, and Randell Larson, Wright & Wright & Larson, and Redman, Alexander & Bacon, all of San Francisco, for appellants.

Rae B. Carter and John D. Chinello, both of Fresno, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for injuries alleged to have been suffered by the plaintiff wife. A jury returned a verdict for $25,000 in her favor and $1,628.65 in favor of her husband. The defendants have appealed from the judgment which followed.

There is little dispute with respect to the facts surrounding the incident out of which the action arose. The appellant corporation operated a department store in Fresno, of which the individual defendant was the assistant manager. Mrs. Clark had come to this store to shop, accompanied by her friend Mrs. Logoluso and the latter's four-year-old daughter. At the rear of this store there was a freight elevator which had doors opening into the storeroom and, on the opposite side, doors which opened upon the alley. When the floor of the elevator was at the level of the alley entrance it was some ten inches above the floor level in the store. The elevator doors on the store side were operated by hand and consisted of an upper and a lower section which were so counter-balanced that when the upper section moved upward the lower section moved downward, and vice versa. At the bottom of the upper section was an iron "lip" which fitted over the top of the lower section when the two sections were brought together in closing the doors.

About noon on May 2, 1940, a truckload of potted plants was unloaded at the alley entrance and placed upon the floor of this freight elevator and the appellant Huddleston was in the elevator assisting in this operation. The floor of the elevator was at the alley level and the inner doors of the elevator were also open, the top of the lower section being on a level with the floor of the elevator and covering the space between the floor of the elevator and the floor of the store.

About that time Mrs. Clark observed these potted plants which she said appeared to be in an "opening" about a foot above the floor level, although she said she did not know this was an elevator. She asked a saleslady if these plants were for sale and was told that they were. The two stepped over to the front of the elevator and looked at the plants. Mrs. Clark selected a plant and pointed it out to the saleslady, who stepped into the elevator to get it. While she was doing this Mrs. Clark leaned forward and spoke about another plant. As she straightened up the top of the upper section of the door, which was then being lowered a few inches, came in contact with her head.

The reason for the lowering of the upper half of this door at this time appears as follows: While the selection and sale of the plant was in progress Mrs. Logoluso's small daughter had stepped upon the top of the lower section of the door, which had been at the level of the floor of the elevator, and this action caused the lower section of the door to go down until its top was at the floor level of the store. Mr. Huddleston, who was in the elevator, observing this and desiring to raise the lower section of the door to the floor level of the elevator in order that there be no opening left between the floor of the elevator and the floor of the store, took hold of the upper section of the door and pulled it down some ten or twelve inches, which also had the effect of raising the lower section a similar distance. There is a conflict in the evidence as to whether he gave a warning that he was about to move the doors of the elevator. Several witnesses testified that he did so and others testified that they heard no warning at all. He testified that he did not know that a sale was in progress and did not see the parties engaged therein, and that while he was lowering the upper section he could not see out of the elevator. As he lowered the upper section, he heard it come in contact with Mrs. Clark's head.

Mrs. Clark made no outcry, although she made some remark about bumping her head. The saleslady, who had not seen the door come in contact with her head, asked her if it hurt and she replied: "No." Shortly thereafter Mrs. Clark and Mrs. Logoluso and her daughter left this store and visited three other stores. Then Mrs.

Clark got her automobile and they came back to the Woolworth store and got the plant. Mrs. Clark then drove to her home where she made some coffee for herself and Mrs. Logoluso. They talked awhile, after which Mrs. Clark got some checks which she wanted to deposit and they drove to a bank. Mrs. Clark then took Mrs. Logoluso and her daughter home and then returned to her own home. Sometime that evening Mrs. Clark called Mrs. Logoluso on the phone and asked her what had happened, saying that she could remember nothing of what had occurred that day. The next day she consulted her physician. On May 23, 1940, Mrs. Clark went to the court house and passed an examination for citizenship. About that time she complained about blurred or double vision and at the suggestion of her physician consulted an eye specialist. On June 3, 1940, she went to San Francisco to consult a brain specialist and remained there for observation for fifteen days. Her condition improved somewhat thereafter and this action was tried in January, 1941.

The appellants first contend that there was no evidence disclosing negligence on their part and that it must be held, as a matter of law, that Mrs. Clark was guilty of contributory negligence. It is argued in this connection that appellant Huddleston was required, through no fault of his own, to move the doors of the elevator because the little girl had depressed the lower section leaving a portion of the elevator shaft exposed; that he gave a warning before he moved the doors; that Mrs. Clark should have and must have seen that the doors were in motion; that Mrs. Clark, while in a position of safety, suddenly leaned over to point to a plant and thus brought her head into the plane in which the door was moving; that Huddleston could not possibly know that she was going to change her position while he was moving the doors; that Mrs. Clark failed to observe a "danger" sign which was above the elevator doors and also failed to observe the moving of the doors, which were in plain sight; and that it follows that any injury received must be attributed solely to Mrs. Clark's negligence.

[1] While there is some conflict, and without completely reviewing the evidence in this connection, it must be held that, at best, nothing more appears than a question of fact which was for the jury. While standing immediately in front of and facing the elevator and engaged in selecting a plant from among those upon the floor of the elevator, and with the saleslady inside the elevator for the purpose of getting the plant selected, it cannot be said, as a matter of law, that it was not a reasonable act for Mrs. Clark to lean over while commenting upon the different plants. The situation was, or should have been, obvious to Huddleston and he should not have lowered this door between the customer and the saleslady engaged in making the sale without taking reasonable precautions that it could be done in safety. Whether he took such reasonable precautions under the peculiar circumstances here existing was, to say the least, a question of fact and not one that can here be disposed of as a matter of law.

Some contention is further made that one of the instructions in effect told the jury that the appellants were insurers of the safety of the premises while Mrs. Clark was only called upon to use ordinary care. Not only is the instruction in question not susceptible of that interpretation but when considered with the other instructions given it appears that the jury was fully and correctly instructed in this regard. The contention here made is without merit.

The most serious question raised is as to whether the evidence supports an award of $25,000 for the injuries sustained by Mrs. Clark, and whether it appears that such a verdict must have been arrived at through the influence of passion or prejudice.

It is at once apparent that the amount of the verdict is excessive unless it covers future damage which Mrs. Clark would suffer after the date of the trial, which was some eight months after the alleged injury. While such future detriment may be considered and allowed for it must be such as is reasonably "certain to result in the future", Civil Code, § 3283, and it must be such damage as arises from the injury complained of. While there was evidence in the form of testimony by expert witnesses that the condition of Mrs. Clark, of which she complains, was the result of hysteria unconnected with this accident, and while other portions of the evidence support this theory and strongly indicate that the injury itself was trivial in nature, it is also true that a part of the evidence supports the inference that Mrs. Clark received very substantial injuries as a result of the accident, and one expert witness expressed the opinion that she received an injury which would be permanent. Because of this and other testimony given by

another expert witness it is necessary to rather fully review the evidence in this regard, especially in view of the rather unusual situation which here appears.

Mrs. Clark was 34 years of age. She testified that her health was "absolutely perfect" before the accident; that she had no trouble with her eyes, did her own housework, drove automobiles, and assisted her husband in his business; that she had worked as a dressmaker before marriage and made her own clothes; that immediately after the accident she became "foggy" and that when she "came to" that evening she remembered nothing of what happened; that she vomited for five days and suffered severe pains in her neck and head and was tired and dizzy; that she remained continually in bed until June 2, 1940, except on May 23, 1940, when she went to the court house and passed an examination for citizenship; that her physician, Dr. Calloway, prescribed ice packs and recommended that she remain in bed; that about May 23, 1940, she began to see "double"; that she then consulted Dr. Goldstein, an eye specialist; that on his recommendation she went, on June 3, 1940, to San Francisco to consult Dr. Brown, a specialist in brain and nerve surgery, where she remained some fifteen days; that she felt much better when she returned to Fresno; that her eyes were then much better and things were not blurred or double any more; that when she got home she stayed in bed on and off for three months; that since that time she has operated her husband's Fresno business but cannot do it as well as before, and cannot remember so well; that now if she looks at anything any length of time it gets blurred or double; that she cannot work at sewing although she has not tried that sort of work much; that she can only read five or ten minutes without its getting blurred; that she has a pain in her head, her neck is stiff and she cannot move so quickly; and that she cannot remember as many telephone numbers as she used to.

Her family physician, Dr. Calloway, testified that she came to his office on May 3, 1940; that she complained of soreness in her neck and had a bump on her head about the size of a half dollar, which was blue in color and with a swelling; that the color and swelling left in about ten days; that he saw her every day for several days and then saw her three or four times a week because she would call him and say her head was not any better; that later she complained of having double vision and he suggested that she see an eye man; and that when she first came to his office he did not think much of the injury she complained of and considered it a minor injury. He also testified that he had treated her for nearly a year before this accident; that she had a goiter; that it was an internal one which could not be seen without examination; and that he knew nothing about goiters.

Dr. Goldstein, the eye specialist, testified that he first saw Mrs. Clark on May 30, 1940; that he had just returned from the east and found that his associate had been called on the case about May 24; that his associate told him he had a "very unusual situation out there"; that he agreed with his associate when he examined her on May 30; that Mrs. Clark told him of what had occurred on May 2, 1940, that she did not become conscious of her surroundings until that evening, and that she since had had quite a headache and her mind was not clear; that he examined her and found that her eyes turned in toward her nose and were what is called "crossed"; that the rest of her cranial nerves were all right, her hearing was all right, the sensation of her face was all right, her swallowing was all right, her tongue was all right, and her sense of smell was all right; that he had never seen anything "quite the equal of this" and so he arranged for her to go to a Dr. Brown in San Francisco, which she did; that after she returned from San Francisco her eyes were theoretically straight although there was an imbalance or incoordination of the eyes in that when the eyes were moved one would lag and not move as fast as the other; and that this condition still existed at the time of the trial. He further testified that he had given her no special treatment but advised her to remain in bed; that there was a marked improvement after she returned from San Francisco; that her eyes were theoretically straight now; that some of her symptoms are more logically explained on the basis of hysteria and some on the basis of organic damage; that the eye nerves seemed all right; and that about the only way you could explain her blurred vision was on the basis of hysteria.

Dr. Brown testified that he examined her and had her under observation for some fifteen days following June 3, 1940; that she had a decrease in feeling over the right side of her face and over the entire right side of her body; that x-rays showed

no fracture but indicated a shrinkage or atrophy on the surface of the brain; and that this was also indicated by a procedure which he carried out known as encephalogram. He stated that Mrs. Clark gave him her history following the accident on May 2, 1940, and complained of double vision and dizziness when she moved quickly, and that she told him she had had no serious illness and that she had been well up to the time of the accident. Based upon this history and the examination he made he expressed the opinion that there was an atrophy or degeneration of a part of the brain. He stated that this might have come from causes other than an injury, but expressed the opinion that in this case it came from this injury since she had been well before the accident. He further testified that he saw her again in October, 1940, when she came up for a check-up and also saw her the morning of the trial. Although he testified that if there was an atrophy of the brain it would be permanent and no improvement was possible, he testified that he saw a marked improvement when he saw her in October and that when he saw her the morning of the trial she was definitely better than she had been when he first saw her; that she was then not quite as accurate with her right hand as she was with her left; that she could move her arm in all directions; that there was no evidence of actual paralysis; and that she told him she could do her house work but tired easily. He then testified that he thought some improvement could still be expected but that it would be eighteen months or two years from that time before a maximum improvement could be expected; that he was hopeful that her condition would still improve; and that her condition could have come from other causes than the blow she received on this occasion.

[2] The only evidence that any condition from which Mrs. Clark was suffering at the time of the trial would be permanent or with respect to what may be called future damages rests upon the testimony of Dr. Brown. While he testified that there was an atrophy of the brain and that such atrophy is incurable, he impeached his own testimony by testifying that Mrs. Clark had made a marked improvement and that further improvement might be expected in the future. The testimony of other witnesses, including Mrs. Clark herself, also shows a very marked improvement in her condition. Moreover, Dr. Brown's opinions were based in part upon Mrs. Clark's history as she gave it to him, including the statement that she was perfectly well before the accident. So far as the record shows, Dr. Brown was not informed that Mrs. Clark was suffering from a goiter and apparently he did not discover that fact or take it into consideration. It is well known that certain types of goiters produce some, if not many, of the symptoms which appeared in Mrs. Clark's condition, and that matter might have an important bearing upon the extent of such of her injuries as arose from this accident. The fact that this was not disclosed to Dr. Brown may have had a considerable effect upon his testimony. Whether or not this is true, it does appear that Mrs. Clark had greatly improved and that further improvement was to be expected, and there is an entire absence of any evidence from which it may be told how much or to what extent detriment may be reasonably "certain to result in the future." The amount of the judgment could only be sustained on the basis that very serious and permanent injuries had been sustained, which in this case means that there was a permanent injury to the brain and nervous system. Since the evidence is not sufficient to show that her condition at the time of the trial will be permanent or to what, if any, extent this condition or part of it may be reasonably certain to continue, the evidence is not sufficient to sustain the amount found in the verdict. It may be further observed that a number of circumstances appear in the record which might well support an inference that the amount of the verdict was the result of passion or prejudice on the part of the jury, and which indicate that an injustice may well have occurred. Under the rather unusual circumstances here appearing, we think the ends of justice require that a new trial be had on the issue as to the amount of the damages, if any, which have been suffered by Mrs. Clark or her husband as a result of the accident in question.

The judgment is reversed and the cause is remanded for a new trial solely upon the issue of the amount of damages, with directions to the trial court to render judgment in favor of the respondents for the amount of damages so found upon a determination of that issue.

MARKS and GRIFFIN, JJ., concurred.

PEOPLE v. YOUNG.

Cr. 470.

District Court of Appeal, Fourth District, California.

March 3, 1942.

Hearing Granted April 1, 1942.

1. Automobiles ⇐344

When the legislature in 1941 amended section of vehicle code dealing with negligent homicide, by striking out the words "in a negligent manner or in the commission of an unlawful act not amounting to a felony" and inserted the words "with reckless disregard of, or wilful indifference to the safety of others", it did not intend that a motorist should not be guilty of negligent homicide unless he was guilty of "wilful misconduct" as the phrase wilful misconduct is used in the section of the vehicle code dealing with civil liability of a motorist for injuries to a guest. Vehicle Code, § 403, St. 1935 p. 154, and § 500, as amended by St. 1941, p. 1414.

See Words and Phrases, Permanent Edition, for all other definitions of "Wilful Misconduct".

2. Automobiles ⇐355(13)

Evidence sustained conviction of motorist for negligent homicide of street car passenger who had just alighted from street car. Vehicle Code, § 500, St.1941, p. 1414.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Maude Mae Young was convicted of negligent homicide, and she appeals.

Affirmed.

Newton F. Rozzelle, Jr., of San Diego, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice, pro tem.

By an information filed by the District Attorney of San Diego County appellant was charged with negligent homicide under the provisions of Vehicle Code, section 500, St.1935, p. 173, as amended by the statutes of 1941, St.1941, p. 1414. Appellant pleaded not guilty, and after trial before the court without a jury was found guilty. Appellant's application for probation was denied and appellant's motion for a new trial was denied. Judgment was thereupon pronounced sentencing appellant to imprisonment in the California Institution for Women at Tehachapi. This appeal is from the judgment and from the order denying motion for a new trial.

Briefly stated, the facts, as shown by the record, are as follows: Just prior to 5 o'clock on the afternoon of September 26, 1941, an outbound street car was proceeding on 30th Street, in the vicinity of Palm, in the city of San Diego. The car made the customary stop at Palm to allow one of the passengers, a young boy, to get off. The boy exhibited his school pass to the conductor, whereupon the conductor opened the door and the boy stepped out on the street. The boy started to take a second step when he was struck by appellant's automobile. There is no safety zone for passengers at that street car stop.

The conductor testified that when the automobile struck the boy, his body apparently lunged and was bounced and rolled in front of the automobile until the automobile came to a stop, approximately 100 feet north of the street car. The boy lived for a brief time but died within five minutes after the officers arrived. It was stipulated that the boy was 13 years old and that the autopsy report showed that he died from a skull fracture and multiple injuries.

The accident occurred in the daylight upon a dry, clear street in clear weather. The testimony showed that the boy left his seat in the street car when it was approximately in the middle of the block. The street car came to a gradual stop. Several witnesses testified that the street car had come to a complete stop before the boy got off. All witnesses, except the appellant testified in court that the boy stepped onto the pavement and started to take his second step when struck. Several witnesses observed the speed of appellant's car at the time of the impact and testified that it was approximately 35 miles per hour. The boy passenger was carrying a bundle of groceries on his left arm and showed his pass to the conductor with his right hand. The groceries were scattered on the pavement when the officers arrived, and the two officers observed that there was one single skid mark 47 feet long and scrape marks continuing intermittently up underneath the automobile in the position where it stopped.

When the automobile came to a stop the body of the boy was in front of the car with one leg twisted and caught in the undercarriage of the automobile. The officer testified further that he examined the rear stop lights on the street car and both of the amber lights were lighted. The doctor corroborated the fact that the lights on the rear of the street car were working at the time of the accident.

A number of witnesses testified as to conversations with the appellant at the scene of the accident. The appellant asked the conductor if he did not think she was half way past the door of the street car before the boy stepped out. The conductor replied that she was not. Another witness testified that after he examined the boy he started back to the street car when the appellant stopped him and stated, "I was past the door before it was open." The witness made no reply. The appellant stated to one of the officers that she had been driving alongside of the street car when the street car stopped suddenly and that the boy jumped out before the street car stopped, and that appellant's automobile was past the door at the time and she was then traveling about fifteen miles an hour.

The appellant took the stand in her own defense and stated that she came up alongside the street car at a speed of approximately 25 miles an hour; that the street car did not slow up and she had no idea it was going to stop; that when the front of her automobile passed the front of the street car and her left fender was even with the door the boy came out of the street car door on top of the fender; and that she then stopped the automobile as quickly as she could.

The conductor observed the impact when the automobile struck the boy. Another passenger on the street car testified that she observed the boy start down the steps and her eyes were taken away from him when she looked directly across the car and saw the defendant's automobile passing, that the defendant's automobile was not up near the steps at the time she first saw it, and that the automobile was then traveling about 25 miles an hour. Another witness observed the automobile at the time of the impact and saw the front of the left fender of the automobile strike the boy. Another witness looked out of the street car window and observed the automobile before it struck the boy, and as it passed the window of the street car this witness estimated its speed to be 35 miles an hour. Another witness, who was riding on the right-hand side of the street car in the ninth seat back, saw the appellant's automobile flash past the window of the street car after the street car had stopped. Another witness, who observed that the street car came to a gradual stop, first saw the appellant's automobile in back of the whole street car while the street car was coming to a stop. This witness estimated the speed of appellant's automobile at that time as 35 miles an hour. This witness testified that the street car had come to a complete stop before the doors were opened, and that the boy had one foot on the pavement and was raising the other foot when the appellant's automobile struck him.

Section 500 of the Vehicle Code, as it read prior to the 1941 amendment, used the words "in a negligent manner or in the commission of an unlawful act not amounting to felony." The amended statute drops the quoted language and substitutes the words "with reckless disregard of, or wilful indifference to, the safety of others." It is further to be noted that the 1941 amendment adds a sentence to section 500, reading as follows:

"Hereafter, the provisions of the Penal Code, defining involuntary manslaughter, shall not apply to homicide caused by the driving of any vehicle."

Appellant's first contention is that in amending section 500 in 1941, the legislature intended to set up the same standard of criminal liability as is prescribed in section 403 of the Vehicle Code, St.1935, p. 154, for civil liability for injuries to a guest of a vehicle operator except where the element of intoxication is involved.

The two sections employ entirely different language. Section 403 provides, in substance, that a guest shall have no cause of action for civil liability for personal injury unless the guest can establish that the injury proximately resulted from the intoxication or wilful misconduct of the driver of the automobile. Section 500, as amended in 1941, on the other hand, says nothing of intoxication or wilful misconduct, but provides only that when death is the proximate result of injuries caused by driving a vehicle with "reckless disregard of, or wilful indifference to, the safety of others," the operator shall be guilty of negligent homicide.

We are, in effect, asked by appellant to hold that when the legislature in 1941 amended section 500 by striking out the words "in a negligent manner or in the commission of an unlawful act not amounting to felony" and inserted the words "with reckless disregard of, or wilful indifference to, the safety of others," it intended that an automobile driver should not be guilty of negligent homicide unless he be guilty of "wilful misconduct."

[1] The language "wilful misconduct," was first written into our Vehicle Code in 1929. It has been defined by our courts on numerous occasions, and we are justified in assuming that if the legislature had intended to amend section 500 so as to make the requirements for a conviction of negligent homicide the same as for the recovery of damages by a guest it would have used the term "wilful misconduct," and not the words "reckless disregard of, or wilful indifference to, the safety of others."

Appellant next argues that the evidence is insufficient to prove that defendant was guilty of reckless disregard of, or wilful indifference to the safety of others.

The evidence in this case establishes that the street car running at approximately 20 miles an hour, came to a gradual stop at an intersection and that the street car stopped to permit a school boy passenger, aged 13, to alight; that the street car had come to a complete stop when the boy showed the conductor his pass and then opened the door; that the boy stepped out onto the pavement and started to take a second step when struck and killed by appellant's automobile. The accident occurred in the afternoon on a dry street in clear weather. One witness, sitting in the street car, saw appellant's automobile flash by the street car window after the car had stopped, and another witness observed appellant's automobile coming up in back of the street car while the street car was slowing for the stop. The amber signal lights on the street car were working at the time of the accident. Appellant's automobile was traveling at approximately 25 miles per hour at the time of the impact. No part of the evidence shows any attempt by appellant to stop until after the impact. Appellant admitted knowing the requirement to stop and not pass a street car when it was about to stop, but insists that she had passed the street car when it stopped. The trial court found the evidence sufficient to show reckless disregard of or wilful indifference to the safety of others.

[2] As we view the record, the evidence is amply sufficient to support the court's judgment of conviction. If the appellant was not observing the street car with sufficient attention to see that it was coming to a stop; if she took no notice of the amber stop lights on the rear of the street car as she approached to pass it; if, when she was about to pass it, she failed to observe that the door was opening or that a passenger was alighting, it may fairly be said that all of these acts combined on the part of appellant constituted such "reckless disregard of, or wilful indifference to, the safety of others" as to imply a high degree of probability that such harm would result as did, in fact, result in the instant case.

The judgment and order are affirmed.

BARNARD, P. J., and MARKS, J., concurred.



50 Cal.App.2d 363

COLDEN v. COSTELLO et al.

Civ. 13302.

District Court of Appeal, Second District, Division 3, California.

March 6, 1942.

Rehearing Denied April 3, 1942.

Hearing Denied May 4, 1942.

1. Action ⇐6

In action for declaratory relief, where parties stipulated that actual controversy existed between them as to whether plaintiff's contemplated actions in courts of California and Texas for declaratory judgments, determining community or separate character of properties in estates of plaintiff's deceased husband, would violate provision of his will disinheriting any devisee or legatee unsuccessfully contesting or opposing plan of will, and defendant did not deny that controversy arose out of dispute as to proper construction of will, superior court had jurisdiction of action, since disputes as to proper construction of wills may be resolved in declaratory relief action. Code Civ.Proc. § 1060.

2. Action ⇐6

A declaratory judgment, allowing testator's widow to prosecute actions on equity rather than probate side of court for declaratory judgments, determining community or separate character of property in testator's estate, before making election whether to take property devised to her by will or her distributive share of community property, was erroneous.

3. Wills ⇐790

The superior court in probate exercises jurisdiction over interest of decedent's surviving wife in community property in course of administration on his estate and hence has jurisdiction to determine what share of property in estate is community and what is separate property as between widow and other beneficiaries under decedent's will, so that widow is not required to bring independent equity actions for declaratory judgments determining such question before making election whether to take property devised to her by will or her distributive share of community property.

4. Courts ⇐472(4)

The proceeding provided by Probate Code for administration on decedents' estates is in rem, and probate court's jurisdiction over property of estate and all persons claiming interest therein under decedent is complete and exclusive as to all matters involved in complete and effective administration.

5. Husband and wife ⇐276(3)

A decedent's surviving wife's title to her interest in community estate rests on distribution decree, which determines and identifies estate coming to her by virtue of her right and is indispensable as muniment of her title.

6. Action ⇐6

Declaratory relief is not provided as a substitute for other established and adequate legal procedure.

7. Action ⇐6

The statute authorizing construction of wills in declaratory relief actions did not transfer matters of probate cognizance from probate to equity side of superior court, but supplemented equitable powers of such court in probate with broader remedy of declaratory relief. Code Civ.Proc. § 1060.

8. Courts ⇐475(2)

Where declaration of rights and duties under will is only matter before court in equity action and equitable powers in probate are available and adequate, judges sitting in equity should leave settlement of controversy to probate side of court.

9. Wills ⇐790

A testator's widow, required to elect whether to take property devised to her by will or her share of community property, may first appear in proceeding under Probate Code for determination of heirship by setting up her right to distribution of part of estate, in which case decree may encompass adjudication of her community property rights, which would be conclusive on all interested parties and controlling on distribution of estate, or probate court, on petition for distribution, may adjudicate claims asserted by widow and determine what distributive share she would receive according to what election she made and such decree would be binding on all parties. Probate Code, §§ 1020 et seq., 1080–1082.

10. Courts ⇐200¼

As question of community or separate character of property of deceased husband's estate is within jurisdiction of superior court in probate to determine, such court may exercise such of its equity powers as it needs to invoke in aid of proper discharge of its manifest duties.

11. Wills ⇐790

A testator's widow is not entitled to withhold her election whether to take property devised to her by will or her distributive share of community property until rendition of final judgment establishing extent of community and separate property of testator's estate, as she will receive full information, to which she is entitled before making election, as to status of property, in course of proceedings available to her in probate administration.

12. Courts ⇐476

The California District Court of Appeal will assume that courts of another state exercise such complete and adequate jurisdiction in matter of administration of decedents' estates as is commonly possessed by courts of the several states, in absence of contrary showing.

Appeal from a Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Clara N. Colden against John M. Costello, Abbey Bell Colden Alexander,

individually and as executrix of the estate of Charles J. Colden, deceased, and others, for a declaratory judgment determining whether proposed actions by plaintiff for declaratory judgments determining community or separate character of decedent's properties would constitute contest of or opposition to decedent's will within provision thereof disinheriting unsuccessful contestant or opponent. Judgment for plaintiff, and defendants executrix and others appeal.

Modified, and affirmed as modified.

Hearing denied; TRAYNOR, J., dissenting.

Stewart, Shaw & Murphey, of Los Angeles, for appellants.

Goodspeed, McGuire, Harris & Pfaff, of Los Angeles, for respondents.

SHINN, Justice.

Respondent is the widow of Charles J. Colden, deceased, and entitled under his will to one-fifth of his estate remaining after the payment of certain specific bequests. In the will the share left to respondent was declared to be inclusive of her interest in the community property. The estate is situated partly in California and partly in Texas. Respondent claims that all of the California estate and a large part of that in Texas is community property. The other beneficiaries deny that respondent's community interest exceeds her share under the will. The case is one in which respondent is required to make an election to take under the will or her share of the community property. She has not done this and the estate cannot be closed until she does. The will contains in paragraph nine thereof a comprehensive "disinheriting" provision in case of unsuccessful contest or opposition to the plan of the will by any devisee or legatee.

In this situation respondent filed her complaint for declaratory relief against the executors of the will and the beneficiaries thereunder, alleging the foregoing and certain additional facts. She alleged that she was without information or knowledge as to the extent of the community property on which to base an intelligent election to take or not to take under the will; that she could not obtain such knowledge without the aid of a court of equity; that if compelled to make an election without judicial determination of the character of the property "plaintiff will be then subjected to the danger of irreparable loss and damage to her rights and interests in and to decedent's said estates * * * that plaintiff's rights and interest will be prejudiced and placed in jeopardy should she be forced to elect, without first having secured and ascertained by judicial determination and adjudication, the community or separate character of the various items of property in said decedent's California and Texas estates." It was then alleged that she desired to file in the courts of appropriate jurisdiction in the states of California and Texas, respectively, application for declaratory relief in the form of exhibits attached to the complaint. These were proposed complaints for declaratory relief, one to be filed in California and the other in Texas. By such proposed actions for declaratory relief plaintiff intended to obtain, outside of the probate proceedings, a determination as to the community or separate character of decedent's estate. It was further alleged that plaintiff had not filed said declaratory relief actions because of her fear that the same might constitute a violation of the contest clause of the will; that she had been advised by her counsel that the same would not violate said provision, but that the defendants claim and allege that it would be violated by the filing or prosecution of such proposed actions and "that, therefore, an actual controversy exists between plaintiff and defendants as to the proper construction and interpretation of the Last Will and Testament of decedent, Charles J. Colden, Deceased, and in particular as to the true construction, interpretation and effect of Paragraph Nine thereof, as to which plaintiff seeks and is entitled to receive declaratory relief." Defendants, without demurring, filed their answers denying material allegations of the complaint. Upon the trial it was stipulated by all parties that all of the allegations of the complaint were true and that all of the denials of the answers were untrue. The judgment was therefore based upon the truth of the facts alleged in the complaint.

The decree from which the appeal is prosecuted specifically awards to respondent the following rights: (1) to have full information as to what part of the estate is community property; (2) to pursue to final judgment in the appropriate courts of the states of California and Texas or elsewhere complaints for declaratory relief for a determination of the extent of the community property; (3) to prosecute such suits without incurring any penalty, as for a violation of the ninth paragraph of the will; (4) the right to withhold her

election until there has been a judicial determination and adjudication establishing the community or separate nature of the property in California and Texas.

The underlying cause of this litigation is the disagreement of the parties as to the extent of the community property, which respondent proposes to have settled in separate actions in equity for declaratory relief. Appellants deny that she has this right and assert that all proceedings for the determination of her community interest in the estate should be taken in the probate proceeding. They contend that the court in probate has exclusive jurisdiction to determine questions relating to community property. Respondent contends that the probate court has no such jurisdiction but that the power to make that determination is exclusively in a court of equity trying separate and independent actions, one in California and one in Texas.

The judgment appealed from is attacked upon the grounds that the court was without jurisdiction to render it, and that it is erroneous.

Appellants' assault, which they say is upon the jurisdiction of the court, appears to deny not jurisdiction to entertain and determine the present action but its power to render the particular judgment which it did render. Questions as to respondent's right to maintain the present action and those relating to her right to bring the proposed declaratory relief actions must not be confused. The present action is conceded to be one for the construction of a will. The proposed actions are for the determination of community property rights. In determining whether the present case is a proper one for declaratory relief, it is immaterial that the judgment actually rendered may be or is erroneous, as is also the fact that the contemplated declaratory relief actions might constitute an unauthorized encroachment upon the jurisdiction of the probate court.

[1] So far as the question of the authority of the court to entertain the present action is concerned, we think that matter is settled by the facts as found by the court pursuant to the stipulation. By the ninth paragraph of the will it was provided that any beneficiary thereunder who should unsuccessfully prosecute a contest or oppose the plan of the will should receive only one dollar instead of the share which would otherwise go to him. Appellants stipulated that an actual controversy existed between the parties which called for an interpretation of this provision by the court in the nature of a declaration that respondent's contemplated declaratory relief actions either would or would not constitute a violation of the provisions of paragraph nine.

Appellants do not deny that the controversy to be adjudicated is one which arose out of a dispute as to the proper construction of the will, nor do they assert that the controversy involves either more or less than that. They submitted the question to the trial court as a proper one for it to decide. We therefore have the simple question whether a dispute as to the proper construction of a will may be resolved in a declaratory relief action. The answer is found in section 1060 of the Code of Civil Procedure. Wills are among the instruments which may be construed, where their terms are in dispute, in an action for declaratory relief. The section was so applied in McCaughna v. Bilhorn, 1935, 10 Cal.App.2d 674, 52 P.2d 1025, a case in which a judgment construing a will in a declaratory relief action was sustained on appeal.

In the present case the trial court properly held that it possessed authority to construe the will. However, in so stating, we have in mind that the case was presented to the court upon the theory that the particular matter in dispute, namely, respondent's claim that she had a right to bring other actions for declaratory relief, raised a question regarding the construction of a will within the meaning of section 1060 of the Code of Civil Procedure. No contention to the contrary is made here. Because of the manner in which the question was presented to the trial court and is presented here we must assume that one who claims under a will may appeal to the court in an action for declaratory relief to obtain a decree declaring what he may or may not do in asserting rights greater than those he enjoys under the will without violating a provision of the will against contests such as we have in the present case.

[2] The real controversy is whether proceedings for the determination of a widow's interest in community property should be taken in or independently of the probate administration. Simply stated, the question is this: Did the court properly extend the right to respondent to prosecute separate declaratory relief actions to final

judgment before making her election, or should she have been limited to such steps as are available within the probate administration for the purpose of acquiring all available information with relation to the nature of the estate before making her election? We think the judgment is erroneous in allowing respondent to prosecute her claims upon the equity side rather than the probate side of the court.

We should say first that it is not contended on the appeal that the prosecution of the separate declaratory relief actions would violate the will, although that contention was made in the court below. It is contended on the one hand that the jurisdiction of the probate court is exclusive and, if not exclusive, that it is the proper jurisdiction for trial of the community property issue, and upon the other hand that that court has no jurisdiction in the matter.

[3] Respondent's contention is that she must bring independent actions in equity because the court in probate has no jurisdiction to determine as between her and the other claimants what share of the property is community and what is separate. She assumes that in asserting her community property rights she claims adversely to the estate and to the other beneficiaries under the will, and she says that this being so, the court in probate cannot adjudicate her rights. Theller v. Such, 1881, 57 Cal. 447; Bath v. Valdez, 1886, 70 Cal. 350, 11 P. 724; Barnard v. Wilson, 1887, 74 Cal. 512, 16 P. 307; In re Estate of Niccolls, 1912, 164 Cal. 368, 129 P. 278.

The contention is without merit. In re Estate of Burdick, 1896, 112 Cal. 387, 44 P. 734. The court in probate has always exercised jurisdiction over the interest of the surviving wife in the community property in the course of administration upon the estate of a deceased husband. No one of the powers of the court in probate is more firmly settled or more universally conceded and acted upon than this one.

[4-8] Since respondent's claims may be adjudicated in the probate court, the remaining questions are whether they can be adjudicated elsewhere and, if they can be, whether respondent should be allowed to have them tried in separate suits in equity.

The answer to the second query is so obvious and, in our opinion, so satisfactory as to render it unnecessary for us to answer the first one. Among the allegations of the complaint which we have quoted is one to the effect that respondent's rights and interests will be prejudiced if she has to make an election "without first having secured and ascertained by judicial determination and adjudication the community or separate character of the various items of property in said decedent's California and Texas estates." The truth of this allegation was admitted at the trial. It may very well have formed the basis for that provision of the decree awarding respondent the right to have such "judicial determination and adjudication." We cannot believe that appellants consciously and intentionally stipulated away their case. The right of respondent to have such "judicial determination and adjudication" was the very one that was in controversy. In spite of the breadth of this allegation we deem it more reasonable to believe that appellants conceded respondent's right to have a determination in the probate court as to the character of the property, but denied her right to have such determination in the form of a judgment, either final or otherwise, in any court, before making her election. In order to reach a just and proper determination of the controversy we should proceed upon this assumption.

The Probate Code provides one comprehensive, exclusive method for administration upon the estates of decedents. The proceeding is in rem and the jurisdiction of the court is complete over the property of the estate and over all persons claiming interests therein under the decedent, as to all matters involved in a complete and effective administration. The law does not provide an alternative procedure for determining questions of heirship in connection with rights of succession or the probate of wills, nor one in which the court has jurisdiction over all heirs and other claimants, both known and unknown. In those respects probate law is unique and exclusive. The title of a surviving wife to her interest in the community estate rests upon a decree of distribution. Her right as survivor of the community is one thing; the decree of distribution which determines and identifies the estate which comes to her by virtue of her right is quite another, and is indispensable as a muniment of her title. It would be an inexcusable interference with established probate procedure, and one which would result in delay and confusion, to permit issues strictly within probate jurisdiction to be tried through the medium of independent suits in equity. Declaratory relief is not provided as a substitute for other established

and adequate legal procedure. True, there is the power to construe a will in a declaratory relief action, but we have no thought that in making this provision it was the intention of the legislature to transfer from the probate side of the court to its equity side matters of probate cognizance, but rather that it was the intent to supplement the equitable powers of the court in probate with the broader remedy of declaratory relief. The wisdom of this course was illustrated in the cause of McCaughna v. Bilhorn, supra, 10 Cal.App.2d 674, 52 P.2d 1025, where a court in an equity action had assumed jurisdiction of an entire controversy which could have been tried and determined in part but not in its entirety by the probate court. After pointing out the reasons why the appeal to the court sitting in equity was proper, it was stated in the opinion that (10 Cal.App.2d pages 683, 684, 52 P.2d page 1030), "Where the declaration of the rights and duties under a will is the only matter before the court, the judges sitting in equity might with great propriety leave the settlement of the controversy to the probate side of the court." We go further and hold that they should do so in every case where the equitable powers in probate are available and adequate, as they are in the case before us.

There is no doubt in our minds as to respondent's right to apply to the probate court for a judicial inquiry preliminary to a determination of the community property issue. She may do so without fear that any application which she may present in aid of the court's inquiry or any effort that she may make by the production of proof to establish that any part or all of the estate is community property will visit upon her the penalties of the ninth paragraph of the will. This is because the present decree, in terms which are not here questioned on that point, gives her even greater rights; likewise because appellants concede that respondent has a right to a full investigation of the question in the probate court and insist that she make her application within the proceedings in probate if at all.

[9, 10] Respondent may appear in any proceeding under sections 1080–1082 of the Probate Code for a determination of heirship by setting up her right to distribution of a part of the estate. The decree could encompass an adjudication of her community property rights, which would be conclusive upon all interested parties, and would be controlling upon distribution of the estate. Also, upon petition for distribution under section 1020 et seq. Probate Code the court could adjudicate any claims asserted by respondent and determine what share she would receive according to such decision as she may make under her right of election. The decree would be binding upon all parties. In re Estate of Burdick, supra, 112 Cal. 387, 44 P. 734. As the question of the community or separate character of the property of the estate is one within the court's jurisdiction in probate, that court may and will exercise such of its powers in equity as it may need to invoke in aid of the proper discharge of its manifest duties. In re Burton, 1892, 93 Cal. 459, 29 P. 36; Johnson v. Superior Court, 1929, 102 Cal.App. 178, 283 P. 331.

[11] The next objection which respondent has to going into the probate court is that she would prefer to have a final judgment establishing the extent of the community and separate property of the estate before she makes her election. She cannot obtain this in the probate court because she will be required to make her election before distribution and will therefore have to elect before the court makes an order either upon a hearing to determine heirship or for distribution. In holding that all further proceedings be had in the course of the administration of the estate, we are necessarily deciding that respondent is not entitled to withhold her election until she has received a final judgment, or in fact any judgment of the court upon the community property issue. She has the right to receive full information as to the status of the property of the estate before she decides whether to take under the will. In re Estate of McCarthy, 1932, 127 Cal.App. 80, 85, 15 P.2d 223; In re Estate of Dunphy, 1905, 147 Cal. 95, 104, 81 P. 315. This she will receive, for in the course of the proceedings which are available to her in the probate administration she will be as fully informed as the court will be as to the character of the property. We do not see how she can be entitled to more than this. She has a choice to make. The other beneficiaries do not question her right to make it, and whichever way she decides they must abide by it. They are not interfering with her decision and are willing that she shall pursue such inquiries as she may see fit to make within the probate administration. They are entitled to have their shares of the estate distributed to them without unnecessary delay. It is the policy of the law, and an indispensable

one, that administration of estates in probate should be conducted with the utmost expedition. Executors and administrators must perform their duties promptly and means for compelling them to do so are readily available. Surely the right of other claimants to have their shares distributed to them promptly is superior to the privilege which respondent claims and which is accorded her by the judgment appealed from. She is not entitled to insurance in the form of a final or any judgment against error in making her choice. The judgment in this respect goes so far in her favor as to seriously invade the rights of other beneficiaries, for it cannot be questioned that respondent plans a course which would greatly delay the closing of the estate. Every right which she has will be fully protected within the probate administration in a manner which will fully respect the rights of all other claimants. Her further steps must be taken there.

[12] What we have said has particular reference to the laws of California. It is equally applicable to the Texas estate. It appears that the estate there consists, in part at least, of real property. We naturally assume that the courts of Texas exercise such complete and adequate jurisdiction in the matter of the administration of estates of decedents as is commonly possessed by the courts of the several states. Our attention has been called to nothing to the contrary. The findings and judgment in the present case furnish no reason for delay in the closing of the California administration while respondent prosecutes an equitable action in Texas apart from the probate administration for the determination of her rights as surviving wife to all or a portion of the property located in that state.

If we are correct in our views, then it was error for the court below to grant respondent the right to bring separate declaratory relief actions for the purpose of determining the nature of the property of the estate. Our conclusions call for a modification of the judgment to provide that respondent is not required to make her election whether she will take under the will or her share of the community property until the conclusion of an appropriate proceeding in the administration of the estate of Charles J. Colden, deceased, conducted for the purpose of eliciting all available proof offered by any of the interested parties as to the nature of the property of the estate, whether it be in whole or in part community or separate property, and that applications to the court in such connection, and the offering of proof to show that all, any or no part of the estate is community property, will not violate or render operative paragraph nine of the will of said decedent. As so modified, the judgment will be affirmed.

Neither party shall recover costs on the appeal.

There has heretofore been submitted for decision a motion by appellants for leave to introduce upon the appeal evidence of proceedings had with reference to the matters in controversy since the entry of the judgment appealed from. The conclusions we have reached in disposing of the appeal render it unnecessary for us to consider the matters to which the proposed evidence would relate, and the application is therefore denied.

SCHAUER, P. J., concurred.

PARKER WOOD, J., deeming himself disqualified, does not participate in this decision.



50 Cal.App.2d 374

FERRAN et al. v. CITY OF PALO ALTO et al.

Civ. 6636.

District Court of Appeal, Third District, California.

March 6, 1942.

1. Municipal corporations ⇐111(3)

Before a municipal ordinance will be declared invalid on ground that it is unreasonable, oppressive, unequal, and unlawfully discriminating, it must be very clearly obnoxious to such objections.

2. Municipal corporations ⇐122(2)

Every intendment is to be indulged in favor of the validity of a municipal ordinance, and all doubts are to be resolved in a way to uphold the lawmaking power, and a contrary conclusion will never be reached on light consideration.

3. Municipal corporations ⇐63(1)

A municipality has the right to regulate its local affairs, within the law, and it is the duty of the courts to uphold such regulations, unless it manifestly appear that the ordinance or by-law transcends the power of the municipality and contravenes rights secured to the citizen by the constitution or laws made in pursuance thereof.

4. Municipal corporations ⇐111(1, 2)

A municipal ordinance must be consistent with the general powers and purposes of the municipality, and must harmonize with the general laws of the state, the municipal charter, and the principles of the common law.

5. Municipal corporations ⇐120

A municipal ordinance can have no extraterritorial force unless by express permission of the sovereign power. Const. art. 11, § 11.

6. Constitutional law ⇐230(3)
Licenses ⇐7(1, 6)

City ordinance, providing that laundries within or without cities should pay a license fee to be calculated on a basis of the number of employees at laundry plant, is invalid because of attempted extraterritorial application, because of unlawful and unreasonable discrimination against and denial of "equal protection of the law" to laundries doing their laundering and having their plants outside of city, but deriving some of their business from within city, and because it unlawfully discriminates against those engaged in the city in business of taking orders for laundering to be done by laundries maintaining their washing plants and doing their business outside city. Const. art. 11, §§ 11, 12.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of the Law".

7. Appeal and error ⇐179(4)

Where plaintiffs, seeking to restrain city from enforcing city ordinance requiring payment of license fees in connection with conduct of a laundry business, on ground that ordinance was void, showed that plaintiffs had fully complied with all provisions of city ordinance except with respect to payment of license tax, plaintiffs could not raise the point on appeal that the police and sanitary regulations involved in the ordinance offended constitutional principles of equal protection of the law.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by Mme. Ferran and others against the City of Palo Alto and others for an injunction to restrain the defendants from enforcing an ordinance of the City of Palo Alto requiring the payment of license fees in connection with the conduct of a laundry business. From a judgment in favor of defendants, the plaintiffs appeal.

Judgment reversed with instructions to enter judgment for plaintiffs.

Henderson & Henderson, of San Francisco, for appellants.

Arnold Rumwell, City Atty., of Palo Alto, for respondents.

COMSTOCK, Justice pro tem.

Plaintiffs prosecute this appeal from a judgment in favor of defendants in an action for an injunction seeking to restrain the defendants from enforcing an ordinance of the city of Palo Alto requiring the payment of license fees in connection with the conduct of a laundry business.

It was stipulated that all of the allegations in the First Amended Complaint are true, except the allegation that the ordinance in question is illegal and void.

The plaintiffs are copartners engaged in the laundry business. The plant where their washing and ironing is done is located in the city and county of San Francisco. They have customers in various localities in the San Francisco Bay area, including San Francisco, San Mateo and Santa Clara Counties and the city of Palo Alto. Motor vehicles are operated by plaintiffs throughout these localities for the purpose of picking up articles to be laundered, transporting them to the plant in San Francisco, where they are washed and ironed, and then returning them to the customers. Plaintiffs have thirty-five employees at their establishment where the laundering is done. They do a gross annual business of about $900 in Palo Alto and about $60,000 in other localities, including San Francisco.

Appellants contend that the ordinance is beyond the power of the city to enact or enforce and is unequal, unfair, unreasonable, discriminatory, unconstitutional and void.

The provisions under attack are section 215, subsection "c," of Codified Ordinance No. 3 of defendant city, as amended,

section 678 of said ordinance, as amended, and section 684 thereof, as amended. The first-mentioned provides that any person, firm or corporation, engaged in the laundry business in the city of Palo Alto, or taking orders for laundering, or washing of any article of clothing, linens, napery, blankets, bed clothing, or fabrics of any kind whatsoever, to be laundered or washed, for hire, whether said work is to be done within or without the limits of the city of Palo Alto shall pay a license fee to be calculated upon a basis of the number of employees at the plant or place of laundering. Where the number of such employees is four or less, the license fee is $15 per quarter, where more than four and less than fifteen, $30 per quarter, and where fifteen or more, $45 per quarter. The second requires any such persons engaging in such business in said city to first obtain a permit from the Board of Public Safety of said city and that no license or permit therefor shall be issued by said board until the plant or place of laundering and the employees engaged therein shall have been inspected by the Health Officer of said city, or his duly authorized representative, under the rules and regulations of the Board of Public Safety, and the sanitary character of the plant and the absence of contagious or infectious disease among its agents or employees shall be certified to by him; provided, that if such laundry establishment is situated outside of the city of Palo Alto, the Health Officer, in lieu of such inspection "may accept a certificate" from the Board of Health, Health Officer or other health authority of the city or town where such establishment is located, certifying to such health conditions. Where the plant is situated in Palo Alto, such inspections are required to be made without charge. Said section 684 provides that whenever any laundry seeking to do business within the city of Palo Alto is located without the city limits of said city "and is unable from any cause to produce a satisfactory certificate from the health authority" in the town or city where it is located, certifying to the health conditions at such establishment, it may, before a permit is granted, be required to submit to an inspection by the Health Officer of the City of Palo Alto, for the making of which he shall charge mileage at the rate of 15¢ per mile for each mile actually traveled by him from his office in the city of Palo Alto to the place where inspection is made, and return therefrom, and in addition is required to charge a fee for such inspection at the rate of $2.50 per hour for each hour actually spent in making such inspection, from the time of his departure from his office in the city of Palo Alto until the time of his return thereto; provided, that where two or more laundries are inspected on the same trip, the time occupied in traveling to and from such establishments "may be pro-rated and charged proportionately to such establishments."

There is no serious disagreement between the parties as to the principles underlying the doctrine of equal protection and uniform application of the law. These principles have been exhaustively dealt with in numerous decisions of our supreme and appellate courts and it will serve no useful purpose to reiterate here general principles so well established and understood. The difficulty arises in attempting to apply those principles to any case possessing unusual circumstances.

[1-3] A well-established rule of construction which must always be borne in mind when approaching the solution of a problem such as that before us has frequently been quoted from Ex parte Haskell, 112 Cal. 412, 416, 44 P. 725, 32 L.R.A. 527, wherein the court said: "It is urged * * * that the particular provision in question is unreasonable and oppressive, and that it is unequal and unlawfully discriminating. * * * A municipal ordinance must be very clearly obnoxious to such objections as those made, or some one of them, before it will be declared invalid by the courts. Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the lawmaking power, and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs, —within the law, of course,—and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the constitution, or laws made in pursuance thereof."

In respect to the provisions of the ordinance basing the license fee to be charged upon the number of employees at the laundry plant, appellants, while conceding the general proposition that license charges for revenue purposes on business or occupations transacted within a munici-

pality may properly be based upon the volume of business done therein and that various means have been lawfully employed for measuring the volume, including gross receipts, number of vehicles employed and number of employees, insist that under the circumstances here to base the license fee on the number of employees at their plant outside the city operates extra-territorially and exceeds the power of the city, unlawfully discriminates against them and in favor of laundries doing their washing within the city, and violates the principle that an ordinance may not be devised solely for the purpose of erecting a protective tariff for the benefit of businesses located within the city. No case has been cited by either the appellants or the respondents which is strictly analogous on its facts.

Article XI, section 11 of the Constitution of California provides: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Article XI, section 12 thereof provides: "The Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

Palo Alto operates under a freeholder's charter, of which article II, section 6 gives the city power, "To exercise police powers and make all necessary police and sanitary regulations, to adopt ordinances and prescribe penalties for the violation thereof." Article II, section 7 thereof provides for the authority, "To levy and collect taxes and assessments, impose license fees for revenue or regulation, and provide all means for raising the revenue necessary for the City."

[4, 5] "A municipal ordinance must consist with the general powers and purposes of the corporation; must harmonize with the general laws of the state, the municipal charter, and the principles of the common law. Ex parte Frank, 52 Cal. [606], 609 [28 Am.Rep. 642]; Ex parte Kearny, 55 Cal. [212], 225. One of the limitations upon such ordinances is that they can have no extra-territorial force unless by express permission of the sovereign power. In the nature of things, this must be so unless intolerable confusion and evil is to result; and the constitution of the state, recognizing the necessity for such a restriction, has provided (article 11, § 11) that 'any county, city, etc., may make and enforce within its limits all such local, * * * and other regulations, as are not in conflict with general laws.'" South Pasadena v. Los Angeles Terminal Ry. Co., 109 Cal. 315, 41 P. 1093, 1094. "Municipal ordinances are necessarily local in their application. Usually they operate only in the territory of the municipality by which they are enacted and can have no force beyond it." McQuillan, Mun.Corps.Rev., vol. 2, p. 723, par. 693.

In the case of In re Smith, 33 Cal.App. 161, 164 P. 618, 619, an ordinance of the city of Tropico, among other things, contained a provision in effect making it unlawful, without first obtaining a license so to do, for any person to operate or carry on the business of operating any auto bus or motor vehicle over the streets of said city in carrying passengers for hire from one point to another, both of which points are outside the boundaries thereof. Holding that the ordinance was invalid, the court said: "While under its police power such city may adopt and compel the observance of all reasonable measures intended for the regulation of traffic over the streets by all persons operating motor vehicles thereon, its sole power to levy a tax of this character is found in subdivision 10, section 862, of the charter for cities of the sixth class (Deering's Gen.Laws, Ed. 1915, p. 1123), which provides that the board of trustees of said city shall have power 'to license, for the purpose of revenue and regulation, all and every kind of business authorized by law and transacted and carried on in such city or town, and all shows, exhibitions and lawful games carried on therein; to fix the rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise.' Under this provision the power of the city to impose a license upon a *business* is clearly limited to that only which is *'transacted and carried on in such city.'* That by virtue of this section the city of Tropico may require persons, companies, or corporations who *therein* conduct the *business* of transporting passengers for hire to be licensed, admits of no question. It is the occupation, however, not an act which is merely incidental thereto, which is subject to the tax."

The case of Kansas City v. Seaman, 99 Kan. 143, 160 P. 1139, 1140, L.R.A.1917B, 341, involved an attempt to impose a license tax on a laundry business which sent an employee from Kansas City, Mo., where its laundry was located, to Kansas City, Kansas, to pick up by means of a horse and wagon the linen of its patrons there, take it to the laundry, and when it was ready for delivery, return it to its patrons and collect the charges. The ordinance of Kansas City, Kansas, for the violation of which the defendant had been convicted, provided that no person, either as principal, officer, agent, servant, or employee, should carry on or operate within the city any calling, trade or occupation therein specified, without first obtaining a license therefor. The ordinance fixed the occupation tax for laundries as follows: "Laundry Wagon. Any person or corporation conducting, pursuing or carrying on a laundry business by collecting or delivering laundry by means of a wagon or other vehicle, for each wagon or vehicle, $10." The court said:

"We construe the ordinance as imposing an occupation tax upon the laundry business; the amount of the tax against the business being determined by the number of wagons employed therein.

"There are two reasons why we think the judgment convicting the appellant must be reversed: First, he was not carrying on the business of a laundry within the city, and therefore was not within the terms or contemplation of the ordinance. The laundry was conducted in Kansas City, Mo. * * * He had no place of business in Kansas City, Kan., but was simply using the streets for the lawful purpose of transporting from that city to the state of Missouri articles to be laundered and to return them to the owners when the service was completed."

The case then goes on to discuss a question of interstate commerce. Concluding the opinion, the court held: "While engaged in collecting articles to be laundered or in returning them to the owners in Kansas after the labor and service had been performed in Missouri, the appellant, as the servant and agent of his employer, was not carrying on the laundry business in Kansas; and for that reason alone was not within the provisions of the ordinance which purports to levy an occupation tax upon persons carrying on such business within the state."

In People v. Sackett, 6 Cal.App.2d Supp. 763, 43 P.2d 1115, 1117, the Appellate Department of the Superior Court, County of Los Angeles, had under consideration an ordinance of the city of Los Angeles attempting to regulate transportation companies "which operate between points, stations or depots, one or more of which are within and one or more of which are without said city; and which do not, on the same continuous run, receive and discharge passengers or freight within said city." It was held that the ordinance was void as being an attempted regulation of matters not local or municipal and as unreasonably discriminatory and obnoxious to the provisions of article I, section 21, of the California Constitution.

[6] Appellants point out that inasmuch as the number of their employees at their laundry or washing plant is directly related to the total volume of their business derived from all localities in which it originates or is collected, which volume is approximately $60,000 a year, whereas only about $900 a year thereof comes from within Palo Alto, the effect is to raise revenue for the city of Palo Alto on business not local or transacted within the municipality bearing an overwhelming ratio to that reached by the same license tax and done within the city. In other words, in appellant's case, of their business sought to be reached by and burdened with this license tax, more than sixty times as much is done outside the city as is done inside. The argument is that this attempts to reach out and tax non-local pursuits for revenue by the ingenious method of tying the license measure to an incidental part or branch of the business carried on in an almost inconsequential proportion within the city. It is further urged that the tax is just as definitely oppressive and discriminatory against the appellants and others in their situation as a measure which exempts the inside concern but levies a license tax on the one having its established or principal place of business or laundry plant outside, but coming into the city to do some business, or as one which levies a disproportionately smaller flat license charge upon the local one than upon the one operating a delivery service within from a laundry situated outside, both of which methods are condemned by the authorities. Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 65 P.2d 884, 109 A.L.R. 895; In re Hines, 33 Cal.App. 45, 164 P. 339; Ex parte Frank, supra.

Respondents argue that while the method of calculating the tax is novel and to their knowledge has never been under judicial review, it is nevertheless valid; that it does not tax business done outside the city limits; that the ordinance merely provides a license fee for the privilege of engaging in business in the city of Palo Alto; that the amount of the fee is not based upon the earnings of the licensee, but upon the size of the plant, and that the city is not concerned with the volume of business done by any laundry. These arguments do not, in our opinion, satisfactorily dispose of those advanced by appellants. Every occupational or business tax may be said to be but a levy of a license fee for the privilege of engaging in business. The distinction attempted is one of terms only. When we speak of the size of the plant and adopt as the measure the number of employees therein, we are not speaking of mere physical dimensions of buildings, or the like, but of the size of the group employed, which is very definitely related to the volume of business done, in that productive labor produces quantity or volume of output and affects the amount of business done in terms of dollar and cent value. It has been held that the number of employees in a laundry plant is a way of gauging the amount of business done therein within the meaning of an ordinance requiring licenses to be "discriminating and proportionate to the amount of business." In Ex parte Sisto Li Protti, 68 Cal. 635, 10 P. 113, it was said: "Whether the number of persons employed in the various *laundries of the city* is the basis by which can best be gauged the amount of business done *therein* or not, it is *one* way of doing so, and, for aught we know, the safest way. The city council cannot count the various articles of wearing apparel laundried by the various laundries. But it is fair to presume that no more persons are employed in such establishments than are necessary to the performance of the work, and, as a consequence, that the amount of business done by such establishments is in proportion to the number of persons employed therein." (Emphasis added.) It will be noted that this case dealt only with a license tax imposed upon the *laundries of the city* in respect to the amount of business done *therein* and that it is not authority for the proposition that the number of employees at the place where the washing is done is a valid basis for computing the fees to be paid by laundries having their plants outside the city and doing but a small portion of their business within the city by picking up and delivering therein articles washed elsewhere. This question was not involved nor discussed in the case. Since the number of employees is in a general way proportionate to the amount of business done, and since in this case the total amount of business done is about $60,000 per annum, of which only about $900 per annum comes from within Palo Alto, it follows that the license tax is non-local and operates upon business outside of Palo Alto in proportion to the difference in amounts. It is an invalid attempt by the city to make its ordinance extraterritorial in scope and application. If the method were upheld, it would be possible to subvert the entire principle of local application of municipal revenue measures. We also hold that the case is governed by the principles laid down in Bueneman v. City of Santa Barbara, supra, and related cases, and that section 215, subsection "c" of the ordinance is void as an unlawful and unreasonable discrimination against and denial of the equal protection of the law to laundries doing their laundering and having their plants outside of Palo Alto, but deriving some of their business from within said city. It also unlawfully discriminates against those engaged in Palo Alto in the business of taking orders for laundering or washing to be done by laundries maintaining their washing plants and doing their business outside the city. The business of such solicitors may be an independent calling having no logical connection whatsoever with the number of employees at the plant where the washing is done.

It is our opinion that the views expressed herein do not conflict with the case of California F. S. Co. v. Santa Monica, 206 Cal. 714, 275 P. 948. In that case persons conducting the business of operating motor-propelled vehicles for the transportation of baggage, express, freight, goods, merchandise or machinery were required to pay semi-annually a license tax computed upon the annual tonnage of freight, wares and merchandise so transported. Whether the attempt was to collect the license tax based upon the total tonnage handled in pursuance of business done both within and without the city was not specifically commented upon. The principal point was whether the company was engaged in business in the city of Santa Monica within the meaning of the ordinance, since its principal place of business was in Los Angeles and only a

portion of its transportation functions was carried on in Santa Monica. The court held that it was engaged in business within the city of Santa Monica and frequently throughout its decision referred to and stressed its business in said city. One of the authorities quoted from as strengthening respondent's case was The Emporium v. City of San Mateo, 177 Cal. 622, 171 P. 434, 435, the language selected being as follows: "When a business institution, though located as to its central place of conduction or of the sale of its goods or products in one city or town, conducts through delivery wagons or other vehicles a regular system of delivery to customers within another municipality, the latter under proper authority may impose a license tax upon the wagons or other appliances *of the distributing business which is thus actually done within it* and upon and along its streets." (Emphasis added.) A careful reading of the case discloses that the business which was being taxed was that done within and along the streets of Santa Monica and in the absence of any language indicating that the tonnage handled elsewhere should be included in the computation for the purpose of the city license tax, it will not be presumed or inferred that it was the intention of the court to hold that it could be based upon anything more than the amount of tonnage handled in business *actually done within the city.*

[7] As to the police and sanitary regulations involved in sections 678 and 684 of the ordinance, as amended, appellants argue that they offend the constitutional principles of equal protection of the law for the precise reasons set forth in the case of In re Blois, 179 Cal. 291, 176 P. 449, declaring void the provisions of a former ordinance of the city of Palo Alto, relating to the same subject. While this question has been extensively briefed on both sides, the point is made by respondents that it is improperly raised on this appeal, as the facts pleaded in the First Amended Complaint show that appellants have fully complied with all of the provisions of the respondent city's ordinances except the payment of the license tax of $180 per year based upon the number of employees at the plant where their washing is done and no complaint whatever is made of any attempt to wrongfully enforce any other provisions of the same. We agree with respondents' position in this regard. Said amended complaint, whose allegations under the stipulation constitute the factual basis of the case before us, tenders no issue with respect to any wrong or threatened wrong of which appellants can complain or upon which an injunction might be based in regard to the inspection features of the ordinance or the fees to be charged for such inspection.

The judgment is reversed with instructions to the trial court to enter its judgment in favor of the plaintiffs and enjoining the defendants from enforcing or threatening to enforce against plaintiffs the provisions of the ordinance requiring the payment of a license fee based upon the number of employees at their laundry plant situated outside the city of Palo Alto.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.



50 Cal.App.2d 320

PRICE v. MASON–McDUFFIE CO.

Civ. 11662.

District Court of Appeal, First District, Division 1, California.

March 4, 1942.

1. Limitation of actions ⇐197(2)

Evidence supported finding that contractor perpetrated a fraud upon owner in construction of house, but that owner had knowledge of structural defects in house and foundation at all times subsequent to the year 1929, and hence action was barred by limitations where it was not filed until June 11, 1937. Code Civ.Proc. § 337, subd. 1; § 338, subds. 1, 4; § 339, subd. 1; § 343.

2. Limitation of actions ⇐100(12)

The means of knowledge of fraud being equivalent to knowledge, if it appears that plaintiff had notice or information of circumstances which would put him on inquiry which, if followed, would lead to knowledge, or that facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of those facts, as regards whether an action for fraud is barred by lim-

itations. Code Civ.Proc. § 337, subd. 1; § 338, subds. 1, 4; § 339, subd. 1; § 343.

3. Pleading ⇐236(1)

There is no set rule governing the filing of an amended answer and each case depends upon its own facts, and the trial court is vested with broad discretion in determining whether amendment may be filed.

4. Pleading ⇐229

Great liberality should be shown by a trial court at all stages in permitting such amendments to pleadings as will facilitate production of all facts bearing upon questions involved in the action, where this can be done without working great delay and without jeopardizing rights of adverse party, and where the cause of action or issues involved therein will not be radically changed.

5. Pleading ⇐229

Amendments which may remove a possible ambiguity in a pleading or cure a defect of form should be liberally allowed.

6. Pleading ⇐229

Liberality in allowance of an amendment to a pleading is the rule rather than the exception, and, where such amendment can be made in the furtherance of justice without jeopardizing rights of adverse party, it should be allowed.

7. Pleading ⇐236(4)

Where first amended answer purported to deny plaintiff's allegations of fraud but denials were imperfect in form, and case was tried upon assumption that fraud was a disputed issue, and plaintiff treated denials as being sufficient to require production of proof on issue of fraud, permitting defendant to file a second amended answer containing denials conforming to rules of pleading was not an abuse of discretion.

8. Appeal and error ⇐671(1)

Plaintiff could not on appeal complain that defendant willfully suppressed evidence by failing to call as a witness an employee, where record did not disclose that employee was in possession of facts material to issues.

9. Judgment ⇐197

That defendant's motion for nonsuit was denied and that defendant thereafter offered no evidence did not entitle plaintiff to judgment, since in ruling on a motion for nonsuit all testimony introduced by plaintiff must be taken as true but such rule does not prevail in deciding case on merits.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge Assigned.

Action by Lawrence M. Price against Mason-McDuffie Company, a corporation, for damages for alleged fraud. From a judgment for defendant, plaintiff appeals.

Affirmed.

Philip O. Solon and Nathan Kessler, both of Oakland, for appellant.

Hagar, Crosby & Crosby, of Oakland, for respondent.

KNIGHT, Justice.

Plaintiff appeals from a judgment in favor of defendant in an action for damages based on allegations of fraud committed by defendant in constructing a dwelling for plaintiff. The trial court found that defendant had perpetrated a fraud on plaintiff, but held that the action was barred by the statute of limitations. The principal question raised by the appeal, so plaintiff states in his opening brief, is the propriety of an order made by the trial court granting defendant leave to file a second amended answer. However, the determination of that question, as well as the others urged in support of the appeal, requires a consideration of the facts of the case and the trial court's findings thereon.

At the time the transactions here involved took place, plaintiff was a professor of languages in the state university at Berkeley, and the owner of a lot situated on the side of a hill in that city. In June, 1923, he entered into a written contract with the defendant company for the construction of a dwelling on said lot. The plans and specifications therefor were drawn and prepared by C. R. Madison, an employee of defendant; and the house was completed in September, 1923. Eight days afterwards it was destroyed by fire; and in November, 1923, plaintiff entered into a second contract with said company to build another dwelling on the same lot. The plans and specifications therefor were likewise prepared by Madison. The house was built on the old foundations, and was completed and plaintiff moved into it on March 7, 1924. The contract price was approximately $7,300, which plaintiff paid in full in accordance with the terms of the contract. Soon after plaintiff moved into the house a number of serious structural defects became apparent to him, and the conditions grew steadily worse during the next

several years. Broadly stated, the house progressively sagged, cracked, deteriorated and warped, and plaintiff was fully aware of these conditions, and on three or more occasions called upon the defendant company to repair the damage. The ceiling, walls and foundations cracked; several of the doors and windows jammed; the floors warped; the hearth began sinking; the back and sides of the house sagged, and it was feared that the chimney would fall. Within a year or so after moving into the house plaintiff called the company to repair the cracked plaster; and calling attention to the sagging of the walls of the house and the condition of the foundations, asked the company if something should not be done about it. He was informed that the company had built the house in accordance with the plans and specifications, and that the damage was not caused by faulty construction, but was due to the fact that the house was built on the side of a hill. On that first occasion plaintiff paid the company between $50 and $100 for making the repairs. About two years later it became necessary to summon the company again to make other repairs, for which plaintiff paid an additional $250. In 1929 he called on the company again, this time to make extensive repairs to the foundations, for which he paid approximately $200 more; and between 1934 and 1935 more repairs were necessary, for which the company was also paid. Most if not all of the repair work was done under the direction of two company employees named Nagle and Pusey. In 1936 plaintiff left Berkeley on his sabbatical leave, and upon his return in 1937 found the dwelling in a state of collapse; and after waiting a week for the defendant company to send an expert to inspect the premises, plaintiff employed Mr. Wagenet, a licensed architect, to do so and to perform such work as was necessary to prevent the house from slipping down the hill. For the work performed under the direction of Mr. Wagenet plaintiff paid some $1,170. The complaint in the present action was filed on June 11, 1937.

[1] The trial court found that defendant induced plaintiff to enter into the second contract by falsely representing to him (a) that the defendant would construct the house in a workmanlike manner, in accordance with the plans and specifications and with the building laws of California and Berkeley; (b) that Madison was an architect, as an architect is defined under the laws of the state of California; and (c) that the foundations of the first house were good and substantial and could safely be used for the foundation of the second house. But the court further found that it was not true that at any time after the completion of the second house, that is to say, March 7, 1924, appellant believed or relied upon representations made by defendant that there were no structural defects in the house or foundations; it further found that defendant knew that said foundations were insufficient to support said dwelling house and fraudulently attempted to conceal said fact from the plaintiff, but that defendant did not conceal the same from plaintiff; that plaintiff had knowledge thereof. It further found "that at all times subsequent to the year 1929 plaintiff knew of the condition of said foundations and that they were not constructed or laid in a workmanlike manner or in accordance with said agreements or said drawings, plans, specifications, ordinances or laws, and that solely by reason thereof the said building had become and was untenantable and dangerous in which to live." The evidence is amply sufficient to support the trial court's finding that the defendant company perpetrated a fraud upon plaintiff in the construction of said house; but it also fully sustains the trial court's second ultimate finding as to plaintiff's knowledge of the structural defects in said house and the foundations upon which it was built. Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809. That being so, the trial court's conclusion that the action is barred by the statute of limitations must be upheld.

[2] Plaintiff contends that because of the statements made to him by defendant's employees to the effect that the damage to the house was caused by the fact that the house was constructed on the side of a hill, it cannot be held that he discovered the fraud at any time prior to 1937 when he was informed by Mr. Wagenet that defective foundations were the real cause of the damage. Plaintiff argues, therefore, that the provisions of subdivision 4 of section 338 of the Code of Civil Procedure are controlling, and if so his action was brought within the time prescribed by law, citing Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 P. 351, 42 L.R.A.,N.S., 125. As said, however, in the Lady Washington case, supra [113 Cal. 482, 45 P. 810]: "* * * as the means of knowledge are equivalent to knowledge, if it ap-

pears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts;" and clearly this is just such a case. We find nothing in the case cited by plaintiff which can be said to be helpful to him; in fact it appears from the decision therein that the court there was not concerned at all with the question of the statute of limitations.

Nor are we able to agree with plaintiff's contention that the trial court erred in granting leave to file a second amended answer. The circumstances leading up to the making of the order were these: On February 23, 1938, the attorneys then representing defendant filed an amended answer to the complaint. It contained certain denials of the allegations of fraud, damage, and time of discovery of the fraud, and as affirmative defenses pleaded the statutes of limitation, subd. 1, sec. 337, subd. 4, sec. 338, subd. 1, sec. 339, and sec. 343, Code Civ.Proc. In August, 1938, defendant's present attorneys were substituted, and the cause came on for trial in October, 1938. Evidence was introduced by plaintiff in support of all of the allegations of his complaint; whereupon he rested his case. Defendant moved for a nonsuit and the motion was denied; whereupon defendant rested its case, without introducing any testimony. The obvious reason therefor was that it relied upon plaintiff's testimony as establishing that the action was barred by the statutes of limitation. The cause was then continued until November 13, 1938, with the understanding that briefs were to be filed, following which the cause was to be ordered submitted for decision. Plaintiff filed his opening brief wherein he argued, among other things, that the denials in the amended answer of some of the allegations of the complaint relating to the issue of fraud were insufficient in form and amounted to admissions of those allegations. The imperfections in said denials consisted chiefly in the fact that certain allegations of the complaint were denied on information only, rather than on information and belief. Thereupon defendant's present attorneys moved for an order granting leave to file a second amended answer containing denials which admittedly conformed to the rules of pleading. The motion was supported by an affidavit made by defendant's former counsel to the effect that the filing of the answer containing the defective form of denials was due to mistake, inadvertence and excusable neglect. A counter-affidavit was filed by plaintiff's counsel, and a reply affidavit by defendant's present counsel. The motion was granted, and the cause was ordered submitted for decision; whereupon the trial court made its findings of fact and conclusions of law, and rendered judgment in favor of defendant.

[3-6] In support of his contention that the order permitting defendant to file the second amended answer was erroneous, plaintiff cites several cases including Richter v. Adams, 19 Cal.App.2d 572, 66 P.2d 226, 230; but it should be noted that in most of those cases the trial court denied the application to file the amended pleading, and it was held that such refusal did not amount to an abuse of discretion under the circumstances. It would appear, therefore, that there is no set rule governing such matters; that each case depends upon its own peculiar facts, and that the trial court is vested with a broad discretion in determining whether the amendment may or may not be filed. In any event, so far as we are here concerned, the rule of those cases goes no further than to hold that "* * * amendments of pleadings to conform to the proofs should not be allowed when they raise new issues not included in the original pleadings and upon which the adverse party had no opportunity to defend." Richter v. Adams, supra, quoting from Lavely v. Nonemaker, 212 Cal. 380, 298 P. 976. On the other hand, as stated in California Jurisprudence (vol. 21, p. 183) great liberality should be shown by a trial court at all stages in permitting such amendments as will facilitate the production of all the facts bearing upon the questions involved in the action, where this can be done without working great delay and without jeopardizing the rights of the adverse party, and where the cause of action or the issues involved therein will not be radically changed; and that "amendments which may remove a possible ambiguity in a pleading or cure a defect of form should be liberally allowed." 21 Cal. Jur. 185. In other words, as stated in Abbott v. Limited Mut. Comp. Ins. Co., 30 Cal.App.2d 157, 85 P. 961, liberality, in allowance of an amendment to a pleading is the rule rather than the exception; and in a case where such amendment can be made in the furtherance of justice without jeopardizing the rights of the adverse par-

ty it should be allowed. In LeCyr v. Dow, 30 Cal.App.2d 457, 86 P.2d 900, the original answer specifically admitted certain allegations of the complaint, and afterwards an amendment was allowed which specifically denied such allegations. The reviewing court sustained the trial court's order allowing the amendment, saying in effect that the whole subject of amendments to pleadings is addressed to the sound discretion of the trial court and that while ordinarily a party will not be permitted on trial to amend by denying a fact admitted in the answer, there is no absolute rule governing the matter, and that when the amendment does not operate to the disadvantage or prejudice of the adverse party the trial court's ruling will not be disturbed. See also Wrightson v. Dougherty, 5 Cal.2d 257, 54 P.2d 13.

[7] Here it appears that the first amended answer purported to deny the allegations of fraud, but the denials were imperfect in form; and the answer set up in due form the affirmative defenses of the statutes of limitation; furthermore the record shows that at the opening of the trial it was the understanding of defendant's counsel and doubtless that of the court that the allegations relating to the issue of fraud had been sufficiently denied, and the cause was tried upon the assumption that fraud was a disputed issue in the case. It also appears that plaintiff's evidence was introduced accordingly; that plaintiff himself was fully examined and cross-examined on all phases of that branch of the case. In short, throughout the trial plaintiff treated the denials as did counsel for defendant, as being legally sufficient to require the production of proof on the issue of fraud. It is apparent, therefore, that plaintiff was not taken at any disadvantage, nor has he suffered any prejudice as the result of the trial court's ruling granting leave to file said second amended answer.

[8, 9] Further contention is made that defendant wilfully suppressed evidence by failing to call as a witness an employee named Tompkins. But nowhere in the record does it appear that he was in possession of any facts material to the issues in the case. Finally, plaintiff urges that since defendant's motion for nonsuit was denied and thereafter it offered no evidence, plaintiff was entitled to judgment. But in making this point plaintiff apparently overlooks the fact that in ruling on a motion for nonsuit all testimony introduced by the plaintiff must be taken as true; whereas in deciding the case on the merits, no such rule prevails.

The judgment is affirmed.

PETERS, P. J., and GOODELL, Justice pro tem., concurred.



50 Cal.App.2d 272

THOMPSON v. SUTTON et al.

Civ. 6635.

District Court of Appeal, Third District, California.

Feb. 28, 1942.

1. Appeal and error ⇐1129

The policy of the law is to have a hearing on the merits wherever possible, and reviewing courts are much more disposed to affirm an order which results in compelling trial on merits than it is when the judgment by default is allowed to stand and it appears that a substantial defense could be made. Code Civ.Proc. § 473a.

2. Appeal and error ⇐957(1)
Judgment ⇐139

A broad discretion is allowed to courts in granting relief against default, and it is only in cases where lower court has abused its discretion that reviewing court will reverse action of the lower court. Code Civ. Proc. § 473a.

3. Judgment ⇐143(1)

The provision of Civil Code relating to setting aside of judgments taken against party through mistake, inadvertence, surprise, or excusable neglect is a "remedial statute" and is required to be liberally construed so as to dispose of cases on the merits, and give party claiming in good faith to have a subsisting cause of action or substantial defense thereto an opportunity to present it. Code Civ.Proc. § 473a.

See Words and Phrases, Permanent Edition, for all other definitions of "Remedial Statute".

4. Judgment ⇐145(2), 159, 163

An applicant seeking relief from judgment taken against him through mistake, inadvertence, surprise, or excusable neglect is required in first instance to show only that he has not been personally served with summons and that he has a good defense to the action which he could have presented had he been informed of its pendency, but his opponent may show in opposition to application that applicant had actual notice of action in time to have entered appearance and to have presented defense and that failure to do so was owing to his neglect or his consent to judgment, and, in event of such showing, a case arises for exercise of discretion of the court and it must determine whether the "laches" is of a character that should preclude relief. Code Civ.Proc. § 473a.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

5. Appeal and error ⇐837(9)

In determining whether showing of a meritorious defense was made by applicants whose motions to vacate and set aside default and judgment and to permit them to answer and defend action on its merits were denied, the reviewing court was entitled to consider both the affidavits filed by the applicants in support of their motions and their verified proposed answers. Code Civ. Proc. § 473a.

6. Judgment ⇐159

Where defendants who claimed easement on land sought relief from default and judgment entered against them in suit to partition the land, affidavits, stating unequivocally that no personal service of summons was made on defendants and that first knowledge they had that such suit had been brought or was pending or that judgment had been entered was when defendants' easement was barricaded for first time, was sufficient showing in respect to lack of personal service of summons to entitle defendants to relief. Code Civ.Proc. § 473a.

7. Judgment ⇐161

Where defendants who claimed easement on land sought relief from default and judgment entered against them in suit to partition the land, and filed affidavit and verified proposed answer, allegation of answer based on information and belief of facts peculiarly within knowledge of the party, and allegation which merely mentioned alleged easement by way of recital, were insufficient and were eliminated from consideration on the showing of merits. Code Civ.Proc. § 473a.

8. Judgment ⇐160

Where defendants who claimed easement on land sought relief from default and judgment entered against them in suit to partition the land, and the facts relied on in the showing of merits were specifically stated, the general formal affidavit of merits could be disregarded, since even though it may have been sufficient without the specific statement of facts, since the specific statements were set forth, they were the measure of the merits and the court might determine their sufficiency. Code Civ.Proc. § 473a.

9. Judgment ⇐145(4)

Where defendants who claimed easement on land sought relief from default and judgment entered against them in a suit to partition the land, the defendants, in alleging facts to show that they had a good defense to the action on the merits, were not required to state probative facts concerning origin of their title to easement. Code Civ. Proc. § 473a.

10. Judgment ⇐145(4)

Where defendants who claimed easement on land sought relief from default and judgment entered against them in suit to partition the land, affidavits and verified proposed answers, which embodied the ultimate fact that the defendants were the owners of the easement in question, were sufficient "prima facie" showing of merit to entitle defendant to relief sought. Code Civ.Proc. § 473a.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie".

11. Judgment ⇐162(4)

Where defendants who claimed easement on land sought relief from default and judgment entered against them in suit to partition the land, and defendants made prima facie showing of meritorious defense, counter affidavits amounting to nothing more than an attempt to controvert truth of showing of merits were insufficient and did not preclude granting of relief to the defendants. Code Civ.Proc. § 473a.

12. Judgment ⇐145(4)

Where city which claimed easement on land sought relief from default judgment entered against it in suit to partition the land,

affidavit and proposed answer of the city, which contained no allegation of its ownership of an easement or that the alleged easement constituted a public street, and merely alleged use of roadway across the land by residents and inhabitants of city and by fire, police, and street departments thereof, did not establish meritorious defense necessary to entitle city to relief sought. Code Civ. Proc. § 473a.

13. Judgment ⇐145(4)
Pleading ⇐8(11)

Where city which claimed easement on land sought relief from default judgment entered against it in suit to partition the land, assertion in affidavit and proposed answer that city acquired a right by user was a mere "conclusion" and did not establish meritorious defense necessary to entitle city to relief sought. Code Civ.Proc. § 473a.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by W. W. Thompson against R. R. Sutton and others, for partition of realty. From orders denying motions of defendant City of San Carlos and defendants Asa E. Hull and others to vacate and set aside a default and judgment and to permit them to answer and defend the action on its merits, such defendants appeal.

Order denying motion of defendant city affirmed, and order denying motions of defendants Asa E. Hull and others reversed with directions to grant application and permit the filing of purported answers and defend the action on its merits.

Henry F. Wrigley, of San Francisco, and Albert Mansfield, of Redwood City, for appellants.

R. R. Sutton in pro. per. and Kirkbride & Wilson, all of San Mateo, for respondents.

COMSTOCK, Justice pro tem.

This is an appeal from orders denying motions of the appellants to vacate and set aside a default and judgment, and to permit them to answer and defend the action on its merits.

The action was commenced as a suit in partition by the plaintiff, W. W. Thompson, against the defendant R. R. Sutton and "all persons unknown who have or claim any right, title, estate, interest or lien in or upon the real property described in the complaint or any part thereof." It was alleged that plaintiff owned a four-fifths interest and defendant R. R. Sutton owned a one-fifth interest in six lots in the city of San Carlos. There were allegations that no other persons claimed any interest in the property excepting the persons designated as "all persons unknown," etc., and as to them that their claims were without any right whatsoever. The prayer was for a partition of the real property according to the respective rights of plaintiff and the defendant R. R. Sutton and that their title be quieted against all others. Service of summons upon defendants "all persons unknown," etc., as described in the complaint, was made by publication once a week for two months in a newspaper published in the city of San Mateo. On February 25, 1938, the defendant Sutton, appearing in propria persona, filed an answer admitting the allegations of the complaint and on that date the default of the defendants "all persons" was demanded and entered and plaintiff and defendant Sutton made and filed a written stipulation waiving notice of trial, written findings, appointment of a referee and an interlocutory decree. On the same day a final decree of partition was entered, allotting to plaintiff five lots and to defendant Sutton one lot and further decreeing that "all persons unknown who have or claim any right, title, estate, interest or lien in or upon the real property described in the complaint, or any part thereof, have and each of them has no right, title, estate, interest or lien of, in or to the said real property or any part thereof, and that they and each of them be, and they are hereby forever banned and foreclosed from claiming any interest therein, and that the title of said plaintiff W. W. Thompson and defendant R. R. Sutton be and the same is hereby quieted as to their said claims."

Thereafter on November 7, 1938, appellant Asa E. Hull served and filed a notice of motion to vacate default and judgment and to be permitted to file an answer and to defend the action on its merits upon the ground that he had not been personally served with summons in said action. Said notice of motion was accompanied by a supporting affidavit and

a verified proposed answer. On December 13, 1938, appellants Sagehorn, Mewhirter, McIntyre, Pratt and O'Conner filed a like motion with supporting affidavits and a verified proposed answer. On February 6, 1939, the city of San Carlos served and filed its notice of motion to the same effect with supporting affidavit and verified proposed answer. To each of said motions the plaintiff W. W. Thompson interposed an opposition by counter-affidavit. Upon hearing and submission of the motions, they were denied in two orders, one pertaining to the motion of the city, the other to the motion of the other applicants.

Appellants contend that as a matter of law they are entitled to have the default and judgment set aside and to appear and answer in said action and defend the same on its merits.

[1-3] The policy of the law is correctly stated by appellants in their brief wherein they quote from Waybright v. Anderson, 200 Cal. 374, at page 377, 253 P. 148 at page 149, as follows:

"Moreover, it is the policy of the law to favor, wherever possible, a hearing on the merits, and appellate courts are 'much more disposed to affirm an order when the result is to compel a trial upon the merits than it is when the judgment by default is allowed to stand, and it appears that a substantial defense could be made.' O'Brien v. Leach [139 Cal. 220, 72 P. 1004, 96 Am.St.Rep. 105], supra; Downing v. Klondike Min. [& Mill.] Co. [165 Cal. 786, 134 P. 970], supra; Porter v. Bryson [35 Cal.App. 688, 690, 170 P. 1068], supra. This is clearly indicated in the case of Berri v. Rogero, 168 Cal. 736, 740, 145 P. 95, 97, wherein it is stated that: 'The policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. * * * A broad discretion is allowed to courts in granting relief against default, and it is in cases only where the lower court has abused its discretion that the appellate court will reverse its action.'

"Section 473 of the Code of Civil Procedure is a remedial provision and is to be liberally construed, so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a subsisting cause of action or a substantial defense thereto an opportunity to present it. It is for this reason that appellate courts more readily listen to an appeal from an order refusing to set aside default than where the motion has been granted, since in such case the defaulting party may be deprived of a substantial right. Nicoll v. Weldon, 130 Cal. 666, 63 P. 63."

[4] They base their contentions upon the provisions of section 473a of the Code of Civil Procedure. A party seeking relief under said section is not required in the first instance to do more than show that he has not been personally served with summons and that he has a good defense to the action on the merits which he could have presented had he been informed of its pendency; but his opponent may show in opposition to the application that the applicant had actual notice of the action in time to have entered an appearance and to have presented the defense and that the failure to do so was owing to his neglect or to his consent to the judgment and in the event of such showing a case arises for the exercise of the discretion of the court and it must determine whether or not the laches is of a character that should preclude the relief. Guardianship of Stanfield, 32 Cal. App.2d 283, 89 P.2d 696, Hiltbrand v. Hiltbrand, 218 Cal. 321, 23 P.2d 277, Boland v. All Persons, etc., 160 Cal. 486, 117 P. 547, Gray v. Lawlor, 151 Cal. 352, 90 P. 691, 12 Ann.Cas. 990.

The respondents contend that a sufficient case was made to invoke the discretion of the trial court and that its orders find support in the evidence and should not be disturbed on this appeal.

[5] It is urged by respondents that the affidavits and proposed answer of appellants are in and of themselves insufficient to show merit. We think that these supporting papers as presented by the individual appellants demand consideration separately from those relied upon by the appellant city of San Carlos. We are entitled to consider both the affidavits and the verified proposed answers on the question of a showing of merit. Guardianship of Stanfield, supra; Savage v. Smith, 170 Cal. 472, 150 P. 353.

[6] The affidavit of each of the individual appellants states unequivocally

that no personal service of summons in said action was ever made upon him and that the first knowledge that he had that such an action had been brought, or was pending, or that the judgment had been entered, was about the middle of October, 1938, "when said defendant's right of way or easement was barricaded for the first time." This was a sufficient showing in respect to the lack of personal service of the summons. Indeed, no point is made by respondents as to that particular phase of the case. The affidavit of appellant Asa E. Hull alleges: "That he is the owner of all of Block 16 of the San Carlos Park Syndicate; and that, as the owner of said block of land, and as an appurtenance thereto, he is the owner of a private right of way or easement across all of the lots described in plaintiff's complaint herein; that this defendant and his predecessors in interest in the said Block 16 have been in the peaceful and uninterrupted use and enjoyment of said private right of way or easement for over twenty years prior to the filing of plaintiff's complaint herein; and that said use and enjoyment of said right of way or easement, as well as the name and address of this defendant, was known to plaintiff both at and prior to the time he filed said complaint." A general affidavit of merits is also included in the affidavit, as follows: "That affiant has fully and fairly stated all the facts relating to said action to Henry F. Wrigley, Esq., an attorney admitted to practice in all courts in the State of California, and affiant's counsel in said cause, and that, after such statement, affiant was advised by said counsel, and he verily believes, that he has a good and substantial defense to said action on the merits."

[7] In the verified proposed answer of the said Asa E. Hull, paragraph III thereof, he states: "Answering allegation 'IV' of said complaint, this defendant alleges that, for more than twenty years prior to the filing of plaintiff's complaint herein, this defendant and his predecessors in interest have been the owners, and have enjoyed the uninterrupted and peaceful use and possession, of a private right of way or easement over and across the said lots of land described in plaintiff's complaint; that the said private right of way or easement was and is shown as 'Bellevue Avenue', first, upon that certain map entitled, 'Map of the Property of the San Carlos Park Syndicate', recorded September 3, 1907, in Book 5 of Maps, at pages 24 to 26, San Mateo County Records, and, second, upon that certain map entitled, 'Supplementary Map of Tract 1 and a portion of Tract 2 of the Property of San Carlos Park Syndicate', recorded May 20, 1909, in Book 6 of Maps at page 63, San Mateo County Records; and that the location, length and width of said private right of way or easement over and across the said lots is as shown upon the said two maps; and except as thus admitted and alleged this defendant denies allegation 'IV' of said complaint." Also, in paragraph I of said proposed answer he states: "Answering allegations 'I' and 'II' of said complaint, this defendant is informed and believes, and upon such information and belief alleges, that plaintiff W. W. Thompson is the owner of the fee to the lots in said allegations 'I' and 'II' described, that defendant R. R. Sutton has no right, title or interest therein, except as trustee for or agent of plaintiff, and that this defendant has and is the owner of a private right of way or easement over and across the said lots, and all thereof; and, except as thus alleged or admitted, this defendant specifically denies said allegations of plaintiff's complaint." And in paragraph II thereof he says: "This defendant denies allegation 'III' of plaintiff's complaint herein; and in this connection, this defendant alleges that his said private right of way or easement over and across the said lots has not only existed on the ground but it has appeared of record for over twenty years prior to the filing of plaintiff's complaint herein." In our opinion the last two quoted paragraphs of the verified proposed answer should be eliminated from consideration on the showing of merits as the said paragraph I is but an allegation on information and belief of facts peculiarly within the knowledge of the party and is hence insufficient. Hall v. James, 79 Cal.App. 433, 249 P. 876; Loveland v. Garner, 74 Cal. 298, 15 P. 844; Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 P. 527; Mulcahy v. Buckley, 100 Cal. 484, 35 P. 144; Raphael Weill & Co. v. Crittenden, 139 Cal. 488, 73 P. 238, and said paragraph II merely mentions the alleged right of way or easement by way of recital and is likewise insufficient.

The affidavits and proposed answers of the other individual appellants are substantially similar to that of Asa E. Hull.

[8] The facts relied upon in the showing of merits having been specifically stated, the general, formal "affidavit of merits" may be disregarded, for while this may have been sufficient without the specific statement of facts, when the facts constituting the defense are set forth, they are the measure of the merits and the court may judge of their sufficiency. Osmont v. All Persons, etc., 165 Cal. 587, 133 P. 480.

[9, 10] While the statements of fact on the showing of merits by the individual appellants contain much surplusage and immaterial matter, nevertheless they embody the ultimate fact that said parties, respectively, are the owners of the right of way or easement in question. It is unnecessary for them to state probative facts concerning the origin of their title. Gray v. Lawlor, 151 Cal. 352, 90 P. 691, 12 Ann. Cas. 990; Davidson v. All Persons, etc., 18 Cal.App. 723, 124 P. 570; Garbarino v. Noce, 181 Cal. 125, 183 P. 532, 6 A.L.R. 1433; Merrill v. Hooper, 125 Cal.App. 80, 13 P.2d 786. We therefore are of the opinion that a sufficient prima facie showing of merit was made by the affidavits and proposed answers of said moving parties.

Do the counter-affidavits and maps contain any substantial showing of the essential matters to support the orders, i. e., that applicants had actual notice of the action in time to have entered an appearance and presented their defense and that the failure to do so was owing to their neglect or consent to the judgment, amounting to laches, or that they are estopped? The counter-affidavit in opposition to Asa E. Hull's showing is lengthy and involved. We shall not attempt to recount its entire contents. It admits that no personal service of summons was made upon said appellant. On information and belief it denies that said appellant had no personal knowledge of the bringing or of the pendency of the action or the entry of the judgment until the 13th of October, 1938. Various facts are set forth concerning the knowledge of Asa E. Hull of the pendency of another action to which plaintiff and said city, but none of the individual applicants here, were parties and in which the issues were different. Many facts are alleged concerning the history of the recording of the subdivision maps which tend to show that said appellant does not own an easement over the way claimed by reason of any dedication or as an appurtenance to any lot purchased by him with reference to any of said maps. Other facts are stated concerning the taxation and assessment of lots in the subdivisions in question and the making of certain public improvements therein, all of which took place before the commencement of this action. We find nothing in said counter-showing sufficient to constitute a conflict with the prima facie showing of merits made by said appellant or to support the orders from which the appeal is prosecuted.

The counter-affidavit filed by plaintiff in opposition to the showing of the individual applicants other than Hull is even less substantial than that directed against Hull. It merely denies the allegations on information and belief or for lack of information or belief, except as to the questions of ownership of the easement and as to those the counter-affidavit, "Denies that as alleged owners of said parcels of land, and/or as an appurtenant thereto, they or any of them or their said wives or any of them, are the owners of a private right of way or easement across all or any of the lots described in plaintiff's complaint or any part thereof," and then proceeds to deny said applicant's allegations respecting their peaceable and uninterrupted use and enjoyment of the right of way. No affirmative facts are brought forward to show any basis for a claim of laches or estoppel.

[11] None of the aforementioned counter-affidavits amounts to anything more than an attempt to controvert the truth of the applicants' showing of merits. They are therefore insufficient. Rauer's Law, etc., Co. v. Gilleran, 138 Cal. 352, 71 P. 445; Gracier v. Weir, 45 Cal. 53; 14 Cal. Jur. 1071.

[12, 13] We now turn to the supporting papers used by the appellant city of San Carlos on its motion. The affidavit and proposed answer contain no allegation of its ownership of an easement or that the roadway is a public street. We have carefully searched and find nothing of any materiality regarding a defense on the merits. Allegations are made that since the incorporation of the city in 1925 the city of San Carlos, the residents and inhabitants thereof, and the fire, police

and street departments of said city have continuously used a roadway across the property described in the complaint; that the city and its residents and inhabitants "have acquired a right by user to the use of the road or street across the property of the plaintiff;" and that said roadway existed and had been continuously used by the city and its residents, employees and departments for more than twenty years. In our opinion this is no showing of a meritorious defense to the action. The use shown may have been purely permissive, not adverse or under claim of right. Said assertion of the acquisition of a right by user is a pure conclusion.

The other subjects discussed in the briefs are not of sufficient merit to require detailed attention.

The order denying the motion of the city of San Carlos is affirmed. The order denying the motions of the other appellants is reversed with directions to the superior court to grant their applications and permit them to file their proposed answers and defend the action on its merits. Appellants other than city of San Carlos to recover their costs on appeal.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.



BRAY et al. v. JONES.

Civ. 2692.

District Court of Appeal, Fourth District, California.

Feb. 26, 1942.

Hearing Granted April 23, 1942.

1. Taxation ⇐734(9)

Where notice recited that property would be sold for nonpayment of taxes, without mentioning penalties and costs as required by statute, the defect or deficiency appearing in notice was not only an "irregularity", but was such a defect that a subsequent tax deed predicated upon such defective notice was void. Pol.Code § 3747, 3764, as amended by St.1929, p. 742, §§ 1, 2, and §§ 3771, 3771a; St.1929, p. 745, § 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Irregularity".

2. Taxation ⇐772

A void tax deed is void for all purposes.

3. Taxation ⇐659, 751

The statutes prescribing manner of service of notice of tax sales and issuance of tax deeds thereunder are "mandatory" and not "directory".

See Words and Phrases, Permanent Edition, for all other definitions of "Directory" and "Mandatory".

4. Taxation ⇐803

Generally, a short statute of limitations applies only to tax sales invalid because of mere technical defects and irregularities in the proceedings, and possession under such a statute will not sustain a tax deed that is valid on its face, if there were jurisdictional or fundamental defects in the sale which rendered the proceedings void.

5. Taxation ⇐659

Under statute requiring notice to be given owner that property would be sold for nonpayment of taxes, penalties and costs, the giving of notice as required and in manner prescribed by legislature was a jurisdictional prerequisite to the making of a valid sale of the property. Pol.Code § 3764, as amended by St.1929, p. 742, §§ 1, 2.

6. Taxation ⇐688

Where a tax deed to state pursuant to sale of property for nonpayment of taxes was invalid because of failure to comply with statute relating to notice required to be given owner, no title passed pursuant to the sale, and legislature could not cure the defect by passage of a curative act. Pol.Code §§ 3747, 3764, as amended by St.1929, p. 742, §§ 1, 2, and §§ 3771, 3771a, 3897(1, 8); St.1929, p. 745, § 4.

7. Taxation ⇐804

In suit to quiet title, wherein plaintiffs offered only a void tax deed as basis of their claim of title, neither doctrine of "laches" nor a limitation statute could supply the lack of affirmative proof so as to entitle plaintiffs to judgment. Pol.Code § 3897(8).

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

8. Taxation ⇐810(2), 813

Where tax deed was invalid because proceedings leading up to tax sale were defective, purchaser of the deed should be reimbursed for taxes, costs, penalties and expenses incurred, and purchaser should be allowed to introduce evidence as to amount of such items.

Appeal from Superior Court, Kern County; William L. Bradshaw, Judge.

Suit by W. F. Bray and others against Ida T. Jones to quiet title to certain real property. From a judgment for plaintiffs, the defendant appeals.

Reversed.

Raphael Dechter and Lyman P. Robertson, both of Los Angeles, for appellant.

M. J. Rankin, Milo V. Olson, and R. Leslie Sparks, all of Los Angeles, Amici Curiae, for appellant.

West & Vizzard and Edw. West, all of Bakersfield, for respondents.

GRIFFIN, Justice.

Respondents obtained a judgment quieting title to certain real property in Kern County. Defendant Ida T. Jones appealed therefrom.

Respondents, as holders of a tax deed issued by the County Tax Collector of Kern County, brought this action to quiet title against the appellant as the owner in fee of the said property. Respondents rely upon a deed dated October 19, 1937, from the Tax Collector of Kern County. The State of California, as grantor of said deed, according to respondents, acquired title to that property by virtue of a conveyance to the state made on July 15, 1935, by the Tax Collector of Kern County on account of the nonpayment of taxes for the year 1929. In other words, the taxes not having been paid for the year 1929, the property was declared sold to the state on June 30, 1930, and five years having elapsed without any redemption, it was conveyed to the state. It is the contention of appellant that the proceedings leading up to the sale of the property to the state in the year 1930 for the nonpayment of taxes in 1929, and that the proceedings leading up to the issuance of the conveyance of the real estate to the state in 1935, and the proceedings leading up to the issuance of the deed to the respondents, were defective and void.

Under point one it is admitted by respondents in their closing brief that the notice of sale did not comply with section 3764 of the Political Code in that the notice recited that the property would be sold for the nonpayment of taxes instead of reciting that the property would be sold for the nonpayment of taxes, *penalties and costs*. The notice recites that "* * * unless the *taxes delinquent as appear in said list*, together with the penalties and costs, are paid on or before the sale date given below, the real estate upon which taxes are delinquent will be, by operation of law, sold to the state * * *." (Italics ours.) In other words, the notice preceding the list specifically states that the list contains the amount of *taxes* due but makes no mention as to whether the list contains the amount of taxes, *penalties and costs*. The fact that the list makes no mention of containing the amount of penalties and costs is further strengthened by the statement in the notice that "unless the taxes delinquent as appear by said list, together with costs and penalties are paid, I, the said tax collector, etc., will sell said real estate, etc." This would obviously seem to indicate from a reading of the notice that the list contained the taxes only, and that the owner of the property, in addition to the amount of taxes shown in the list, would be compelled to pay some other sum representing penalties and costs in order to retain his property and prevent such sale.

[1] Respondents state that Gottstein v. Kelly, 206 Cal. 742, 276 P. 347, "is directly in point" but was not cited by either respondents or appellant before it was called to the attention of respondents by amici curiae herein, and they admit in this respect "that the proceedings prior to the sale of the lands by the State of California to the respondents were irregular, and that the title of respondents probably will fall unless sustained by the Statute of Limitations set up in subdivision 8, section 3897 of the Political Code, adopted in 1935, and in effect at the time the sale by the state to the respondents was made." It should be here noted, however, notwithstanding the concession made by respondents, that the holding in Gottstein v. Kelly, supra, has been modified to some extent by legislative enactment. Stats. 1929, ch. 422, p. 742. Gottstein v. Kelly, supra, in effect held that under the provisions of sections 3747 and 3764 of the Political Code,

taxes, penalties and costs should be separately shown on the publication of delinquent lists and notices of sale under sections 3771 and 3771a of the Political Code. The legislature, in 1929, amended these provisions (§ 3764, Pol. Code) by requiring that the delinquent list show only "an amount equal to the total amount of all taxes, assessments, penalties, and costs due," and in passing the amendatory act, specifically declared that the amendments were "not a change in, but a statement and declaratory of the law as the Legislature intended it to be by the terms of those sections prior to" the amendment. Section 4 thereof further provided that "all publications of delinquent lists or notices of sale under sections 3771 and 3771a of the Political Code failing to enter taxes, penalties and costs as separate entries but entering the foregoing amounts in one total sum and all sales * * * tax deeds * * * based upon such entries * * * are hereby confirmed, validated and legalized * * *." Clayton v. Schultz, 4 Cal.2d 425, 50 P.2d 446. The defect or deficiency appearing in the notice, as above conceded, is not only an irregularity, but has time and again been held to be such a defect that a subsequent tax deed predicated upon such defective notice is void. Bussenius v. Warden, 71 Cal.App. 717, 722, 236 P. 371; Snodgrass v. Errengy, 86 Cal.App. 664, 261 P. 497; Gottstein v. Kelly, supra. The giving of notice in the manner and form prescribed by the statute is an essential jurisdictional fact. Cordano v. Kelsey, 28 Cal.App. 9, 19, 151 P. 391, 398; Campbell v. Canty, 162 Cal. 382, 123 P. 266; Southern California B. & F. Corp. v. Mathes, 206 Cal. 749, 752, 276 P. 1013; Clayton v. Schultz, 22 Cal.App.2d 72, 74, 70 P.2d 512.

[2, 3] When a proceeding is void for one purpose it is void for all purposes. A void tax deed is like a void judgment which is but a "dead limb upon the judicial tree, which should be lopped off" at any time. Pettis v. Johnston, 78 Okl. 277, 190 P. 681, 689. In matters pertaining to tax sales, statutes prescribing the manner of service of notice and the issuance of tax deeds thereunder are mandatory and not directory. A deed is void to prevent the operation of the short statute of limitations when there is a fundamental or jurisdictional defect in the proceedings, either disclosed by the evidence of the deed or by the record of the proceedings. Lind v. Stubblefield, 138 Okl. 280, 282 P. 365.

[4] In 26 Ruling Case Law, p. 443, § 399, the rule is thus declared: "A majority of the courts in which the question has arisen have taken the further position that a short statute of limitations applies only to sales invalid because of mere technical defects and irregularities in the proceedings, and that possession under such a statute will not sustain a deed that is valid on its face, if there were jurisdictional or fundamental defects in the sale which rendered the proceedings absolutely void * * *." See, also, Harris v. Mason, 120 Tenn. 668, 115 S.W. 1146, 25 L.R.A.,N.S., 1011; Martin v. White et al., 53 Or. 319, 100 P. 290, citing Blackwell on Tax Titles, § 944; Groesbeck v. Seeley, 13 Mich. 329; Kypadel Coal & Lumber Co. v. Millard, 165 Ky. 432, 177 S.W. 270; Secret Valley Land Co. v. Perry, 187 Cal. 420, 202 P. 449; Cooley on Taxation, 4th Ed. vol. 4, pp. 2970, 2971, 2974.

[5, 6] Section 3897, subdivision 1 of the Political Code provides in part that "* * * whenever the State shall have become the owner of any property sold for taxes * * * the tax collector * * * shall * * * sell * * *." If the tax deed to the state was void the state did not become the owner of the property sold for taxes. Where the proceedings are so fatally defective that no title passes, the legislature cannot, by a curative act, transfer the property of one person to another. The giving of the notice as required and in the manner prescribed by the legislature was a jurisdictional prerequisite to the making of a valid sale herein. The notice published was unauthorized and therefore constituted no notice. The only notice to the owner which could constitute due process and under which he could be deprived of his property was that set out in the law at the time the sale was made, and it is evident that such notice was not given. Warden v. Broome, 9 Cal.App. 172, 98 P. 252; Harper v. Rowe, 53 Cal. 233; 37 Cyc. 1379, 1380.

[7] A careful reading of Clayton v. Schultz, supra, does not indicate an intention by the Supreme Court to announce a rule or establish a principle at variance with those herein expressed. The act of 1929 did not have the effect of validating the tax sale in this case, as the sale was absolutely void when it was made. The day after the sale, the title of the owner was as valid in law and in equity and to

all intents and purposes, as though no sale had occurred. Harper v. Rowe, supra. The force of the legislature's declaration is all that purports to make valid a sale which theretofore was void. The deed pursuant to the sale conveyed no title to the state since plaintiffs offered only a void tax deed as a basis of their claim of title. Neither the doctrine of laches nor the statute of limitations could supply the lack of affirmative proof so as to entitle plaintiffs to judgment. Jones v. Walker, 47 Cal.App.2d 566, 118 P.2d 299.

[8] Appellant sets forth several other claimed reasons why the tax sale was void. In view of the concession and determination that the first reason stated was tenable and rendered the sale irregular and consequently void, we see no reason to pass upon the sufficiency of other claimed reasons. Where tax proceedings have been shown to be defective, the purchaser must be reimbursed for all taxes, costs, penalties and expenses incurred. The purchaser may introduce evidence as to the amount of these items. Clayton v. Schultz, supra.

Judgment reversed.

BARNARD, P. J., and MARKS, J., concurred.



50 Cal.App.2d 385

LEONARD v. ALEXANDER et al.

Civ. 2901.

District Court of Appeal, Fourth District, California.

March 9, 1942.

Hearing Denied May 8, 1942.

1. Infants ⇐49

The section of Probate Code relating to contract for attorney's fees for services in litigation, made by or on behalf of minor, does not prohibit an attorney's fee for an attorney for a minor where contract for contingent fees is not approved by court having jurisdiction of minor's estate, but the statute indicates that under such circumstances court awarding judgment to minor should fix attorney's fee based on reasonable value of the services rendered. Probate Code, § 1509.

2. Infants ⇐49

Where contract for attorney's fees on a contingent basis in malpractice action in behalf of minor was never approved by any court, and the action was compromised by minor after reaching his majority and was dismissed, and no judgment ever recovered, provisions of probate code relating to contract for attorney's fees for services in litigation, made by or on behalf of a minor, were not applicable, except insofar as they made the contract for a contingent fee void. Probate Code, § 1509.

3. Infants ⇐50

The services of an attorney are usually considered as "necessaries", and a promise to pay for them is implied when they are rendered in a proceeding personal to an infant.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessaries".

4. Infants ⇐50
Attorney and client ⇐141

Where services were rendered by an attorney in malpractice action on behalf of a minor at mother's request pursuant to a contract providing for contingent fees, which contract was void under probate code because never approved by any court, and the action was compromised by minor after reaching his majority and was dismissed and no judgment recovered, services rendered by attorney were for "necessaries", and their reasonable value was recoverable from minor, but not from his mother.

5. Appeal and error ⇐907(3)

Where appeal, in action by attorney to recover value of his services rendered in malpractice action, was on judgment roll, District Court of Appeal would presume that evidence supported trial court's finding that reasonable value of services rendered was $350.

Appeal from Superior Court, San Bernardino County; Frank A. Leonard, Judge.

Action by Jack P. Leonard against Adin Alexander, Jr., and another to recover for services rendered defendants in an action brought to recover damages in a malpractice action. From an adverse judgment, the plaintiff appeals.

Affirmed in part and reversed in part with directions.

Hearing denied; CURTIS, J., not participating.

Jack P. Leonard, of Los Angeles, in pro. per., Jesse W. Curtis, Jr., of San Bernardino, and Marion P. Betty, of Los Angeles, for appellant.

Fred A. Wilson, of San Bernardino, for respondents.

MARKS, Justice.

Plaintiff, an attorney at law, brought this action to recover for services rendered defendants in an action brought to recover damages in a malpractice action.

Plaintiff recovered judgment in the sum of $350 as the reasonable value of his services rendered. A motion for new trial was made and heard by a judge other than the one presiding at the trial. The findings of fact and conclusions of law were modified and judgment was rendered for defendants. There remained in the modified findings a finding to the effect that the reasonable value of the services rendered by plaintiff was $350. The appeal is on the judgment roll.

The case went to trial on a first amended complaint and a pleading entitled "Second Amended Complaint" but which was ordered "filed and for all purposes considered as an amendment, and further, separate, and third cause of action, to his first amended complaint on file herein and as if therein incorporated." This pleading sought recovery for the reasonable value of the services rendered by plaintiff.

We gather from these pleadings that in the years 1922 and 1923, when Adin Alexander, Jr., was of the age of about five years, he was treated by physicians against whom the malpractice action was subsequently brought. The minor and Jennie Alexander, his mother, consulted plaintiff and employed him to bring an action for damages against the physicians. Plaintiff took the case on a contingent fee basis and brought the action. Jennie Alexander appeared in the action as guardian ad litem for the minor. After the trial had proceeded for several days the action was dismissed.

The minor and his mother desired to have another attorney associated with plaintiff in filing another action for damages. They signed a written agreement which was approved by plaintiff fixing the contingent fees of these attorneys, and a second action for damages was filed.

After the second suit was filed there was some dissatisfaction on the part of the minor and his mother with the services of plaintiff and the other attorney was substituted, in the place of the two attorneys, as attorney for plaintiff in the damage action. In the substitution signed by the plaintiff here, it was stated that should Adin Alexander recover, the attorney claimed that he was entitled to compensation for services rendered and that "This substitution shall not prejudice my claim for attorney's fee as aforesaid."

Adin Alexander, Jr., reached his majority about November 4, 1937, and sometime in July, 1939, compromised his claim, received the sum of $8,000 in settlement of it, and dismissed the damage action.

Plaintiff had been paid $100 out of which he was required to pay the costs in the damage actions. He received no attorney's fees for the services he rendered. The record discloses that the other attorney had to bring suit for the services he rendered and recovered judgment for $2,450.

The judgment against plaintiff refusing him compensation for his services is apparently based on section 1509 of the Probate Code which provides as follows:

"A contract for attorney's fees for services in litigation, made by or on behalf of a minor, is void unless the contract is approved by the court in which the litigation is pending or the court having jurisdiction of the estate of the minor, upon petition of any person in interest. When no such contract is approved, and a judgment is recovered by or on behalf of a minor, the attorney's fees chargeable against the minor shall be fixed by the court rendering the judgment."

[1] This section does not prohibit an attorney's fee for the attorney for a minor where the contract for contingent fees is not approved. On the contrary, it indicates rather clearly that under such circumstances the court awarding a judgment to the minor should fix the fee of the attorney based on the reasonable value of the services rendered.

[2] It is not contended that the contract for attorney's fees on a contingent basis was ever approved by any court. As the damage action was compromised by the minor after he reached his majority and was dismissed, no judgment was "recovered by or on behalf of the minor," so the provisions of section 1509 of the Probate Code

are not applicable to the rather unusual facts of this case, except insofar as they make the contract for a contingent fee void. We must look elsewhere for authorities controlling our decision.

[3] The general rule concerning the fees of attorneys for services rendered a person under disability to contract, is thus stated in 6 Corpus Juris, p. 748, section 330, as follows:

"The services of an attorney are usually considered as necessaries, and a promise to pay for them is implied when they are rendered in a proceeding personal to an infant, or to any other person incapable of entering into a contract, such as a habitual drunkard or an insane man." 7 C.J.S., Attorney and Client, § 190.

Here the trial court found that all of the services rendered by plaintiff were rendered pursuant to the request of Jennie Alexander. On this question as well as on the question of attorney's fees being necessaries of life in certain cases, the court in Stone v. Conkle, 31 Cal.App.2d 348, 88 P.2d 197, 199, said:

"There is no doubt that legal services rendered an incompetent in proceedings looking toward restoration to capacity are necessaries, and a contract to pay the reasonable value thereof will be implied by law and may be enforced in suitable proceedings. Estate of Doyle, 126 Cal.App. 646, 14 P.2d 920; 4 Cyc. 993. Respondent does not seriously question this rule, but the trial court particularly found that the legal services rendered were at the request of L. S. Durben, for which reason it was held no recovery could be had. As above indicated, the evidence is insufficient to show that plaintiff's assignors were employed by Durben as Mrs. Conkle and her brother-in-law were both informed that the property she was supposed to possess would be looked to for compensation for the services rendered. But, irrespective of this fact, the action being for necessaries, it is immaterial whether the services were performed at the request of the incompetent or of a third party, as the law implies a promise and creates an obligation on the part of the incompetent to pay the reasonable value therefor. The mere claim, therefore, that plaintiff's assignors may have been employed by the brother-in-law, Durben, would not militate against or destroy the right of plaintiff's assignors to recover the reasonable value of the legal services against the respondent Mrs. Conkle because the law is clear that, irrespective of the liability or nonliability of a third person in ordering necessaries for an incompetent, the incompetent herself or her estate is nevertheless liable for such necessaries. McClenahan v. Keyes, 188 Cal. 574, 206 P. 454."

On the right of an attorney to collect the reasonable value of his services from a person under disability and consequently unable to make a valid contract, see Estate of Nielsen, 111 Cal.App. 744, 296 P. 122; Estate of Doyle, 126 Cal.App. 646, 14 P.2d 920; and Dorris v. Crowder, 26 Cal.App.2d 49, 78 P.2d 1039. See also Sanker v. Humborg, 48 Cal.App.2d 203, 119 P.2d 431.

[4] Under these authorities we have reached the conclusion that the services rendered by plaintiff were for necessaries of life of the minor and that their reasonable value is recoverable from him, but not from his mother.

[5] The trial court found the reasonable value of the services rendered to be $350. As the appeal is on the judgment roll, we must presume that the evidence supports that finding.

The judgment in favor of Jennie Alexander is affirmed.

The judgment in favor of Adin Alexander, Jr., is reversed with instructions to the trial court to modify its findings of fact and conclusions of law in accordance with the views here expressed and to enter judgment in favor of plaintiff against Adin Alexander, Jr., in the sum of $350.

BARNARD, P. J., and GRIFFIN, J., concurred.

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